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(In)visible Bodies:

Disability, Sexuality and Constitutional Law

*Relatore*

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*Dottoranda*

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anno accademico 2018/2019





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candidata: Carla Maria Reale

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CONSTITUTIONAL LAW

Relatore Prof. Carlo Casonato  
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# (IN)VISIBLE BODIES: DISABILITY, SEXUALITY AND CONSTITUTIONAL LAW

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## ABSTRACT

This study aims to investigate the field where law, sexuality and disability meet, with a particular focus on constitutional law. Through the use of comparative law and an interdisciplinary approach, the study will try to understand whether the law might have a role in overcoming social barriers affecting people with disabilities in the sphere of sexuality, and which are the criteria the State should follow when intervening in this complex field.

Drawing on different notions of disability, we will sketch how law itself is slowly enacting a paradigm shift in disability law, while leaving outside some of the ultimate inquiries elaborated by disability theorists.

It is the case of the issue of sexuality, which still remains a “silenced discourse” both on the international and domestic level. In spite of its relevant legal implications (e.g. forced sterilization and legal denial of sexual agency) and recent efforts to secure its negative aspects, the right to sexuality for people with disabilities has not been the object of positive measures, with few exceptions (e.g. Denmark).

One of the most debated instruments in this field is currently sexual assistance: a controversial praxis, even in its definition and boundaries. It was observed, both at the domestic level and by comparative analysis, that the legal status and the factual development of this tool is strictly linked to the regulation on sex working. An alternative solution, namely framing sexual assistance as a form of personal assistance in Italy, will be theorized.

Sexual assistance, however, is condemned to be ineffective if not surrounded by other tools (such as inclusive sexual education, sexual counselling etc.) aimed at fostering self-determination in the sexual sphere for people with disabilities. These policies need to be developed down the constitutional path already traced by the jurisprudence, starting from the experience and questions of people with disabilities and using flexible sources of law rather than hard law. In this way law could contribute to the social change needed to dismantle social barriers and discrimination experienced by people with disabilities in the field of sexuality and grant them full participation in all areas of life



## INTRODUCTION

*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

«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<sup>1</sup> ».

This was what Anne Finger, an activist for disability and a scholar from the US 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<sup>2</sup>».

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.

Interrogating sexuality and disability from the point of view of constitutional law implies the recognition of sexuality as a relevant element of humanity, as a lawful space for personal growth drawn by the principles of equality, self-determination and the promotion of the well-being of the person. It means investigating the last frontier

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<sup>1</sup> A. Finger, *Forbidden fruit*, in *New Internationalist*, 233, 1992. p. 9

<sup>2</sup> R. Mc Ruer, A. Mollow, *Introduction*, in R. Mc Ruer, A. Mollow (eds), *Sex and disability*, Durham-London, 2012, p. 2

of positive measures, it means unmasking the supposed neutrality of the law in front of situations of injustice and launching a call to action.

The idea of this study, which aims to investigate disability and sexuality from a Constitutional Law perspective, was born during the first year of my PhD. It was a spring weekend and I decided to join a festival on laity in a small town near Trento. A few months earlier I had been diagnosed with a non-degenerative hearing impairment, which apparently has been with me since I was few months old, due to severe diseases I experienced when I was a baby. It was during that festival that, for the first time, I found myself at the crossroads where sexuality and disability meet (together with other streets such as gender, race, sexual orientation and so on). This happened thanks to the words of some young LGBT disabled 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.

They showed a video of T. Shakespeare, a sociologist and currently one of the most respected and original scholars in the field of disability studies, who in less than four minutes, explained in an informative and catchy way the basic issues surrounding sexuality and disability, while at the same time dismantling stereotypes and misconceptions around the topic<sup>3</sup>.

I was captivated. I became passionate about the topic, due to its capability of intersecting many paths of inquiry and incorporating many different levels of complexity (both human and scientific). First of all, I wondered how and whether legal science could approach this topic and give its contribution 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. Beginning from this awareness I started elaborating the main research questions that gave life to this work:

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<sup>3</sup> The video is available with Italian subtitles at this link: <https://www.youtube.com/watch?v=8FHs9IWvZ-Q>

- 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 peculiar 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 disability? 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 disability?
- What kind of instrument is sexual assistance? How is this proposal articulated in Italy? What is its 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?
- Is sexual assistance regulated and disciplined by law or other legally binding instruments in Europe? What is its relationship with the regulation of sex working?

All these questions are mainly addressed from a constitutional law perspective, which means that the present work will 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<sup>4</sup>. This main perspective will be inevitably enriched by comparative law.

In this study, comparative law is present in each part and, in particular, it is more present in Chapter III and Chapter V. In Chapter III we will discuss some relevant experiences from other legal systems in order to enrich our perspective<sup>5</sup>. Instead, in

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<sup>4</sup> 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.

<sup>5</sup> 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 microcomparison «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 micro comparison can be inscribed inside the distinction between comparative methodology and “science of comparative law (Ivi, p. 222), however according to K. Zweigert, H. Kötz, *An introduction to comparative law*, v. I, Oxford, p. 5, «the dividing line

Chapter V we will work through the elaboration of models<sup>6</sup>, by recognizing the existence of recurring approaches towards sexual assistance in the European context. The study detaches from the tradition scheme of comparison (usually homogenous, developed around the experience of authoritative models, such as France and Germany) to analyse, for each chapter and specific topic, the most relevant and significant legal experiences, with particular focus on Europe. This analysis, carried out in an unbiased way, will allow us to have a wider perspective on each specific issue.

The whole study adopts an interdisciplinary approach, starting from the assumption that the law is inevitably and inextricably connected to social phenomena and at the same time is a social phenomenon<sup>7</sup>. For this reason, the categories elaborated when looking at social phenomena must be incorporated by law because there is a strong need to reveal the real interest behind law and the power relations, and assume a critical perspective on the production of legislation and legal knowledge. Moreover, as a tribute to disability studies and in particular in coherence with the motto “nothing

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between macro comparison and micro comparison is admittedly flexible». For further discussion on comparative law see note n. 5.

<sup>6</sup> The elaboration of models in comparative law follows the complex debate on the nature of legal comparison, which have long been debated by scholars. The main terms of the discussion revolve around whether comparative law can be defined as a science itself or it should be qualified as a methodology. According to R. Sacco, *Introduzione al diritto comparato*, Torino, IV ed., 1990 seeing legal comparison as a methodology is reductive and the elaboration of models is the first and main aim of the comparison 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» (Ivi, p. 16). For a summary reconstruction of this debate see L.-J. Constantinesco, *Introduzione al diritto comparato*, Torino, 1996, pp. 188 ss., that in the ends observe of this debate is quite sterile (Ivi, p. 191). Ex multis see also: R. David, *I grandi sistemi giuridici contemporanei*, III ed., Padova, 1980, K. Zweigert, H. Kötz, *An introduction to comparative law*, II ed., v. I, Oxford, 1987; 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 (a cura di), *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*, Padova, IX ed., 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.

<sup>7</sup> See V. Ferrari, *Diritto e società. Elementi di sociologia del diritto*, Roma, and R. Treves, *Sociologia del diritto. Origini, ricerche e problemi*, Milano, 2012 but also on the social dimension of law and how it can be structured by different societies see R. Sacco, *Antropologia giuridica*, Bologna,

about us, without us<sup>8</sup>”, this work includes participative-emancipatory research<sup>9</sup>. This attempt was carried out with the elaboration of an online survey for people identifying as disabled to directly investigate their perceptions and experiences in the field of sexuality and give them a voice and space within this research.

Before seeing how the work will be organized, a brief note on the language adopted will be articulated: we will use both the terms people with disability/ies and disabled people<sup>10</sup> in an interchangeable way, to be intended both as respectful and inclusive. This choice represents the attempt at taking into account both the perspective of a “people-first” language, without discrediting the analysis perpetuated by social model thinkers. In the perspective of this model, disability is mainly seen as an issue of political identity. Another annotation on language is due: the present study will either use the feminine inclusive form or the female/male declination and sometimes the neutral form “they/them” for the nouns, pronouns and terminology used. This choice also represents the will of the author to adopt a critical perspective on language<sup>11</sup> and use inclusive strategies capable of encompassing a wider spectrum of identities.

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<sup>8</sup> This motto suggests that policy on a specific group, especially and oppressed one must be designed in participation with exponents and members of that group. According to Charlton this slogan was first used in the disability movement by the activists Michael Masutha and William Rowland, see J. I. Charlton, *Nothing about us without us: Disability oppression and empowerment*, California, 1998.

<sup>9</sup> Participatory research is an approach to the construction of knowledge used to empower people by the process of construing and using their own knowledge to increase the relevance of the research. The persons involved are the one who are being touched directly by a research topic or belong to the category of people who’s subject of the research. This methodology wants to empower people from the community and believes that they can collaborate with researcher to better understand their own problems and find effective and possible solutions. For an introduction to this topic in relation to disability studies see F. E. Balcazar, C. B. Keys, , D. L. Kaplan, Y. Suarez-Balcazar, *Participatory Action Research and People with Disabilities: Principles and Challenges*, in *Canadian Journal of Rehabilitation*, 12(2), 1998, pp. 105-112 and, more broadly on the topic, W. F. Whyte, *Participatory action research*, Newbury Park, 199; D Selener, *Participatory action research and social change*, New York, 1997.

<sup>10</sup> The phrasing disabled person is expression of an identity first language which emphasize 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). On the contrary, “person with disabilities” uses person-first language that wants to highlight that disability is a secondary trait, coming right after humanity (which include 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 disability as expression of the human rights model of disability (see infra, chapter 1). Both their linguistic form are recognized in this work as valid and are used in an interchangeable way. Cfr P. Foreman, *Language and disability*, in *Journal of Intellectual and Developmental Disability*, 30,1 2005, pp. 57-59.

<sup>11</sup> 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, behaviors and perceptions. » See the report *Gender neutral language in the European Parliament* available at this link: [https://www.europarl.europa.eu/cmsdata/151780/GNL\\_Guidelines\\_EN.pdf](https://www.europarl.europa.eu/cmsdata/151780/GNL_Guidelines_EN.pdf).

The study will be articulated in five different chapters with the following contents.

The first chapter is aimed at investigating the social understanding of disability and its evolution and if or how law incorporated it. This was born from the need to understand whether or not there is a form of contamination between the social knowledge around disability and the production of norms.

Firstly, the shift from the medical model of disability to the social model of disability will be explained and it will be shown how, from the main criticisms of the latter, new intermediary approaches towards disability were elaborated. These approaches are the ones embraced by this study and, as such, they represent the theoretical framework of the analysis, the starting point of the investigation on sexuality and disability.

After having analysed the theoretical proposals on disability, we will move to the analysis of the legal side by investigating first the domestic level and then the international and European levels. This inquiry is made in order to assess the status of the implementation of the theoretical models as sketched out above. Starting from the domestic level, an analysis of the constitutional statute of the person with disability will be provided, then the main legislation around disability will be explained by trying to figure out which disability paradigm is implemented. To conclude, the constitutional jurisprudence on disability will be presented.

We will then move to the international level and consider the United Nations law system, the European Union and then the Council of Europe. We will start with the analysis of the Convention on the Rights of Persons with Disability, its antecedents, its genesis, background and contents. We will then move on to the European Union by analysing at first its relationship with the CRPD, then moving on to its own politics and jurisprudence on disability; in particular we will articulate the definition of disability under EU law. To conclude this part we will explore the disability approach adopted by the Council of Europe, in terms of soft-law, policy and jurisprudence.

In Chapter II, the issue of sexuality and disability, which emerged as a focal point from the theoretical approach and still as something marginal in law, will be investigated.

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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.

We will try to provide a view of the complex relationship between sexuality, disability and law. First of all, the controversial relationship between sexuality and law in general will be reconstructed from a historical point of view, then we will try to address how the sexuality of people with disability is constructed socially through stereotypes and misconceptions, and finally we will briefly see how the sexuality of people with disability is approached by the law at the domestic level (Italy) and at the international level (UN).

The second paragraph will address one of the most common arguments used to justify the absence of any form of positive regulation in the field of sexuality and disability. Here, with a broader approach and by using some relevant examples and case law in other areas, we will try to question this argumentative approach by showing some of its critical points. We will then provide a general overview of the evolution of the relationship between law and sexuality in the last 50 years both on the domestic and international level, to understand what can be deduced from the broader context.

The chapter will close by adopting a constitutional lens on the issue of sexuality first and then on that of sexuality and disability, to try to understand what kind of constitutional justification might be adopted for any positive measures in the field of sexuality and disability.

After having built a theoretical apparatus on disability and sexuality, Chapter III will be dedicated to the concrete analysis of some legally relevant issues that might arise in the field of sexuality and disability.

The first issue to be addressed is the one related to forced sterilisation of people with disabilities and in particular women with intellectual disabilities. The issue will be presented at first through the analysis of some comparative jurisprudence showing the recurrent arguments in support of these non-consensual invasive medical practices. We will then move on to the international level, where sterilization is widely condemned as a human rights violation, as expressed by some core provisions of the CRPD, and as can also be deduced from the jurisprudence of the European Court of Human Rights.

The final part of this analysis will focus on the domestic level with the discussion of the main legal provisions around sterilization, its constitutional framework, and with the analysis of virtuous case law on the topic.

The second issue that will be analysed is the one related to the existence of criminal law aimed at protecting people with disability from possible sexual abuse. This issue will be discussed by revealing the main assumption behind it and then the specific cases of Ireland and Italy will be explained.

After having analysed criminal law on the sexual agency of people with disability and its possible negative effects, we will proceed with the analysis of a best practice from Denmark. It is a set of guidelines for helpers and social workers to address the sexual needs of people with disabilities living in state group homes and to encourage their self-expression and self-determination.

To conclude, the need to balance the demand for protection and an affirmative view of the sexuality of people with disability will be considered. It is in this view that positive policy and measures are inscribed and discussed, starting from the need to design inclusive sex education.

Chapters Four and Five examine the tool of sexual assistance.

Chapter Four draws up different definitions of sexual assistance and then discusses the proposal made in Italy by the *LoveGiver Committee*. This proposal, however, must be understood within the broader context of the legislation on prostitution in Italy, which will be discussed in detail from its genesis to the most recent declaration of constitutionality in Decision no. 141/2019.

After having provided this general perspective, the law proposal formulated in the last 5 years will be explained in detail and discussed by analysing some critical points, legal gaps and possible adjustments. This chapter will be closed by the analysis of the factual situation in Italy, in particular the organization of the first training course for sexual assistants in a *de jure condito* perspective, with particular regard to possible profiles relevant for criminal law.

The discussion of the domestic situation will be followed by a comparative law analysis on the matter of sexual assistance in Chapter V. Here we will mainly focus on the elaboration of models of approach towards sexual assistance: we will be able to distinguish two different approaches by analysing the situation of countries such as Spain, France and Sweden on one hand and Germany, the Netherlands, Switzerland and Denmark on the other hand. We will then try to find a place between these models

for the proposal elaborated in Italy, discuss the sustainability of this model and conclude by trying to elaborate an alternative proposal.



## CHAPTER I

### THE PARADIGM SHIFT IN DISABILITY THEORY AND LAW

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

This overturning change happened at first on a philosophical, sociological and political level, through the elaboration of theories and models to understand disability. We will thus discuss how and whether these findings have been integrated by law, both on an international and national level. For this purpose, we will analyze in detail the Italian legislative level and the Constitutional Court case law. Then we will move on to international law, with specific focus on the United Nations Convention on the Rights of Persons with Disabilities (CRPD), its influence on the notion of disability adopted by the European Union and on the policies, documents and case law of the Council of Europe.

#### *1. From the individual model to the social model of disability: philosophical and social justification*

Disability is a complex phenomenon, and as such it requires complex and systemic definitions to be approached and understood. For this reason, since the birth of Disability Studies<sup>12</sup>, the very first comprehensive knowledge production on disability, scholars have been using models to explain this phenomenon. In this first paragraph, we will provide a quick overview of disability theories, in order to sketch the theoretical framework adopted by the whole work.

##### *1.1. The individual model of disability*

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<sup>12</sup> The terms “Disability Studies” refers to an academic field of studies that adopts an interdisciplinary approach in studying 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 (eds.), *The Disability Studies Reader*, New York, 2006; D. Goodley, *Disability Studies: An Interdisciplinary Introduction*, 2017, London. For a specific discussion of the relevance of Disability studies in the field of law, with particular attention to the Italian context see: A. D. Marra, *Diritto e Disability Studies. Materiali per una nuova ricerca multidisciplinare*, Reggio Calabria, 2010.

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The individual model of disability, unlike the other theories that will follow, is not a fully and cohesively developed approach towards disability. On the contrary, it is the result of the sedimentation of many different theoretical assumptions on disability coming from medical practitioners, philosophers as well as from the fields of law, theology, sociology and bioethics<sup>13</sup>. All these assumptions share the idea of disability as a burden and an individual responsibility. Disability is indeed seen as a form of deviance from the norm, something distancing the disabled person from humankind. Lacking certain bodily characteristics, or precise relational or mental capabilities – the ones believed to be normal for a human being- the disabled person is considered somehow less than human.

At the same time, disability is seen as something pertaining to the individual alone, with no consideration for social and environmental factors. According to some scholars, the individualization of the issue of disability responds to a particular ideological function performed by this model: leaving social and economic structures untouched<sup>14</sup>.

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 her quality of life. This model often depicts disability as a personal tragedy, a disgrace for the person and his/her family, who should be given pity and remedies. For example, according to medicine, disabled people need to be fixed and cured using rehabilitative medicine, according to law disabled people need state aids for everyday life and community life, for religious institutions and other social agencies disabled people need charity<sup>15</sup>.

This model, as I have mentioned above, is not something which has been completely theorized, but it was described by disability scholars while creating an alternative paradigm opposed to a stereotypical and passive view of disability (see *infra* Paragraphs 1.2 and 1.3).

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<sup>13</sup> C. Cameron, *The Medical Model*, in C. Cameron (eds.), *Disability Studies: A Student's Guide*, London, 2013, pp. 98-101

<sup>14</sup> M. Olivier, *Social Policy and Disability: Some Theoretical Issues*, in *Disability, Handicap & Society*, 1, 1986, p. 16

<sup>15</sup> M. Olivier, *The social Model in Action: If I had an hammer*, in C. Barnes, G. Mercer (eds.), *Implementing the social model of disability*, Leeds, 2004, p. 20 and M. G. Bernardini, *Disabilità, giustizia, diritto. Itinerari tra filosofia del diritto e Disability Studies*, Torino, 2017, p. 9.

The individual model is often simply known as the medical model<sup>16</sup>: this is probably because during the XX century medicine played a considerable role in theorizing disability, which became increasingly described through the lens of pathology<sup>17</sup>. It is from the field of medicine that the complete overlapping of the three-way concept of disability, impairment and illness stems. This heritage is still hard to challenge nowadays.

A clear example of this view can be found in the International Classification of Impairments, Disabilities and Handicaps (ICIDH)<sup>18</sup> from the World Health Organization (1980). This classification was born from the idea of tracing a clear correlation between each kind of impairment and the deriving limitations on work and everyday life. In this way, disability is defined in relation to the limitation or loss of capability of doing something considered to be the standard for a human being. Handicap is defined as the disadvantage coming from the pathological state of disability. In this frame, strong emphasis is given to what is considered to be “normal” for a person and there is no space for any discourse or reflection regarding society and environment. For this reason, the whole classification is oriented 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

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<sup>16</sup> Olivier, one of the main theorist 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 an hammer*, in C. Barnes, G. Mercer (eds.), *Implementing the social model of disability*, Leeds, 2004, p. 20

<sup>17</sup> The reference is at the process of pathologization/medicalization of disability. This kind of process transforms a condition in a medical disease in need of treatment, and thus object of study and diagnosis. See F. Ongaro Basaglia, G. Bignami, *Medicina/Medicalizzazione*, in *Enciclopedia*, VIII, Torino, 1979, pp. 999-1041 and A. Maturo, P. Conrad (eds.), *La medicalizzazione della vita*, in *Salute e Società*, VIII, 2, 2009.

<sup>18</sup> This classification was elaborated in the 1980 by Philip Wood, Michael Bury and Elizabeth Badle and was adopted from the WHO until 1999. It attracted an important number of critics 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.

approach has also served to perpetuate discriminations 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 and perpetuated by the law, with legislation based on mere welfarism and denial of agency for disabled people.

## 1.2. *The disability movements in the US and UK*

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

It can be affirmed that the social model of disability was born as a tool for social change and represents the apex of twenty 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, more broadly, minorities and vulnerable groups.

These groups were remarkably active, in particular, in the US and UK.

In the US context, it was the Independent Living Movement which reclaimed more space for disabled people in an able-bodied world, with the first concrete attempts, such as the Creation of the Centre of Independent Living (1970) in Berkeley, California<sup>19</sup>. 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<sup>20</sup>. After this first experience, many similar services started to flourish and the movement began to push for substantial changes in legislation and policies.

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<sup>19</sup> One of the first successful experiment in this sense took place in 1962. Indeed, at University of Berkeley was introduced a program to make students with wheelchairs live in campus and not in segregated facilities. The program was born from the experience and struggles of a student with disability, Edward Verne Roberts, now known as one of the fathers of the Independent Living Movement in 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.

<sup>20</sup> 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)

Similarly, in the UK, after the 1960s many disabled people began to be more aware of their position in society by creating political and social movements, such as the DIG (Disablement Income Group) or the Liberation Network of Persons with Disabilities<sup>21</sup>. One of the most well-known, despite being quite small, is the organization the Union of the Physically Impaired Against Segregation (UPIAS), which is responsible for the first elaboration of what would then be called the social disability movement. The UPIAS was a movement 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 of 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 root 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<sup>22</sup>».

After a few years of elaboration, Finkelstein carried on explaining the *disablement of modern culture*<sup>23</sup> by describing 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 collected for them in up-turned helmets with “Help the able-bodied”, imprinted upon them<sup>24</sup>». From this key concept of disablement as a social construction derives a new definition of impairments, which will no longer be correlated to disability.

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<sup>21</sup> 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

<sup>22</sup> UPIAS, *Fundamental Principles of Disability*, London, 1996, p. 4

<sup>23</sup> V. Finkelstein, *To deny or not to deny disability*, in *Physiotherapy*, 74,12, p. 650

<sup>24</sup> V. Finkelstein, *To deny or not to deny disability*, in *Physiotherapy*, 74,12, p. 650

A clear definition of impairment and disability can be found in a document issued by Disabled People's International (DPI) in 1982, here it is stated that disability 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*<sup>25</sup>».

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 movement from the US has developed a disability theory more focused on the politics of identity, giving value to impairment in this peculiar sense<sup>26</sup>. This distinction will be further developed in the sociological theories arising from the first elaborations of the political movements.

### 1.3. *The social model of disability*

The social model of disability was born precisely from what was called the “big idea” of the disability movement<sup>27</sup>. The social model itself, despite being elaborated by disability scholars, should not be properly considered a mere theory on disability, but more like a heuristic approach towards it.

In particular, it would be the English model of disability (the so called strong social model) to become widely well known. Starting from Finkelstein's materialistic Marxist approach<sup>28</sup>, the English sociologist Mike Oliver coined the term *social creationism* to describe the new approach and to take a step back from biological

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<sup>25</sup> This quotation can be found in the document *Constitution of Disabled People International*, available at this link: <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;

<sup>26</sup> 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.*, 2000

<sup>27</sup> 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.

<sup>28</sup> Elaborated in V. Finkelstein, *Attitudes and Disabled People: Issues for Discussions*, London, 1980

determinism and the medical model with the aim of reinforcing the notion of social constructionism<sup>29</sup>.

The concept of social creationism is based on the ideal subject of the capitalist society: a healthy, able-bodied and productive individual. This subject becomes the norm, and as such every individual without the above-mentioned characteristics is to be discriminated against and excluded by society. At this point, Oliver describes the genesis of the idea of disability as a personal tragedy, pointing out that the individual model of disability is basically a mechanism of social control.

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

Oliver also discusses the role of Institutions during the capitalist era in the social segregation of disabled people, supporting his analysis with the work of Rothman<sup>30</sup>, Althusser<sup>31</sup> and Foucault<sup>32</sup>.

This also implies that, for people with disabilities who were still living with their families- probably the biggest number after all- disability became a source of shame and stigma for the whole family<sup>33</sup>. The result of this process is an exasperation of the segregation of disabled people outside of the public sphere. Oliver claims that hereby, disability, far from being connected to impairment, became a particular form of relation, of oppressive matrix, between able-bodied people and disabled people.

This relation, described also by Oliver as a process, is defined as *disablement*<sup>34</sup>. Disablement, which is rooted in society and culture, is responsible for the exclusion of disabled people, shaping perceptions and ideas, but also social forces and the environment itself.

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<sup>29</sup> This was done in the book M. Oliver, *The politics of disablement*, London, 1990, pp. 78-94

<sup>30</sup> D. J. Rothman, *The discovery of the asylum: Social order and disorder in the New Republic*, London, 1971

<sup>31</sup> L. Althusser, *Ideology and Ideological State Apparatuses*, in *Lenin and Philosophy" and Other Essays*, 1971, pp.121-176

<sup>32</sup> M. Foucault, *Discipline and punish. The birth of the prison*, New York, 1977

<sup>33</sup> M. Oliver, *The politics of disablement*, London, 1990, pp. 25-42

<sup>34</sup> M. Oliver, *The politics of disablement*, London, 1990

## CHAPTER I

Once this framework is established, the need to overturn the notion of disability as a destiny or as something inescapable can be affirmed. On the contrary, disability can and has to be reduced, fought and eliminated by changing society<sup>35</sup>.

This theory was capable of providing a precise political strategy for the disability movement inspired by the pursuit of social transformation, with barrier removal and civil rights as its main tools.

Moreover, the social movement had a huge impact on disabled peoples themselves, representing a turning point on the way disability was seen also by insiders. The understanding of disability based on 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 guilt and 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", a concrete tool more than a theoretical speculation<sup>36</sup>.

Nonetheless, the social model had an impact on academia 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<sup>37</sup>.

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<sup>35</sup> 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 reminds much of the one on gender and sex. In so doing the disability movement, was showing how what was through 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

<sup>36</sup>M. Olivier, *The social Model in Action: If I had an hammer*, in C. Barnes, G. Mercer (eds.), *Implementing the social model of disability*, Leeds., 2004,p. 20

<sup>37</sup> T. Shakespeare, *Disability rights and wrongs*, London, 2006, p. 24

THE PARADIGM SHIFT IN DISABILITY THEORY AND LAW

	<b>MEDICAL MODEL</b>	<b>SOCIAL MODEL</b>
<b>CAUSE OF DISABILITY</b>	Personal tragedy	Social oppression
<b>ORIGIN OF DISABILITY</b>	The Body	Society
<b>IDENTITY</b>	Personal	Defined by class
<b>POLITICAL CLAIM</b>	Assistance	Independency/Rights
<b>POLITICAL TOOLS</b>	State aid	Civil Rights
<b>DISABILITY MANAGEMENT</b>	Long-life assistance	Independent Living
<b>ROLE OF THE DISABLED P.</b>	Patient	Agent/Active participant
<b>RESPONSIBILITY FOR THE INTERVENTION</b>	Medical assistance/Clinique	Civil Society

This chart summarizes the main differences between the social model of disability and the medical/individual model of disability.

From here we can observe how, according to the medical model, disability is a personal tragedy affecting the individual in his/her body. For this reason, disabled people need the State to provide them with assistance and aid. These are mainly given by medical clinics. For this reason the person with disability, in society, mainly acts as a patient.

On the contrary, for the social model of disability, the latter is created by social oppression, which is why disabled people's identities are political. They should unite and ask for their civil rights and be granted the conditions for Independent Living. In this view, people with disability are agents in society who ask and fight for social change.

1.4. *Limits and challenges of the social model of disability*

The social model of disability managed to have a great impact on the general approach towards disability.

It certainly represents a tipping point from many different perspectives, yet some scholars argued that it revealed itself to be incapable of giving input to a solid theoretical analysis<sup>38</sup>. 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, as we will see, creates issues both from a theoretical and practical point of view.

To begin with, we should observe that the rigorous Marxist analysis behind the social model of disability may look 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, being the only social movement ideology that still proudly maintains its focus on Marxist orthodoxy<sup>39</sup>.

However, in spite of this “orthodoxy” and the subsequent critical position against liberal thinking, the social model of disability does not manage to fully remove itself from the liberal logic<sup>40</sup>. This is clearly shown 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.

It has been argued by some scholars that this point of the analysis of the social model theorists represents a betrayal of the initial premises of the discourse<sup>41</sup>.

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<sup>38</sup> Goodley D., Hughes B., Davis L., *Introducing Disability and Social Theory*, in Goodley D., Hughes B., Davis L (eds.), *Disability and Social Theory. New Developments and Directions*, London, 2012, p. 2-3

<sup>39</sup> T. Shakespeare, *Disability rights and wrongs*, London, 2006, p. 20

<sup>40</sup> 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

<sup>41</sup> M. G. Bernardini, *Disabilità, giustizia, diritto, cit.*, p 20. and L. Terzi, *The social Model of Disability: a Philosophical Critique*, in *Journal of Applied Philosophy*, 21 (2004), 2, pp. 141-157

Another point is that the social model is built around an analytical subject widely embedded in the identity of those who theorize it. The social model is the reflection of a very specific experience of disability, the one lived by white men, from the middle class, with physical impairments (mostly acquired). As such, it leaves out any other form of disability experience. This is also tightly linked to the elaboration of the strict dichotomy between disability and impairment, which leaves no space for experiences such as mental impairment or chronic pain.

Many disabled scholars<sup>42</sup> 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<sup>43</sup>, dyslexia and many others.

From the same root, we can find the criticisms of the excessive emphasis on politics, which is not an answer for the most severe disabilities<sup>44</sup> and the risk of conflating and simplifying disabled people's different experiences, while "trivializing" life with severe impairment<sup>45</sup>.

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<sup>42</sup> The literature on this point is very vast and variegated, 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, confluents 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 (eds.), *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; 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, S. (1996) *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

<sup>43</sup> S. French, *Disability, impairment or something in between*, In J. Swain, S. French, C. Barnes, C. Thomas et al. (eds.), *Disabling barriers, enabling environments*, London 1993, p. 19

<sup>44</sup> See, for example, the case of Steve, reported by Vehmas 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 living independently. S. Vehmas, *Special needs: a philosophical analysis*, in *International journal of inclusive education*, 2010, 14, 1, pp. 87-96.

<sup>45</sup> R. McRuer, *Crip theory: Cultural signs of queerness and disability*, New York, 2006, p. 31

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In the end, a strict social constructionist approach is very far from the material realities of life of each and every person with disability. This happens because the strong social model approach forgets to address a crucial point: disability itself is a form of embodiment.

We need to acknowledge that the denial of impairment was still functional on a political level, as a strategic choice. It represented a way to cut with 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, we have to admit that it represented a tangible turning point in that historical period.

From a scientific point of view, the social model contributed to the epistemological invisibility of disabled bodies, missing the core of the issue, without addressing 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<sup>46</sup>. The persistence of this dichotomy and the way in which it can be damaging in disability discourses will be object of further investigation (infra Chapter 2).

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 refuses the idea of services and approaches based on a specific kind of impairment, so there is no space left for the implementation of policies based on specific needs.

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<sup>46</sup> This point is developed, specifically by the feminist disability theorist, 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 (eds.), *Disability Reader: Social Perspectives*, pp. 168-169 (163-180)

1.5. *An intermediate model and a feminist/crip critical perspective as the main theoretical framework for our analysis*

Amongst the above-mentioned critiques, we can find the ones 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)<sup>47</sup>.

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.)<sup>48</sup>.

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<sup>49</sup>.

In doing so, Shakespeare aims at uncovering the discourse around the health of disabled people, acknowledging and addressing the fact that they have higher unmet needs in the field of healthcare than non-disabled people<sup>50</sup>.

Shakespeare calls on scholars to (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<sup>51</sup>».

He suggests we should address impairment as a *predicament*, namely «an unpleasant, trying or dangerous situation<sup>52</sup>», a notion that- according to him- captures the difficulty of many impairments without the «inescapable emphasis of tragedy<sup>53</sup>» typical of the individual/medical model.

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<sup>47</sup> 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

<sup>48</sup> T. Shakespeare, *Disability rights and wrongs*, cit., p. 74

<sup>49</sup>T. Shakespeare, *Disability rights and wrongs*, cit., p. 75. A similar view of disability is the one belonging to 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 favor of studying disability on several different analytical levels”.

A. Gustavsson, *The role of theory in disability research -springboard or strait-jacket?*, in *Scandinavian Journal of Disability Research*, 6, 2004, p. 62.

<sup>50</sup> WHO World Health Survey shows that people with disabilities are three times more likely to be denied health care, for time more likely to be treated badly by medical practitioners and twice as likely to find inadequate equipment or inadequate medical personnel. See World Health Organization, *World Report on Disability*, Geneva, 2011. Available at this link: [https://www.who.int/disabilities/world\\_report/2011/report.pdf](https://www.who.int/disabilities/world_report/2011/report.pdf).

<sup>51</sup> T. Shakespeare, *Disability rights and wrongs*, cit., p. 85

<sup>52</sup> T. Shakespeare, *Disability rights and wrongs*, cit., p. 85

<sup>53</sup> T. Shakespeare, *Disability rights and wrongs*, cit., p. 85

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In this way, the author manages to give space in his theory to policies aimed at the prevention or mitigation of impairments, without undermining the worth or citizenship of disabled people<sup>54</sup>.

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<sup>55</sup> and crip<sup>56</sup> theory.

The work of Shakespeare was already capable of starting a discourse on the embodiment of disability, with credit to the dimension of sexuality<sup>57</sup>. However, a decisive contribution in this field comes from scholars belonging to the field of critical disability studies<sup>58</sup>.

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*<sup>59</sup>».

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<sup>54</sup> Shakespeare is known, indeed, for having addressed some of the most controvert ethical issues in the disability studies field, with original solutions. Some of these are abortion, life termination, prenatal diagnosis, genetics. See T. Shakespare, Disability rights and wrongs, pp. 113-173;

<sup>55</sup> Feminist disability studies is not a scholarship on women with disability but a feminist scholarship that wants to see 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), pp. 1557-1587

S. Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability*, London, 1996; 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, (1989), 2, pp. 104-124. Garland-Thomson, R. (2005). *Feminist Disability Studies*. *Signs*, 30(2), 1557-1587

<sup>56</sup> Crip theory is an elaboration inside critical disability theory. The term “crip” derives from the offensive terminology “crippled” that assumes a new meaning through an act of political reclaim. Crip theory investigates the area of intersection between disability and queerness (for a definition of queer see note 62). Some of the interests these areas share are the challenge to medicalization and the questions 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 Disability*, in *GLQ: A Journal of Lesbian and Gay Studies*, 9(1), 2003, pp. 79–105, R. McRuer, *Composing Bodies; or, De-Composition: Queer Theory, Disability Studies, and Alternative Corporealities*, in *JAC*, 24(1), 2004, pp. 47–78; R. McRuer, *Crip Eye for the Normate Guy: Queer Theory and the Disciplining of Disability Studies*, in *PMLA*, 120(2), 2005, pp. 586–592.

<sup>57</sup> See the research carried out in 1996 which gave life to the first edition of Shakespeare T., D. Davies, Gillespie-Sells K., *Sexual Politics of Disability: Untold Desires*, London, 1996

<sup>58</sup> For a definition of this branch inside 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 on these theories: K. Ellis, R. Garland-Thomson, M. Kent, R. Robertson (eds.), *Manifestos for the Future of Critical Disability Studies*, New York, 2018

<sup>59</sup> H. Meekosha, R. Shuttleworth, *Whats so critical about critical disability studies?*, in *Australian Journal of Human Rights*, 15, 1, 2009, pp. 50

For these scholars, the main fields of investigation 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<sup>60</sup>.

In general, these studies mobilize the already highly developed critiques of gender, class, race, ethnicity and sexuality to 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<sup>61</sup>».

For example, it is in the field of crip studies, which uses tools and instruments from queer theory<sup>62</sup>, that the notion of *compulsory able-bodiedness*<sup>63</sup> (specular to the notion of compulsory heterosexuality<sup>64</sup>) was elaborated.

These authors discuss how normality is constructed on an able-bodied subject. The fact of being able-bodied (*able-bodiedness*) becomes one of the main characteristics of the default subject, and as such it becomes a neutral state, a non-identity and it is ultimately identified with the natural order of things<sup>65</sup>.

The limit of these theories, as highlighted by Shakespeare<sup>66</sup>, 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

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<sup>60</sup> Garland-Thompson R., *Integrating Disability, Transforming Feminist Theory*, in *NWSA Journal*, Vol. 14, n. 3, 2002, p. 4

<sup>61</sup> Garland-Thompson R., *Integrating Disability, Transforming Feminist Theory*, in *NWSA Journal*, Vol. 14, n. 3, 2002, p. 4

<sup>62</sup> Queer theory is a scholarship on sex and gender largely inspired by LGBT (Lesbian, Gay, Bisexual, Transgender) studies and feminism and the work of Foucault, Kristeva, and Derrida. It was born at the beginning of the '90s. The terminology queer was used as an insult usually for homosexual man but was then 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, 1990. The following are two of the main texts that gave life to queer theory according to scholars: J. Butler, *Gender Troubles*, New York, 1990 and Kosofsky Sedgwick E., *Epistemology of the closet*, Berkeley, 1990.

<sup>63</sup> R. McRuer, *Crip theory: Cultural signs of queerness and disability*, New York, 2006

<sup>64</sup> This terminology was elaborated by Adrien Rich to explain the invisibility of lesbian identity and their oppression. See A. Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *Signs*, 5(4), 1980, pp. 631-660

<sup>65</sup> McRuer cares 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*, pp. 371

<sup>66</sup> T. Shakespeare, *Disability rights and wrongs*, cit., pp. 47-72

be used and further investigated. In particular, the fundamental premises of the critical theory analysis will be adopted. These premises are: «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.<sup>67</sup> »

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

Law is not impermeable to social change and other disciplines: we will illustrate how the social model of disability progressively caused a paradigm shift in law both on a national and international level.

This paragraph is dedicated to the analysis of the domestic 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.

However, the results are not homogeneous, as legislations and policies inspired by different views of disability indeed still co-exist in the Italian legal system. The *reductio ad unum* must be found in the Constitutional interpretation of law concerning disability. The fragmented legislative corpus has to find its common framework in the light of the Constitution and in the Constitutional Court's case law.

2.1. *Lights and shadows of the Italian Disability Law system*

We have briefly mentioned, at the beginning of this paragraph, that it is easy to observe how 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

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<sup>67</sup>Garland-Thompson R., *Integrating Disability, Transforming Feminist Theory*, in *NWSA Journal*, Vol. 14, n. 3, 2002, p. 6

of reaching the full inclusion of disabled people in society, as active and effective members of it<sup>68</sup>.

Some scholars argue that the approach towards disability of the Italian legal corpus is a “functional<sup>69</sup>” one, depending on the specific legal instrument to be regulated<sup>70</sup>. For example, the legislation on economic support is based on assistance and State aids depend on a medical assessment of disability<sup>71</sup>. These legal instruments are shaped by the idea of segregation of disabled people into groups (deaf people, blind people, people injured during wars and conflict etc.), and conceding privileges to each of them, in a logic of competition and fragmentation among minority groups<sup>72</sup>. All these state aids<sup>73</sup>, 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 interventions inspired by charity<sup>74</sup>.

These kinds of measures are of course useful to support people with disabilities from a financial point of view, but at the same time they do not facilitate the empowerment process, leaving people with disability at the margins of the society. The most comprehensive law on disability is Law 104/1992<sup>75</sup>. Despite some definitions, terminology and instruments still anchored to medical criteria, this law can be interpreted as an early experiment inspired by the social model of disability (see *infra* Paragraph 2.2.1).

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<sup>68</sup> F. Furlan., *La tutela costituzionale del cittadino portatore di handicap*, in C. Cattaneo (eds.), *Terzo Settore, nuova statualità e solidarietà sociale*, Varese, 2011

<sup>69</sup> 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

<sup>70</sup> A. D. Marra, *Disabilità*, in *Digesto delle discipline privatistiche sez. civile*, Torino, 2010, p. 556.

<sup>71</sup> A. D. Marra, *Società, disabilità, diritti. Come I Disabilities Studies hanno attecchito nella giurisprudenza italiana*, Milano, 2018, p. 16

<sup>72</sup> Marra suggest that in a period of economic crisis this kind of intervention risk to be cut. This gives life to mechanism under which each group fights and lobby for its interests, which are often in conflict or to be weighted with other's groups interests. See A. D. Marra *Società, disabilità, diritti*, cit., p. 16

<sup>73</sup> Such as invalidity pension (law 222/1984) and other instruments (indennità di frequenza, assegno di invalidità, idennità di accompagnamento). On this matter see A. Candido, *Disabilità e prospettive di riforma*, Torino, 2018, pp. 65-119

<sup>74</sup> A. D. Marra *Società, disabilità, diritti*, cit., p. 18

<sup>75</sup> *Legge 5 febbraio 1992, n. 104, “Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate”*, see *Infra*

Conversely, a good example of a definition of disability in accordance with the social model was recently introduced in the Italian system through Law 6/2004<sup>76</sup>, which modified the civil code introducing an instrument called *Support administration* (Amministrazione di sostegno)<sup>77</sup>. The new Article 404 of the Civil code states that “*the person who is in the impossibility (even partially or temporary) of taking care of her own interest because of illness or a physical or mental impairment, can be assisted by a support administrator*”.

Here we can see how the definition is rooted in the concept of social barriers: the impairment does not disappear, but the focus is on the loss of 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<sup>78</sup>. The same goal is pursued by Law 112/2016<sup>79</sup>, which specifically aims at full integration and participation of people with severe disability (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<sup>80</sup>. It can also be argued that the understanding of disability has changed through time, and has evolved, both from a linguistic and a substantial point of view, 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 disability (Paragraph 2.2.2) or the legislation on inclusive

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<sup>76</sup> 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"

<sup>77</sup> 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 contributions 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 ss.; 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

<sup>78</sup> Scholars 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*, Milano, 2018, p. 20

<sup>79</sup> Legge 22 giugno 2016 n. 112 "Disposizioni in materia di assistenza in favore delle persone con disabilità grave prive del sostegno familiare." For a first comment 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

<sup>80</sup> S. Andò, L. Pedullà, *Legge sul "Dopo di noi" e Costituzione: dalla non discriminazione all'inclusione, non profit*, M. Dogliotti, *La condizione dei disabili e la legge sul "dopo di noi"*, in *Famiglia e diritto*, 2018, fasc. 4, pp. 425-428

education for students with disability (Paragraph 2.2.3), a field where Italy is now a leading country in Europe.

*2.1.1. In between: Law 104/1992 on social assistance*

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 is strongly influenced by the period the law was written in, and people with disability are referred to as “handicapped people”. They are defined at Article 3 as persons with a stable or evolving physical, mental or sensory impairment. According to the law, impairment causes difficulties in learning, relations or work integration, which can be responsible for a process of social disadvantage and marginalization<sup>81</sup>. 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 component in the construction of disability. Prior to it, the only unitary definition of disability was the one given by the Constitutional Court in Decision no. 215/1987<sup>82</sup> where social barriers were not mentioned at all<sup>83</sup> and there was a strongly medicalized and normative view of disability.

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

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<sup>81</sup> Here the original text of Article 3(3) in Italian: “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 lavorativa e tale da determinare il processo di svantaggio sociale e di emarginazione”

<sup>82</sup> A leading case for many reasons, but not particularly illuminating on the notion of disability. See *infra*, paragraph 3

<sup>83</sup> The disability definition given by the Constitutional Court is the following: “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

Although the definitions and goals are embedded in the social model, scholars have observed that this law created a “double binary”<sup>84</sup>. On one hand, indeed, there are still many provisions based on charity and assistance; on the other, there is a specific attention to instruments aimed at overcoming social barriers.

For example, provisions such as the one on rehabilitation (Art. 7<sup>85</sup>), the assessment of disability (Art. 4<sup>86</sup>) or medical diagnosis (Art. 6<sup>87</sup>) are still more rooted in the medical model of disability. Conversely, provisions on architectural barriers (Art. 24<sup>88</sup>), transport (Art. 26, 27<sup>89</sup>), accessibility and right to vote (Art. 29<sup>90</sup>) 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 idea of segregation rather than social inclusion, tracing a distinction between the rights of people with disabilities and everyone else’s rights<sup>91</sup>.

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<sup>92</sup>, with an evaluation which is no longer based solely on medical criteria.

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<sup>84</sup> A. D. Marra, *Disabilità*, cit., p. 557.

<sup>85</sup> For a comment on article 7 see, L. Bellanova, *Art. 7*, in P. Cendon (eds.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l’assistenza, l’integrazione sociale ed I diritti delle persone handicappate*, Torino, pp. 63-82

<sup>86</sup> For a comment see A. Venchiarutti, *Art. 4*, in P. Cendon (eds.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l’assistenza, l’integrazione sociale ed I diritti delle persone handicappate*, Torino, pp. 36-45

<sup>87</sup> For a comment see G. P. Leoncini, *Art. 6*, in P. Cendon (eds.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l’assistenza, l’integrazione sociale ed I diritti delle persone handicappate*, Torino, pp. 50-63

<sup>88</sup> For a comment on article 24 see, M. Gorgoni, *Art. 24*, in P. Cendon (eds.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l’assistenza, l’integrazione sociale ed I diritti delle persone handicappate*, Torino, pp. 332-363

<sup>89</sup> For a comment see M. Gorgoni, *Art. 28*, in P. Cendon (eds.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l’assistenza, l’integrazione sociale ed I diritti delle persone handicappate*, Torino, pp. 373-386

<sup>90</sup> For a comment on article 29 see L. Mannelli, *Art. 29*, in P. Cendon (eds.), *Handicap e diritto. Legge 5 febbraio 1992 n. 104, legge quadro per l’assistenza, l’integrazione sociale ed I diritti delle persone handicappate*, Torino, pp. 387-393

<sup>91</sup> A. D. Marra *Società, disabilità, diritti*, cit., p. 19

<sup>92</sup> For a deeper analysis of the difference between the ICDIH and the ICF and related consequences, see footnote number 18 of this work

At a practical level, the fact that the minimum levels 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<sup>93</sup>.

*2.1.2. 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 interventions, and is widely influenced by the Regional legislation<sup>94</sup>. For the purpose of our analysis, emphasis will not be given to the specific provisions of each legislation we are going to mention. On the contrary, the analysis will be shaped by the need to underline the transition from a legislation based on assistance to a legislation more 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 elaborated 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<sup>95</sup>. In the field of public employment, for example, Article 221 of Decree 383/1934<sup>96</sup> imposed a strong and healthy body (*sana e robusta costituzione pubblica*) as a prerequisite for access to any public position.

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<sup>93</sup> See G. U. Rescigno, Principio di sussidiarietà orizzontale e diritti sociali, in *Diritto Pubblico*, 1, 2002, pp. 43-44

<sup>94</sup> More in general on the role of 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.

<sup>95</sup> M. Schianci, *Storia della disabilità: Dal castigo degli dèi alla crisi del welfare*, Roma, 2012.

<sup>96</sup> R.D. 3 marzo 1934, n. 383, "Testo Unico sul pubblico impiego"

## CHAPTER II

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<sup>97</sup>, required an assessment of physical fitness<sup>98</sup> for access to public employment<sup>99</sup>.

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 related to war injuries), such as the ones contained in Legislative Decree 1222/1974<sup>100</sup> (ratified with Law 9 April 1953, no. 292).

As early as 1960, with Decision no. 38, the Constitutional Court adopted an anti-assistance 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<sup>101</sup>.

Regrettably, the first comprehensive Law on employment (482/1968)<sup>102</sup> was strongly anchored to the idea of charity and assistance. This legislation required companies to

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<sup>97</sup> D.P.R. 10 gennaio 1957, n.3, “Testo unico sul pubblico impiego”

<sup>98</sup> Law 104/1992 prescribed at Article 22 that “for the purpose of the public and private employment it is not required the certificate of good health”. Nonetheless the Ministry of public Function 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.

<sup>99</sup> Tucci G., *La discriminazione contro il disabile: i rimedi giuridici*, in *Giornale del diritto del laoro e delle relazioni industriali*, 2011, 129, 1 ss

<sup>100</sup> *Decreto legislativo del Capo provvisorio dello stato 3 ottobre 1947 n. 1222, Ratified with Legge 9 aprile 1953, n. 292.*

<sup>101</sup> Here 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 é, quindi, quella di procurare ai minorati del lavoro 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 é 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).”

<sup>102</sup> Legge 2 aprile 1968, n. 482 "Disciplina generale delle assunzioni obbligatorie presso le pubbliche amministrazioni e le aziende private"

hire persons with disability, without, however, any obligation related to the evaluation of the working capabilities and specific competence of the person. On the contrary, this possibility was even discouraged by the law, which introduced a rigid and automatic system with no possibility of choosing and of evaluating the applicant<sup>103</sup>. Additionally, the category of people who were eligible for this kind of job contract was strictly predetermined<sup>104</sup>.

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<sup>105</sup>.

This law was abolished by Law 68/1992<sup>106</sup> in an attempt to establish a system based on a better balance of relevant interests and, above all, a legislation more focused on real work integration<sup>107</sup>.

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<sup>103</sup> The Law imposed on companies with more than 35 employees the need to hire disabled workers in a percentage of the 15% of the total numbers of employees. 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 and evaluation of the candidate's profile. In this framework the whole process was basically a burocratic and automatic procedure, which resulted totally inadequate. On this law see: Pera G., *Assunzioni obbligatorie e contratto di lavoro*, Giuffrè, Milano, 1965; Pera G., *Sull'assunzione obbligatoria degli invalidi civili*, in *Rivista di diritto del lavoro*, 1966, II, p. 654; Conti G., *La nuova legge sulle assunzioni obbligatorie e la Costituzione*, in *Diritto del lavoro*, 1969, I, p. 186; D'Eufemia G., *Ancora in tema di assunzione obbligatoria*, in *Diritto del lavoro*, 1968, I, p. 179

<sup>104</sup> 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, military disabled (*Invalidi di guerra, militari e civili*) and others. People over 50 years old, without any ability to work left or who for nature and level of disability might have been dangerous for the safety and health of other workers or for the work place were all explicitly excluded from the recipients of the law. For some of these categories of people it was also established a level of invalidity under which the regulation was not to be applied. On this specific aspect see G. Correale., *Invalidi e mutilati*, in *Enciclopedia giuridica*, 1989, vol. XVII; Pera G., *Invalidi e mutilati*, in *Enciclopedia del diritto*, 1972, vol. XXII.

<sup>105</sup> C. Colapietro, *Diritto al lavoro dei disabili e Costituzione*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2009, 124, 4, p. 608. See also: D. Garofalo, *Il sistema del collocamento obbligatorio tra tutela dell'invalido e tutela dell'impresa*, in *Foro italiano*, 1985, I, 536 ss.; D. Garofalo, voce *Lavoro (collocamento obbligatorio)*, in *Digesto delle discipline privatistiche, sez. comm.*, 1992, vol. VIII, pp. 129 ss.; G. Pera, *Assunzioni obbligatorie*, in *Enciclopedia giuridica*, 1988, vol. III; G. Pera, *Disabili (diritto al lavoro dei)*, in *Enciclopedia giuridica*, 2001, vol. XII; A. Bellavista, *Assunzione obbligatoria*, in *Enciclopedia del diritto*, 1997, vol. I, pp.158 ss.; R. Rivero, *Vizi e virtù della legge sul collocamento disabili: analisi della giurisprudenza*, in *Lavoro giurisprudenza*, 2008, 3, pp. 221.

<sup>106</sup> Legge 12 marzo 1999 n. 68 "Norme per il diritto al lavoro dei disabili"

<sup>107</sup> A. D'Harmant Francois, *La nuova disciplina delle assunzioni obbligatorie: prime note*, in *Rivista italiana di diritto del lavoro*, 1999, 1, p. 319 ss.; A. Maresca, *Rapporto di lavoro dei disabili e assetto dell'impresa*, in *Arg. dir. lav.*, 1999, 3, p. 659 ss.; E. Pasqualetto, *La nuova legge sul collocamento dei disabili: prime osservazioni*, in *Quaderni di diritto del lavoro e delle relazioni industriali*, 1999, 22, pp.

The very first remark we can make is on the terminology adopted. In the previous law, recipients were addressed as unable/incapable (*invalidi, inabili*).

Law 68/1992 refers to people with disability. This new terminology is representative of the underpinning view of this law: giving value to the specific capabilities and competences of the disabled worker<sup>108</sup> to pursue her/his own (working) dignity and granting the development of his/her personality<sup>109</sup>.

This is made clear at Article 2, where 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<sup>110</sup>. Targeted placement overcomes the mere bureaucratic management of the system drawn in the previous law. This legislation seeks to support the encounter between supply and demand without neglecting the needs of employers and the professionalism of the aspiring employee, making full integration in the workplace possible<sup>111</sup>.

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93 ss.; A. Vallebona, *La nuova disciplina delle assunzioni obbligatorie*, in *Massime giurisprudenza del lavoro*, 1999, p. 476 ss.; P. Tullini, *Il diritto al lavoro dei disabili: dall'assunzione obbligatoria al collocamento mirato*, in *Diritto del mercato del lavoro*, 1999, 2, p. 332 ss.; A. Tursi, *La nuova disciplina del diritto al lavoro di disabili*, in *Rivista giurisprudenza del lavoro*, 1999, 4, p. 727 ss.; M. C. Cimaglia., *Gli aspetti giuridici della legge sul diritto al lavoro dei disabili*, in *Lav. inf.*, 1999, 9, p. 11 ss.; G. Pera, *Note sulla nuova disciplina delle assunzioni obbligatorie degli invalidi*, in *Giustizia. civile*, 1999, p. 325 ss.; L. Petronio, *Prime osservazioni su alcuni aspetti del nuovo "collocamento obbligatorio": la legge 12 marzo 1999, n. 68*, in *Rivista giurisprudenza del lavoro*, 1999, 3, 16; M. Biagi, *Disabili e diritto al lavoro*, in *Guida lavoro*, 1999, 9, p. 12; S. Bellomo, *Norme per il diritto al lavoro dei disabili (l. 12 marzo 1999, n. 68)*, in *Nuove leggi civili commentate*, 2000, 6, p. 1353 ss., 1463 ss.; 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 ss.; D. Garofalo, *Disabili (lavoro dei)*, in *Digesto delle discipline privatistiche, sezione commerciale*, 2009, vol. IV, pp. 759 ss; A. Di Stasi, *Il diritto al lavoro dei disabili e le aspettative tradite del "collocamento mirato"*, in *Agricoltura diritto e lavoro.*, 2013, 4-5, p. 880.

<sup>108</sup> 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 medical commission and the reduction of it must be over 45%. In alternative they must have a lessen ability to work assessed by INAIL over 33%, or they must be blind or deaf, war invalid etc. The result is a legal prevision referred to some people with disability only, excluding for example people with impairments valued as less invalidating. It should also be noticed that this kind of evaluation, which is hower essential, can be criticized for the strong medical view behind it. Nonetheless we should notice that the legislative decree 151/2015 adopted the ICF model, that considers social barriers as well as medical factors (see *infra*).

<sup>109</sup> 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.

<sup>110</sup> 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*, cit., p. 68;

<sup>111</sup> M. Cinelli, *Profili del collocamento obbligatorio "riformato"*, in in M. Cinelli, P. Sandulli (eds.), *Diritto al lavoro dei disabili*, cit., p. 3

As was mentioned before, the system is quite complex, and the instruments are many. An important role in enforcing this flexible system towards work integration is played by employment offices and by the many active conventions<sup>112</sup>, which represent a good dialogue between the private sector and third sector.

It is also worth observing that this law applies both to the private and public sector, and it represented a crucial step in the elimination of the above-mentioned discrimination in public employment against people with disabilities<sup>113</sup>.

Article 16(3) explicitly cancelled the provisions requiring public employees to be in fit physical condition. In addition, Article 16(2) provided that people with disability had to be granted equal participation to public selections with specific means to facilitate their involvement.

This arrangement is now supported by the anti-discrimination law contained in Legislative Decree 316/2003<sup>114</sup>, specific to the field of employment and occupation, and Law 67/2006<sup>115</sup> which provides a general legal instrument and remedy against any form of discrimination<sup>116</sup>.

These provisions are fundamental to grant the effectiveness of the measures on access to work but also to give a broader anti-discrimination remedy to people with disability. This whole system has been implemented by the many reforms recently occurred.

One of these is Legislative Decree 151/2015<sup>117</sup>. At Article 1 it enumerates strategies to create new virtuous circles between trade unions, cooperatives and NGOs for workers' integration. It was with this law that the bio-psycho-social model for the

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<sup>112</sup> C. Colapietro, *Diritto al lavoro dei disabili e Costituzione*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2009, 124, 4, p. 609

<sup>113</sup> 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 was not to be considered a requisite to access public employment anymore. Inopportunately, this provision was nullified by a circular from the Ministry of public function (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, for this reason the previous one was still applicable in the case of people with impairments, who were to be excluded from accessing public employment.

<sup>114</sup> This law is the transposal of the Directive of the European Union 78/2000/CE on equal treatment on employment and occupation regardless of their 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.

<sup>115</sup> Legge 1 marzo 2006, n. 67 "Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni"

<sup>116</sup> See Tucci G., *La discriminazione contro il disabile: i rimedi giuridici*, in *Giornale del diritto del lavoro e delle relazioni industriali*, 2011, 129, pp. 1-28; R. Belli, *La non discriminazione dei disabili e la legge n. 67 del 2006*, Milano, 2007□

<sup>117</sup> *D.lgs 14 settembre 2015 n. 151*

assessment of disability was adopted. Besides, a new set of guidelines for the evaluation of the working place was elaborated together with a list of good practices for work integration and a new professional figure responsible for integration.

One of the most recent reforms is Legislative Decree 75/2017<sup>118</sup>, specifically aimed at implementing the effectivity of the placement of people with disabilities in the public sector. For example, this law has instituted a consultative body for the integration of people with disability in the working place (*Consulta nazionale per l'integrazione in ambiente di lavoro delle persone con disabilità*), with the task of elaborating policies and monitoring the situation of disabled workers.

This whole legislative approach, briefly sketched above, is far from being highly functional on a practical level, despite its efforts in stressing disabled people's capabilities and in the need to overcome social barriers<sup>119</sup>.

Among the problematic issues, we need to mention that people with minor impairments are excluded from this law, that a person might remain in a sort of waiting list for many years, and that there is a lack of legal instrument to secure the effectivity of the system.

Still, this legislation can be considered a suitable "acid test" to appreciate how the legal definition of disability and the general approach towards it has evolved through time.

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

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

These tools were framed in different legislations, such as Law 1859/1962<sup>120</sup> on separate classes for unable students (*alunni disadattati*) or Law 44/1968<sup>121</sup> on primary school, where special classes -or in the most severe cases segregated schools- were created for children between 3 and 6 years of age with sensory, intellectual and/or

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<sup>118</sup> D.lgs. 25 maggio 2017, n. 75 (legge delega 7 agosto 2015, n. 124)

<sup>119</sup> Datas on employment of people with disability referring the period 2014-2015 were collected by the Ministry and published in 2018 and are available here: [http://www.condicio.it/allegati/340/Relazione8\\_68.PDF](http://www.condicio.it/allegati/340/Relazione8_68.PDF)

<sup>120</sup> Legge 31 dicembre 1962 n. 1859 "Istituzione e ordinamento della scuola media statale"

<sup>121</sup> 18 marzo 1968 n. 44 "Ordinamento della scuola materna Statale"

physical impairments. In general, specific schools were already set up for blind children, deaf children, children with intellectual disability or with various illnesses<sup>122</sup>. From the 1970s, this model began to be challenged by means of a slow but effective paradigm shift, which has led Italy to now be a leading country in the matter of inclusive education<sup>123</sup>.

Some scholars have argued that this passage to a full 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*”<sup>124</sup>.

The emphasis is on the policies actuated by the Government with Ministerial Circular Letters such as Circular Letter 227/1975 and Circular Letter 235/1975, which paved the way for the abolition of the special education system<sup>125</sup>.

The apex of the deinstitutionalization 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 opened the way to community-oriented mental health services<sup>126</sup>.

With Law 118/1971<sup>127</sup>, special classes became an exception reserved to those incapable of attending public school due to impairments and for those living in institutions/hospitals (Article 29). On the contrary, the main assumption and rule is that education must be provided in regular classes inside the public school institution, and the attendance of high school and university must be promoted (on this matter there has been a very important decision of the Italian Constitutional Court, which will be explained later in Paragraph 2.3).

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<sup>122</sup> See L. Calcerano e G. Martinez y Cabrera, *Scuola (ordini e gradi)*, in *Enciclopedia del diritto*, XLI, Milano 1989, p. 889

<sup>123</sup> 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

<sup>124</sup> S. D'Alessio, *Inclusive Education in Italy*, Rotterdam, 2011, p. 3

<sup>125</sup> 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

<sup>126</sup> 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

<sup>127</sup> 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."

## CHAPTER II

With Law 517/1999<sup>128</sup> special classes were eliminated. This law arranges specific and new instruments aimed at promoting the right to education for students with disabilities and the development of each individual as a human being.

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<sup>129</sup>, with the formalization of the role of support teachers (insegnanti di sostegno), who would be crucial actors of the Italian inclusive education model<sup>130</sup>.

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<sup>131</sup>) is accomplished with Law 104/1992, which explicitly mentions among

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<sup>128</sup> 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”

<sup>129</sup> Legge 29 maggio 1982 n. 270 “Revisione della disciplina del reclutamento del personale docente della scuola materna, elementare, secondaria ed artistica, ristrutturazione degli organici, adozione di misure idonee ad evitare la formazione di precariato e sistemazione del personale precario esistente”

<sup>130</sup> Support teachers are qualified professionals who 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 as the teacher of the student with disabilities but “a professional resource assigned to the class to meet the major 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>.

<sup>131</sup> The terminology integration is usually referred in USA 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*, in *European Journal of Special Needs Education*, 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. To these people, while they acknowledge that reaching agreement on terminology can be helpful, they 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.

its goals the development of the abilities of people with disabilities, by granting them the enjoyment of mainstream services and facilities<sup>132</sup>.

This law is the last step towards affirming the idea that the environment must be adaptable and accommodate everyone's needs, not the contrary. It will not be required of the student with disabilities- as an anomalous and minority subject- to fit in the given framework anymore.

The direct consequence is that school must be organized around the specific educational needs of its students, shaping its structure, recruiting and financial aspects towards the goal of effective and quality education for everyone<sup>133</sup>.

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<sup>134</sup>».

With Law 104/1992, the role of support teachers is confirmed and made stronger. They are responsible for the elaboration- in collaboration with schools- and the implementation of the Personalized Educational Plan (PEI- Piano educativo individualizzato), an individualized plan for the education of the student with disability, which addresses her/his/their specific needs.

In 2010, a Law on children with “specific learning difficulties” was passed (Law 170/2010<sup>135</sup>). It was aimed at addressing specific needs of students with difficulties in reading (Dyslexia), writing (Graphic Dyslexia and Dysorthography), or in computing (Dyscalculia) and giving them effective and quality education inside mainstream schools<sup>136</sup>.

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<sup>132</sup>D. Siclari, *Riflessioni sullo statuto giuridico della disabilità nell'ordinamento italiano*, in *Il diritto dell'economia*, 28,3, 2015, pp. 553-573

<sup>133</sup> 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

<sup>134</sup>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, p. 27

<sup>135</sup> Legge 8 ottobre 2010, n. 170 “Nuove norme in materia di disturbi specifici di apprendimento in ambito scolastico”

<sup>136</sup> For a comment see: L. Barone, *La nuova legge n. 170/2010 sui disturbi specifici di apprendimento*, in *Minorigiustizia*, 3, 2010, pp. 239-247

One of the last reforms is the one contained in the broader law on education, Law 107/2015<sup>137</sup>, which further implements the principles stated in Law 104/1992, and changes some aspects concerning the training and the numbers of support teachers.

This law gives the power to enact measures on inclusive education to the Government, setting the criteria and principles to be followed. Legislative Decree 96/2019<sup>138</sup> represents the enactment of the above-mentioned law<sup>139</sup>. Said law, which was elaborated with the support and collaboration of many grassroots organizations, is a further implementation of the idea of fully inclusive education. Among its provisions, we can mention coordination with families regarding the number of hours in which the student is supported by the teacher and the implementation of personalized educational plans.

It is interesting to note how this piece of law explicitly mentions the aspiration to implement the CRPD, adopting the notion of disability affirmed in the Convention.

In general, the Italian educational system is one of the few to be considered consistent with the obligations under Article 24 of the CRPD<sup>140</sup>, despite the economic crisis<sup>141</sup> and some practical challenges which should be addressed<sup>142</sup>. It is interesting to know how this educational system, deeply embedded in the principles of the social model of

<sup>137</sup> Legge 13 luglio 2015, n. 107 “*Riforma del sistema nazionale di istruzione e formazione e delega per il riordino delle disposizioni legislative vigenti*”

<sup>138</sup> Decreto legislativo 7 agosto 2019, n. 69 “*Norme per la promozione dell’inclusione scolastica degli studenti con disabilità*”

<sup>139</sup> On the complicated iter that brought 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 and Cocconi M., *Il Compimento del Cantiere Della C.D. Buona Scuola—Il Commento*, in *Giornale di Diritto Amministrativo*, 4, 2017, p.461.

<sup>140</sup> D. Ferri, *Delia, 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, pp. 1–22.

<sup>141</sup> On the specific issue related to 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

<sup>142</sup> As underlined by the Committee on the CRPD itself in the documents: CRPD Committee, *Concluding Observations on the Initial Report of Italy*, 2016, available online: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (accessed on 20 October 2017).

CRPD Committee, *General Comment No 4 Article 24: Right to Inclusive Education* (Adopted 26 August 2016), 2016, Available online: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.asp>.

For a comment 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 this link:

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjA4dn1itjIAhXNfZoKHVPbCRwQFjABegQIBBAC&url=https%3A%2F%2Fwww.mdpi.com%2F2075-471X%2F7%2F1%2F1%2Fpdf&usg=AOvVaw0Omo8gqzj\\_7mlTetkb03j](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjA4dn1itjIAhXNfZoKHVPbCRwQFjABegQIBBAC&url=https%3A%2F%2Fwww.mdpi.com%2F2075-471X%2F7%2F1%2F1%2Fpdf&usg=AOvVaw0Omo8gqzj_7mlTetkb03j).

disability, is now also reinforced by the CRPD, confirming what is called by scholars a semi-constitutional status<sup>143</sup>.

2.2. *The constitutional perspective on the condition of persons with disabilities: the constitutional parameters*

The unity of this fragmented legislative apparatus needs to be found in the Constitutional parameters in the matter of disability and their interpretation according to the Constitutional Court. The so-called “judge of the laws” 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<sup>144</sup>.

The Italian Constitutional Court defines the person with disabilities as a crossroad of the most important constitutional ideals. For this reason, her/his constitutional statute is complex, and can be at the intersection of many constitutional provisions<sup>145</sup>.

Moving from the particular to the general, the first article to be mentioned is Article 38 on social security. Here the Constitution states that every citizen who is unable to work (*inabile al lavoro*) and does not have the necessary means of subsistence is entitled to economic support (*mantenimento*) and social assistance provided by the State. At 38.2 it states that workers who are no longer able to provide for themselves

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<sup>143</sup> S. Favalli S., D. Ferri D., *Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints*, in *European Public Law*, 22, 3, 2016

<sup>144</sup> The original quote is: «titolari di tutte le situazioni soggettive garantite in generale della Costituzione» in U. De Siervo, *Libertà negative e positive*, in R. Belli (eds.), *Libertà inviolabili e persone con disabilità*, Milano, 2000, p-36

<sup>145</sup> Here the original quotation from the decision 80/2019 «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».

because of accidents, illness, disability<sup>146</sup> (*invalidità*), old age or involuntary unemployment have the right to adequate means for their needs and necessities.

At Article 38.3 it is stated that the disabled and the handicapped<sup>147</sup> have the right to education and vocational training. This particular paragraph of the article was to become of high 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<sup>148</sup>, as will be discussed later on in this paragraph. The last paragraph states that private sector assistance is free.

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 amongst 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 and close enumeration<sup>149</sup>) and affirms the equal 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.

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<sup>146</sup> The actual term used by the Constitution is not the exact translation of disability.

<sup>147</sup> In Italian version the terminology doesn't specifically refer to any handicap or disability, the terminology, nowadays considered very offensive, is "minorati" that indicates intrinsically the lessened capabilities of these persons.

<sup>148</sup> Here 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. ».

<sup>149</sup> According to Barbera it is not possible to give to 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 value that the Constitution does not explicitly mention. To support this idea Barbera mentions Esposito and his doctrine: according to this scholar if sovereignty belongs to the people then law is founded in people's wills. See A. Barbera, *Art. 2*, in G. Branca (ed.), *Commentario alla Costituzione*, Roma, 1975, p. 83 and C. Esposito, *La Costituzione italiana, Saggi*, Padova, 1954, p. 22. Similarly A. Spadaro, *Il problema del fondamento dei diritti "fondamentali"*, in *I diritti fondamentali oggi*, Atti del V Convegno dell'Associazione italiana dei Costituzionalisti, Taormina, 1990, Milano 1995, 235 ss; F. Modugno, *I "nuovi diritti" nella Giurisprudenza Costituzionale*, Torino 1995, 3 s.; A. Baldassarre, *Diritti inviolabili*, ora in *Diritti della persona e valori costituzionali*, Torino 1997, p.1; according to this author. 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 *Il Diritto costituzionale tra principi di libertà e istituzioni*, Padova 2005. But also P. Barile, *Diritti dell'uomo e libertà fondamentali*, Bologna, 1984, pp. 54, according to this author article 2 is not to be considered a source of rights but their guardian and matrix («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), during time however 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).

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

Article 3.2 is the core of every positive action in the Italian system, and this is particularly true if we want to look at disability from a social model perspective, where positive actions can be justified by the need to contrast the process of disablement started by an ableist<sup>150</sup> society.

Article 3 usually comes in combination with Article 2. These two articles together can call to mind the controversial and discussed notion of human dignity, which in this sense can be considered as referring to the need for each individual to have equal opportunities for self-development, meaning equal opportunities to effectively enjoy constitutional rights and freedoms<sup>151</sup>.

Article 2 can be considered the *fil rouge* connecting constitutional canons and laws on disability and, as will be later discussed, it is the recurrent and one of the most important arguments in the case law of the Italian Constitutional Court.

This article recognizes the pre-existence of a set of inviolable rights belonging to the human person as an individual and as member of society. The constitutional guarantee of self-development for each person is embedded in this article, which was also interpreted by the Constitutional Court as the constitutional source of the self-determination principle<sup>152</sup>.

In this provision we can find the person with disability protected as a person among others, and in relation with others, in a condition of mutual interrelations. It was indeed

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<sup>150</sup> «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 Aabledness*, Basingstoke, 2009, p. 5.

<sup>151</sup> See A. Baldassarre, *Diritti sociali*, in *Enciclopedia giuridica*, Roma, XII, 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».

<sup>152</sup> 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 the original citation «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"»

stated that under Article 2 people with disability find “*a common protection for their own humanity, which has no differences*”<sup>153</sup>.

### 2.3. *The Constitutional Court case law on disability: overcoming social barriers as a primary matter*

The case law of the Italian Constitutional Court on disability is conspicuous and widely varied.

A common ground of all these decisions is represented by the use of a peculiar technique developed by the Constitutional Court, the so-called “balancing of rights”<sup>154</sup>, consisting in finding a reasonable balance between conflicting constitutional interests<sup>155</sup>. In these decisions, the Court identifies an “indefectible nucleus of rights” (*nucleo indeffettibile di diritti*) which must be granted, without limitations and without any possible discretion for the legislator.

The other common thread in the decisions on disability on the part of the Constitutional Court is the attention to 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, was sometimes inappropriate and obsolete; nonetheless what comes to light from this corpus is a progressive incorporation of the social model in the Italian constitutional system.

This is evident from the fact that the Constitutional Court defines disability as a relevant human and social issue<sup>156</sup>. 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 towards disability was mentioned. In particular, the Court remarked

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<sup>153</sup> The translation is from the author. Here 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*, 1986, n. 2, p. 525.

<sup>154</sup> The literature on this technique elaborated 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.

<sup>155</sup> 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

<sup>156</sup> A relevant social and human issue. In the original quotation «Rilevante problema umano e sociale» (See decisions n. 215/1987 and n.167/1999).

that disability was no longer to be considered an individual problem, but something to be addressed collectively by the whole of society<sup>157</sup>.

This emerges also by looking at the pillars of the Italian constitutional jurisprudence: sociality, accessibility and involved participation, which, according to scholars, are the three essential elements to grant full citizenship to people with disabilities<sup>158</sup>.

The leading case is the already-mentioned Decision no. 215/1987 on education<sup>159</sup>. Here the Court decides on Article 28 of Law no. 118 of 1971 and, by using a particular technique, it manipulates the text of the article<sup>160</sup>, stating that access to secondary school for disabled students must be granted, not only facilitated<sup>161</sup>. This decision is particularly known for being particularly audacious: with this operation, indeed, the court transformed a programmatic norm into binding law<sup>162</sup>.

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<sup>157</sup> Decision 1999 n. 167. The Court states that the legislator first carried out this change with a legislation centred on disability issues as social issue. Here 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

<sup>158</sup> A Valastro, *Le vicende giuridiche dell’handicap e la “società dell’informazione”: vecchie conquiste e nuove insidie per la Corte Costituzionale*, in A. Pace (eds.), *Corte costituzionale e processo costituzionale nell’esperienza della rivista “Giurisprudenza costituzionale” per il cinquantesimo anniversario*, Milano, 2006, p. 990.

<sup>159</sup> 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

<sup>160</sup> This kind of decision from the Constitutional Court is called by scholar 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 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;

<sup>161</sup> The article mentioned the need to promote the attendance of secondary schools (facilitare la frequenza della scuola secondaria superiore) and the Constitutional court changed the word “promotes” (facilitare) with the word “grant” (garantire)

<sup>162</sup> Furlan F., *La tutela costituzionale del cittadino portatore di handicap*, in C. Cattaneo (eds.), *Terzo Settore, nuova statualità e solidarietà sociale*, Varese, 2011

## CHAPTER II

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 to overcome 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 her/his own personality.

The Court affirms that participation in the educational process with teachers and non-disabled peers represents a relevant socialization factor that can largely contribute to developing the potential of the disadvantaged student<sup>163</sup>.

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 importance of understanding that these impediments are not solely economic but also social, especially for students with disability. Both these kinds of obstacles must be addressed by the law (Point 5 of the decision): attending school is an essential factor of inclusion for students with disability and it helps them to overcome social marginalization and to reach full development as a human being<sup>164</sup>.

This is also why the Constitutional Court rejected the idea of the adequacy of home schooling for students with disability, stressing the importance of the inclusion process within mainstream institutions<sup>165</sup>.

In general, the right to education has often been the object of litigation in front of ordinary tribunals, administrative tribunals, and at a Constitutional level.

What should be mentioned is that this right is to be regarded as incompressible and must be ensured effectively<sup>166</sup>.

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<sup>163</sup> The translation is almost literal and is done by the author. Here the original passage: «la partecipazione al processo educativo con insegnanti e compagni normodotati costituisce un rilevante fattore di socializzazione e possa contribuire in modo decisivo a stimolare le potenzialità dello svantaggiato»

<sup>164</sup> Here 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 ai fini del complessivo sviluppo della personalità».

<sup>165</sup> Decision n. 226 del 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»

<sup>166</sup> Blando, F. (2017). Soggetti disabili istruzione: la lotta per il diritto. *Federalismi.it*, 10/2017

This is what the recent decisions (no. 275/2016<sup>167</sup> and no. 80/2010<sup>168</sup>) on the unconstitutionality of financial restraints on inclusive education in times of economic crisis highlight.

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

For example, in Decision no. 1088/1988<sup>169</sup> 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 disability in workplaces is to be considered positively. According to the Court, this is particularly relevant in a Constitutional system which

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<sup>167</sup> The judges decided on Article 6(2)-bis of the Abruzzo Regional law no. 78/1978 as modified by law n. 15/2004. The case concerned transport and assistance of students with disability and their possible limitation according to available financial resources to be decided by local authorities. Italian constitutional court stated that it was against the Constitution to impose budget constraints on right to education for disabled students. Emphasis was put on the fact that transports are fundamental for the inclusion and participation of students with disability 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 incompressibili ad incidere sul bilancio, e non l'equilibrio di questo a condizionarne la doverosa erogazione*, in *Osservatorio AIC*, 2017; A. Longo, *Una concezione del bilancio costituzionalmente orientata: prime riflessioni sulla sentenza della Corte costituzionale n. 275 del 2016*, in *Federalismi.it*, 2017; R. Cabazzi, *Diritti incompressibili 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.

<sup>168</sup> The judges decided on dell'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 canceled the possibility of derogating to national provision to hire a surplus of support teachers for the right to education of students with severe disability. The Court declared this provision against the Constitution. This decision is particularly important because it is one of the first to explicitly mention the fact that people with disability 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 risulta essere affetta in concreto una persona») For comments 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)*, 2010, 7, p. 2403; L. Nannipieri, *Il diritto all'istruzione del disabile nelle fonti nazionali tra problemi definitivi, 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.

<sup>169</sup> C. Colapietro, *La vicenda del collocamento obbligatorio degli invalidi psichici; un nuovo modo di proceder nei rapporti Corte-Parlamento*, in *Giurisprudenza italiana*, 1990, I, 1, p. 863 e ss.

is characterized by “*intense sociality*”, such as that of Italy, where each and every person has the right to take part in the political, economic and social organization of the country<sup>170</sup>.

On the matter of accessibility, 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<sup>171</sup>.

We can notice that, in its case law, the Constitutional Court affirms the primary importance of social inclusion, by making it the prevalent interest from among others. 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 to overcome environmental barriers<sup>172</sup>. Scholars have stated that in this way the person with disabilities has a specific role in the actuation of Article 3 Paragraph 2<sup>173</sup>.

The person with disability is imbued with the constitutional notion of dignity. This must be interpreted as social dignity, and as such it is strongly anchored to the concrete living conditions that must be granted to each individual in relation to all others. In the background we can recognize the image of the person portrayed by the Constitutional system, which must be pursued to grant the realization of the *irrevocable asset of the human being* (patrimonio irretrattabile delle persona umana)<sup>174</sup>.

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<sup>170</sup> Here 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 la lavoro in una Repubblica impegnata a promuovere le condizioni per rendere effettivo tale diritto. »

<sup>171</sup> Decision n. 167 del 1999, for comments see the previous footnote. Here the Court states that barriers hinder relational life, here the original citation 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».

<sup>172</sup> C. Colapietro, *Diritti dei disabili e costituzione*, Pisa, p. 40

<sup>173</sup> F. Furlan, *La tutela costituzionale del Cittadino portatore di handicap*, cit., 242

<sup>174</sup> This expression can be found in the decision n. 11/1956 from the Constitutional Court

3. *From the individual model to the human rights model: what is happening in international Law*

The following paragraphs will be dedicated to the international level of legislation and policy. It will be shown how, especially looking at the United Nations system, international law has started challenging the traditional model of disability with the elaboration of policies and treaties more focused on human rights protection and inspired by the social model of disability.

We will start the discussion by analysing the United Nations Convention on the Rights of Persons with Disability, currently the leading international law instrument in the field of disability, then we will consider how this influences the European Union level and the work of the Council of Europe.

3.1. *The UN and Disability: the route towards the Convention on the rights of persons with disability*

The Convention was adopted on 13 December 2006 and was opened for signature on 30 March 2007. Earlier attempts to address the General Assembly in order to focus on disabilities date back to the 1990s<sup>175</sup>, 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<sup>176</sup>.

In the earlier documents from the UN, people with disability are not explicitly considered<sup>177</sup>. It can be stated that in the period between 1945 and 1970 disabled people were invisible as citizens and rights holders in front of the United Nations<sup>178</sup>.

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<sup>175</sup> T. Degener, *Disabled persons and human rights; the legal framework*, in T. Degener, Y. Koster-Dreese (eds.), *Human rights and disabled persons: essays and relevant human rights instruments. International studies in human rights*, 40, Leiden, 1995, p.12.

<sup>176</sup> 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

<sup>177</sup> Neither the UN Charter of 1945 nor the Universal Declaration of Human Rights of 1948 mention disability. Not in the Universal Declaration of Human Rights of 1948, nor on the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights

<sup>178</sup> 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 Della Fina V., Cera

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During the period between 1970 and 1980 disabled persons became the subjects of some declarations on the part of the UN, such as the *Declaration on the Rights of Mentally Retarded Persons*<sup>179</sup> (1971) and the *Declaration on the Rights of Disabled Persons*<sup>180</sup> (1975). Both these documents reflect a medical view of disability, conceiving it as a matter of rehabilitation.

In the *Declaration on the Rights of Mentally Retarded Persons*, for example, it was stated that it was possible to deny or restrict human rights of a person with cognitive impairments as long as it was done with a legal safeguard preventing him/her 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 should be «as close as possible to those of the normal life of a person of his or her age<sup>181</sup>».

Despite this, the document was the first to acknowledge the importance of the participation of and consultation with organizations of disabled persons<sup>182</sup>.

In 1976, the General Assembly launched 1981 as the *International Year of Disabled Persons*<sup>183</sup>. This initiative was the beginning of a new phase, which was more active and guided by the awareness that disability was a human rights issue<sup>184</sup>. Particular emphasis was put on 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*<sup>185</sup>, focused on enhancing disability prevention, rehabilitation and equalization of opportunities. The document, with more than 200 paragraphs, was focused on

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R., Palmisano G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities A Commentary*, Cham, 2017, p. 3

<sup>179</sup> Declaration on the Rights of Mentally Retarded Persons, Resolution A/RES/26/2856 (XXVI), December 20, 1971.

<sup>180</sup> Declaration on the Rights of Disabled Persons, Resolution A/RES/30/3447 (XXX), December 9, 1975.

<sup>181</sup> Declaration on the Rights of Disabled Persons, Resolution A/RES/30/3447 (XXX), December 9, 1975, para. 9.

<sup>182</sup> Declaration on the Rights of Disabled Persons, Resolution A/RES/30/3447 (XXX), December 9, 1975, para. 12.

<sup>183</sup> International Year of Disabled Persons, Resolution A/RES/31/123, December 16, 1976.

<sup>184</sup> Still under this vision the person with disability was more of an object, rather than a subject of human rights, see *Infra*.

<sup>185</sup> World Program of Action Concerning Disabled Persons, Resolution A/RES/37/52, December 3, 1982. On this Program see: J. D. Chermak, 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.

achieving equal opportunities and pertained to issues such as legislation, physical environment, income maintenance and social security, education, employment, recreation, culture, religion and sport<sup>186</sup>.

To keep on implementing the document, the General Assembly decided to proclaim the *International Decade on Disabled Persons (1983-1992)*<sup>187</sup>. The decade was the occasion for the United Nations to adopt documents and create tools on the issue of 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*. The 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<sup>188</sup>.

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<sup>189</sup>. 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. The second study covered all persons with disabilities and was published in 1993<sup>190</sup>, showing huge evidence of widespread human rights abuses against 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 up by adopting another non-binding instrument: The *Standard Rules on the Equalization of Opportunities for*

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<sup>186</sup>World Program of Action Concerning Disabled Persons, Resolution A/RES/37/52, December 3, 1982.

<sup>187</sup> Implementation of the World Program of Action Concerning Disabled Persons, Resolution A/RES/37/53, December 3, 1982, para. 11.

<sup>188</sup> Convention (No. 159) concerning vocational rehabilitation and employment (disabled persons), entered into force June 20 1985, UN Treaty Series, Volume 1401, 23439, Article 4. For a general comment 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*, Seite, pp. 635 - 641

<sup>189</sup> 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.

<sup>190</sup> Human Rights and Disabled Persons, UN publications, Sales No. E.92.XIV.4.

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*Persons with Disabilities*<sup>191</sup>. The document consists of four sections and twenty-two rules targeted at achieving equal participation, divided into preconditions, main areas of action (accessibility, education, employment), implementation and monitoring<sup>192</sup>. This approach is considerably more rights-based, compared to that of the *World Program of Action*. The document contains keywords such as independence, personal assistance and service. These words would be leading motives for future developments. The monitoring provisions are between the most innovative ones. The figure of a Special Rapporteur, advised by a panel of experts, was created. Through this mechanism, persons with disabilities were for the first time able to make their voice heard inside the United Nations. This provision was at the same time a cause and an effect of the international rise of the disability rights movement.

The movement managed to start the process of elaboration of disability policy and became an actor of international law-making: disabled people were finally human rights agents<sup>193</sup>. It was during the *World Summit on Disability* in March 2000 that the disability movement called out 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 of the conference invited the UN General Assembly to elaborate an international convention for the promotion and protection of the rights and dignity of disabled people<sup>194</sup>.

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, a crucial step was taken when 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*<sup>195</sup>.

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<sup>191</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Resolution A/RES/48/96, December 20, 1993.

<sup>192</sup> See M. Rioux, A. Carbert, *Human Rights and Disability: The International Context*, in *Journal On Developmental Disabilities*, 10, 2, 2003, pp. 1-12 and Degener T., Quinn G., *Human Rights and disability*, cit., pp. 34-38.

<sup>193</sup> Degener T., Quinn G., *Human Rights and disability*, cit., p. 3

<sup>194</sup> 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.

<sup>195</sup> Degener T., Quinn G., *Human Rights and disability*, cit., p. 33

## THE PARADIGM SHIFT IN DISABILITY THEORY AND LAW

The first meeting for the examination of a Convention proposal was scheduled for July, but there was no agreement on the need for a Convention. A second meeting was held a year later, in July 2003. In the previous year, a huge amount of work had been done, including regional meetings to consider the proposal.

Given that the general opinion turned in favour of a Convention, the debate focused on its scope and the type of document to be adopted. The Ad Hoc Committee concluded the meeting with an agreement on creating a working group, composed of Member States and disabled persons' associations, to write down the draft text that would have been the basis for negotiation by Member States and Observers<sup>196</sup>.

The working group carried out its work successfully in two weeks, thanks to the unprecedented work from the disabled persons' association<sup>197</sup>, but left unsolved some core but 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 hard discussions on the above-mentioned 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, that day 81 states signed, a unique case for any UN treaty.

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<sup>196</sup> 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

<sup>197</sup> 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

### 3.1.1. *The CRPD as a revolutionary instrument: the human rights approach*

The Convention is the concrete outcome of years of struggling of disabled persons associations and of efficient lobbying for a binding treaty<sup>198</sup>. 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<sup>199</sup>.

Disabled persons became real subjects of human rights, an enactment on an international scale of the motto *Nothing about us without us*.

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<sup>200</sup>.

The negotiation process started from a common point of agreement: the need to overcome the medical model<sup>201</sup>.

Some scholars argue that one of the main purposes of the Convention was to affirm a social model of disability<sup>202</sup>. Others support the idea that the CRPD goes beyond the social model of disability, affirming a human rights model<sup>203</sup>.

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<sup>198</sup> This work is the result of the political struggle of disabled people and allies over the last three decades to challenge the historical oppression and exclusion of disabled people. We mentioned this movement, in particular the one in UK and the one in US, in the previous paragraph. More literature: D. Driedger, *The Last Civil Rights Movement: Disabled People's International* (C. Hurst & Co. Publishers, 1989); Campbell J, M. Oliver, *Disability Politics: Understanding Our Past, Changing Our Future*, London, 1996).

<sup>199</sup> 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.

<sup>200</sup> Degener T, Begger A, *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*, 2017, Cham, p. 38.

<sup>201</sup> 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.

<sup>202</sup> 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*, in *Human Rights Law Review*, 8, 1, 2008, p. 7.

<sup>203</sup> This was said even earlier, during the negotiation by Degener and Quinn. See Degener T., Quinn G., *Human Rights and disability*, cit., p. 13-14.

The Committee of the CRPD has recently embraced this vision, using the term *human rights model* in its more recent concluding observations<sup>204</sup>.

The human rights model was elaborated by legal scholars and it is claimed to be an evolution and the only concrete alternative to the social model of disability<sup>205</sup>. The CRPD should be considered its full elaboration.

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 as 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<sup>206</sup>.

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”.

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<sup>207</sup>:

1. First of all, Degener argues that all the people with disability must be regarded as human rights bearers, because impairment is not an obstacle for the enjoyment of human rights. This approach is called a “right-based” as opposed to a “need-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

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<sup>204</sup> Concluding Observations on the initial report of Argentina as approved by the Committee at its eight session (17-28 September 2012), CRPD/C/ARG/CO/1, 2012, October 8, paras, 7-8; Concluding Observation on the initial report of China, adopted by the Committee at its eight session (17-28 September 2012), CRPD/C/CHN/CO/1, October 15, 2012, paras. 9-10, 16, 54.

<sup>205</sup> Mainly by T. Degener, A Human Rights Model of Disability, in P. Blanck, E. Flynn (eds.), *Routledge Handbook of Disability Law and Human Rights*, pp. 31-49; T. Degener, *Disability in a human rights context*, in *Laws*, 5(3), 35, 2016; T. Degener, Degener, *A new human rights model of disability*. In *The United Nations convention on the rights of persons with disabilities*, in V. Della Fina, R. Cera, G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, 2017, Cham, pp. 41-59.

<sup>206</sup> See T. Degener, G. Quinn, *Human Rights and disability*, cit., p. 5

<sup>207</sup> T. Degener, *A Human Rights Model of Disability*, cit., p. 33

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 youths 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 aforementioned 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 comprehending disability in justice issues.

Some scholars contend that the human rights model should be considered as part of the models elaborated within critical disability studies. For example, it was argued that, despite being openly inspired by the social model of disability, the CRPD implements an intermediate model of disability<sup>208</sup>.

The discussion on the existence of something called a human rights model does not hinder the remarkability of the instrument, which is revolutionary in the landscape of international law and international disability law.

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

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<sup>208</sup> For example, M. G. Bernardini, *Disabilità, giustizia, diritto, cit.*, pp. 64-72

### 3.1.2. *Some core provisions of the CRPD*

The CRPD clearly recognizes disabled persons as subjects of human rights<sup>209</sup>. The rights of people with disabilities are, as such, inalienable, universal and strictly inherent to the person<sup>210</sup>. The Convention protects these human rights, especially for persons with more intensive support needs<sup>211</sup>. The purposes of the Convention are drawn up at Article 1 and are to: «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».

A set of principles to reach these objectives is established at Article 3.

One of the most important statements is the one regarding the right to equal recognition as a person before the law, with equal legal capacity<sup>212</sup>.

The CRPD affirms a broader vision of the rights of persons with disabilities<sup>213</sup>. This treaty is indeed comprehensive of both first and second generation human rights. The importance of combining these two categories of human rights is now being understood more generally under international law, despite having been for a long time described as hierarchically related<sup>214</sup>. The CRPD offers a good example of the

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<sup>209</sup> By reaffirming the universality of all human rights for all disabled persons. Preamble, paragraph (c), of the CRPD.

<sup>210</sup> Art. 1 of the Universal Declaration of Human Rights states that All human beings are born free and equal in dignity and rights”

<sup>211</sup> This is stated in the Preamble, paragraph (j)

<sup>212</sup> Art. 12, paras. 1 and 2. For comments on this article see <sup>212</sup> 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*, in *International Journal of Human Rights*, 20, 471, 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 Right of Persons with Disabilities*, cit., 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;

<sup>213</sup> Still there's a huge debate on whether the Convention has created or not 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. Mègret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, in *Human Rights Quarterly*, 30, 2, 2008, pp. 494-516.

<sup>214</sup> These two categories are both included in the 1984 universal declaration but then separated in 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

combination of these sets of human rights, supporting the idea of their indivisibility and interdependence. The commixture is so deep that certain rights, stated in the Convention, are not easily defined as belonging to one or another of these categories. An example could be the right to independent living<sup>215</sup>, deriving from the disability rights movement, which has not yet been qualified as either a civil or a social right by the CRPD Committee. The Convention, indeed, 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<sup>216</sup>, while other grounds such as race, colour, language, religion, nationality, ethnicity, indigenous and social origin, property and age are only mentioned in the preamble<sup>217</sup>. 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<sup>218</sup>.

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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*, 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. 45.

<sup>215</sup> Article 19, see the following comments: J. Fiala-Butora, A. Rimmerman, A. Gur, *Article 19*, in Bantekas, M. Ashley Stei, D. Anastasiou (eds.), *The UN Convention on the Right of Persons with Disabilities: A Commentary*, Oxford, 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*, Cham, 2017, pp. 353-373;

<sup>216</sup> Articles 6 and 7. For comments see: R. Mikytiuk, E. Chadha, *Article 6*, in Bantekas, M. Ashley Stei, D. Anastasiou (eds.), *The UN Convention on the Right of Persons with Disabilities: A Commentary*, Oxford, pp. 171-198; V. Dalla 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*, Cham, 2017, pp. 175-194; I. Bantekas, *Article 7*, Bantekas, M. Ashley Stei, D. Anastasiou (eds.), *The UN Convention on the Right of Persons with Disabilities: A Commentary*, Oxford, pp. 198-229; A. Broderik, *Article 7*, in V. Della Fina, R. Cera, G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities A Commentary*, Cham, 2017, 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. Koenig (eds.), *Women and international human rights law*, 2003, pp. 267-282

<sup>217</sup> Preamble, paragraph (p), of the CRPD. An interesting reading on intersectionality in disability is: Degener T, *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

<sup>218</sup> Article 24, paras. 3 (a) and (b), of the CRPD. For comments: D. Anastasiou, M. Gregory, J. M. Kauffman, *Article 24*, in Bantekas, M. Ashley Stei, D. Anastasiou (eds.), *The UN Convention on the*

In the frame of the Convention, the issue of health is addressed in a human rights context, demanding equal access to general and specialized health care services for disabled persons. It is specified that services must be community-based and sensitive to freedom rights as well as to the dignity of the individual<sup>219</sup>.

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<sup>220</sup>, 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 that disability is mainstreamed in all development programs, having disabled persons organizations monitor these activities.

### 3.2. *The European Union, the CRPD and the European approach towards 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

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*Right of Persons with Disabilities: A Commentary*, Oxford, pp. 656-705 ; V. Dalla 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*, Cham, 2017, pp. 439-470

<sup>219</sup> Article 25. See comments here: P. Weller, *Article 25*, in Bantekas, M. Ashley Stei, D. Anastasiou (eds.), *The UN Convention on the Right of Persons with Disabilities: A Commentary*, Oxford, 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*, Cham, 2017, pp. 471-485

<sup>220</sup> 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](http://www.who.int/disabilities/world_report/2011/report.pdf). Accessed on September 2017.

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disability<sup>221</sup>. The first Resolution was elaborated in 1974<sup>222</sup>, mainly in the area of employment, and was inspired by a medical and welfare-based view of disability. The policy aimed at rehabilitating people with disabilities or placing them in sheltered industries<sup>223</sup>, 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». As scholars have noticed<sup>224</sup>, 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<sup>225</sup> around disability, which fell outside the core of the European Community project, at that time.

The EU’s approach towards disability started changing around the end of the 1990s: the first step was taken with the approval of the *Disability Strategy* in 1996<sup>226</sup>.

This document, still non-binding, was the first one to recognize EU competences in disability policy making and the first one clearly stating the need to comprehensively address fundamental rights of people with disability.

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<sup>221</sup> Waddington L., Diller M., *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.

<sup>222</sup> Council Resolution 27 June 1974 establishing the initial Community action programme for the vocational rehabilitation of handicapped persons

<sup>223</sup> For a specific comment 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

<sup>224</sup> See for example L. Waddington, *Disability Employment and the European Community*, 21, Brussel, 1995, p. 100

<sup>225</sup> For example, when the Community tried to enable institution to follow through national implementation of goals in employment the States exercised their veto powers, or the attempt to approve ordinary legislation on disability such as the one of transportation failed. See L. Waddington, *From Rome to Nice in a Wheelchair: The Development of a European Disability Policy*, Groeninger, 2006, pp. 6-11;

<sup>226</sup> Commission Communication on Equality of Opportunity for People With Disabilities: A New European Community Disability Strategy, COM (1996) 406 FINAL (JUL. 30, 1996).

The Strategy, inspired by the *UN Standard Rules*, was aimed at identifying and tackling obstacles to full participation and equality of people with disability 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<sup>227</sup> (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<sup>228</sup>».

*Directive 2000/78/CE* still represents one of the main legislative acts on disability, specifically on employment and occupation<sup>229</sup>.

The Directive prohibits direct and indirect discriminations, harassment and instruction to discriminate 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 working environment (Art. 5)<sup>230</sup>. The Directive contains a provision on positive measures (Art. 7) and it mentions that the principle of equality is not an obstacle for member states «for 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<sup>231</sup>.

Here, disability is explicitly mentioned as a ground of non-discrimination in Article 21: moreover, Article 26 is entirely dedicated to disabled people, stating that

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<sup>227</sup> See R. Whittle, *Disability Discrimination and the Amsterdam Treaty*, in *European Law Review*, 23 (1), 1998, p. 50 and R. Whittle, *Disability Rights after Amsterdam: the way forward*, in *European Human Rights Law Review*, 1, 2000, pp. 33-48

<sup>228</sup> Commission Communication: Towards a Barrier Free Europe for People with Disabilities, at 3, COM (2000) 284 final (May 12,2000)

<sup>229</sup> See A. Lawson, *The Eu Rights Based Approach To Disability: Strategies For Shaping An Inclusive Society*, in *International Journal of Discrimination and the Law*, 2005, 6, pp. 269-287.

<sup>230</sup> 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.

<sup>231</sup> For an overview of this document see: S Peers, A Ward (eds.), *The European Union charter of fundamental rights*, Oxford, 2004

## CHAPTER II

«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*<sup>232</sup>, the legislative competence of the EU on disability gained strength. An example of this might be found in Art. 10, the horizontal nondiscrimination clause, which imposed upon Member States a duty of mainstreaming<sup>233</sup>. At the same time, the Lisbon Treaty brought about a change in the status of the European Charter of Human Rights in European Law, making it fully part of the European legislative system.

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<sup>232</sup> 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. Verschuere, P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between law and policy*, Antwerp, 2012, pp. 41-69

<sup>233</sup> 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

### 3.2.1. *The European Union and the CRPD*

The above-mentioned asset was integrated and modified by the CRPD<sup>234</sup>.

The CRPD is the first treaty on international human rights to provide a mechanism to incorporate regional integration organizations as parties, and it is also the first human rights treaty to be signed by the EU.

After having participated in the discussion and elaboration of the document, the European Union adopted the UNCRPD with a decision by the Council in November 2009<sup>235</sup>. The CRPD is a mixed agreement<sup>236</sup>, meaning that 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 EU). The CRPD is to be considered «integral part of EU Law», as stated by the European Court of Justice<sup>237</sup>.

According to scholars, the CRPD enjoys a quasi-constitutional status<sup>238</sup> 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.

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<sup>234</sup> The influence of the CRPD in EU law is widely discussed by scholars. Here 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*, Leiden, 2009, 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*, 2011, 18, 4, 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, p. 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*, 3, Antwerp, 2012, pp. 34-40;

<sup>235</sup> The CRPD was accessed through the 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*, 1, Antwerp, 2010; pp. 47-59;

<sup>236</sup> The CJEU has jurisdiction on interpreting these kinds of agreements under Art. 267 TFUE as stated in many case law such as Case C-53/96, *Hermes* or Case C-240/09 *Lesoochránárske zoskupenie VLK*

<sup>237</sup> Cases C-335/11, C-337/11

<sup>238</sup> S. Favalli, D. Ferri., *Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints*, in *European Public Law*, 22, 3, 2016.

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 the 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<sup>239</sup>».

### 3.2.2. *The definition of disability under EU legislation*

Directive 2000/78 prohibits any form of direct and indirect discrimination, but does not provide a specific notion 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.

We need to mention that, after the adoption of the CRPD, the definition was also influenced by the Convention, while many scholars still wonder if the current definition under EU law should be considered fully compatible with the CRPD<sup>240</sup>.

One of the first definitions provided by the CJEU is the one contained in the *Chacòn Navas* case<sup>241</sup>, decided in 2005.

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<sup>239</sup> Case C-363/12, *Z. v A Government Department*. We should notice however that the Italian Constitutional Court, clearly expressed in the decision n. 236/2012 that the UNCRPD is European Law. The motivation of the Court is that, as the European Union joined the CRPD, then the Treaty must have the same legal status and feature 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). 240L. 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 Rodríguez (eds.), *The Changing Disability Policy System: Active Citizenship and Disability in Europe Volume 1*, London, 2017, pp. 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*, 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 Belavusau U., K. Henrard K. (eds.), *EU Anti-Discrimination Law beyond Gender*, Oxford, 2018, pp. 321-328.

<sup>241</sup> *Chacòn Navas v Eurest Colectividades SA*: C-13/05

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: «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 purpose of the Directive, disability must be considered differently from sickness: 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 framework, the problem is the impaired individual and not the environment: there is no consideration for social barriers.

In the period separating this decision from the adoption of the CRPD, the ECJ held that protection against discrimination on grounds of disability also extends to discrimination “by association”, as in the *S Coleman v Attridge Law and Steve Law* case<sup>242</sup> (2008). In this case, the Court of Justice recognized the discrimination suffered by 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<sup>243</sup>, arguably influenced by the UN Convention<sup>244</sup>, is represented by the *HK Denmark* case<sup>245</sup>, 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 with other workers» and the Court mentions that «it does not appear that the Directive is

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<sup>242</sup> *S Coleman v Attridge Law and Steve Law* C.303/06, but Also Judgment 22 March 2016 *In Guberina v. Croatia*;

<sup>243</sup> This was the definition used by Advocate General Wahl in the decision *HK Danmark*

<sup>244</sup> L. Lourenço, P. Pohjankoski, *Breaking down Barriers? The Judicial Interpretation of “Disability” and “Reasonable Accommodation” in EU Anti-Discrimination Law*, in Belavusau U., K. Henrard K. (eds.), *EU Anti-Discrimination Law beyond Gender*, Oxford, 2018, p. 380;

<sup>245</sup> *HK Danmark* C-335/11 and C-337/11

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 above-mentioned sense, for example the *Commission v. Italy* or *Z. v A Government Department* cases.

In the *Z. v A. Government Department* case<sup>246</sup> 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<sup>247</sup>.

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<sup>248</sup>, where the Court, having to define whether severe obesity could be regarded as a disability, 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.

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<sup>246</sup> *Z. v A. Government Department* C-363/12

<sup>247</sup> 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 to physical impairments in relations to mobility.

<sup>248</sup> *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*. *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, G., *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, 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, *(Re-)Conceptualizing Disability-based Discrimination and Sickness Absence at Work*, in *International Labor Rights Case Law*, 5(1), 2019, pp. 86-91.

Similar conclusions are shared by the *Dauidi* case<sup>249</sup>. In general, we need to recognize that the definition elaborated in *HK Denmark* moves away from the medical model of disability. Despite this, the CJEU still does not consider the side of disability coming from social barriers<sup>250</sup>. 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*<sup>251</sup>».

### 3.2.3. *The 2010-2020 Disability Strategy*

The *2010-2020 Disability Strategy* was approved by the Commission shortly after the adoption of the CRPD<sup>252</sup>. Consistently with the previous strategy, 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<sup>253</sup> is part of the EU's *Europe 2020 Strategy*. In this document, the economic and social participation of people with disabilities in society is considered

<sup>249</sup> Case *Daouidi v Bootes Plus SL*, C-395/15. For a comment 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*, in *International Labor Rights Case Law*, 5(1), 2019, pp. 86-91.

<sup>250</sup> 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. 84

<sup>251</sup> Waddington L., *The influence of the CRPD on EU Anti-Discrimination Law*, in Belavusau U., Henrard K. (eds.), *EU anti-discrimination law beyond gender*, Oxford, 2018, p. 350;

<sup>252</sup> 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, p. 28-35

<sup>253</sup> On the Strategy: Hosking D., *Staying the course: the European disability strategy 2010-2020*, in Waddington L., Quinn G., Flynn E. (eds), *European Yearbook of Disability Law*, 4, 2013

essential to create smart, sustainable and inclusive growth in European society as a whole.

The *2010-2020 Disability Strategy* is explicitly inspired by the CRPD. 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.

The European Accessibility Act<sup>254</sup>, approved in June 2019, is part of the *Strategy*. It is a legislative text, 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. Unfortunately, it leaves out important fields such as transport<sup>255</sup>.

The Strategy also called for the approval of a new Directive on non-discrimination. The elaboration of a reformed Directive, however, stopped after the proposal elaborated by the Council in 2008<sup>256</sup>. This new version extends the anti-discrimination legislation beyond the labor market, covering relevant fields such as social protection, education, access to goods and services and many others. However, the proposal has never been approved.

### 3.3. *The Council of Europe*

During the last ten years, the Council of Europe has issued some documents and a comprehensive strategy on disability to be applied by all the Member states. At the same time, the European Court of Human Rights has developed a fair corpus of

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<sup>254</sup> Directive (EU) 2019/882 on the accessibility requirements for products and services

<sup>255</sup> For a first comment on the Directive see: European Disability Forum, *EDF Analysis of the European Accessibility Act*, 2019, Brussel.

<sup>256</sup> Proposal 2 July 2007, COM (2008) 426

decisions surrounding disability matters, specifically in the field of mental health and institutionalization, but with the limit of being incapable of stronger position against the States, due to the inherently social nature (and the related high cost) of most of these rights.

On the whole, a tendency towards the social model of disability can be detected also in the work of the Council.

### 3.3.1. *The non-binding documents: resolutions, policies and strategies*

In the last twenty years, the Council of Europe has adopted a view of disability increasingly inspired by the social model<sup>257</sup>.

The recommendation of the Committee of Ministers, Rec (2006) 5<sup>258</sup>, Paragraph 2.2, explicitly mentions a paradigm shift in disability law.

It is stated that «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)*<sup>259</sup>, there are more than 80 million people with disabilities in Europe. The notion of disability embraced by this document is a universalistic one: in the Resolution it is stressed that «Every human being is likely to suffer some temporary or permanent impairment at some point in his or her life<sup>260</sup>». The Assembly affirms that, despite being a high impact phenomenon, disability is still largely

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<sup>257</sup> 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;

<sup>258</sup> 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, Rec(2006)5

<sup>259</sup> Resolution 2039 (2015), Equality and inclusion for people with disabilities 20 January 2015, paragraph 1

<sup>260</sup> Resolution 2039 (2015), Equality and inclusion for people with disabilities 20 January 2015, paragraph 1

underaddressed, which results in the marginalization and invisibilization of people with disability 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 view of disability strongly anchored in the social model of disability.

The *European Convention of Human Rights* and the *European Social Charter* are mentioned as instruments to secure the rights of people with disabilities, suggesting that these two documents shall be interpreted according to the above-mentioned framework. To conclude, members States are recommended to ratify and implement the CRPD and the European Social Charter.

Moreover, the Council of Europe has recently elaborated a *Disability Strategy 2017-2023*<sup>261</sup> 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 encourages, using the CRPD as an anchor, Member States to adopt and implement legislation based on the social model of disability, with particular attention to political participation, equality and non-discrimination, as well as accessibility.

### 3.3.2. *The European Court of Human Rights*

When it comes to shifting from non-binding soft law documents and acts to the judiciary level, the situation is notably different.

The entire Convention can be applied to disability rights; however, the case law of the Court was mainly developed from Article 3 (prohibition of inhuman and degrading treatment)<sup>262</sup> Article 5 (right to liberty), Article 6 (right to fair trial), Article 8 (right to private life) and Article 14 (prohibition of discrimination).

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<sup>261</sup> G. Quinn, L. Waddington, E. Flynn, *Council of Europe*, in G. Quinn, L. Waddington, E. Flynn (eds.), *European Yearbook of Disability Law*, 5, Oxford, 2015, pp. 343-346

<sup>262</sup> 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

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 the broad and sensitive field related to mental health and psycho-social/intellectual disability<sup>263</sup>. On this matter, the Court usually finds a violation of Article 5 when a person with an intellectual disability is interned without her/his consent and de facto deprived of his/her liberty (*H. L v. the United Kingdom*<sup>264</sup> or *Staney v. Bulgaria*<sup>265</sup>).

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<sup>266</sup>. This might be because of accessibility issues not enabling the person to move autonomously inside the building, use toilet facilities autonomously or have proper access to medical facilities (e.g: *Vincent v. France*<sup>267</sup>, *Arutyunyan v. Russia*<sup>268</sup>, *Grimailos v. Latvia*<sup>269</sup>, *Semikhvostov v. Russia*<sup>270</sup>, *Asalya v. Turkey*<sup>271</sup>) or because continuous detention is not compatible with certain impairments and conditions (*Helhal v. France*<sup>272</sup>, *Topekhn v. Russia*<sup>273</sup>).

In a particular case, *Z.H. v. Hungary*<sup>274</sup>, concerning a deaf and mute person, the ECHR, 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

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<sup>263</sup> 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

<sup>264</sup> H.L. V. The United Kingdom, No. 45508/99, 5 October 2004

<sup>265</sup> Stanev V. Bulgaria, Application No. 36760/06, 17 January 2012 (Grand Chamber)

<sup>266</sup> 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

<sup>267</sup> Case Of Vincent V. France, Application No. 6253/03, 24 October 2006

<sup>268</sup> Case Of Arutyunyan V. Russia, Application No. 48977/09, 10 April 2012

<sup>269</sup> Grimailovs v. Latvia, Application No. 6087/03, 25 June 2013

<sup>270</sup> Case Semikhvostov V. Russia Application No. 2689/12, 7 July 2014

<sup>271</sup> Asalya/Türkiye, Application No. 43875/09, 15 April 2014

<sup>272</sup> Case Of Helhal V. France, Application No. 10401/12, 19 May 2015

<sup>273</sup> Case Of Topekhn V. Russia, Application No. 78774/13, 17 October 2016

<sup>274</sup> Z.H. V. Hungary, Application No. 28973/11, 8 November 2011

is remarkable because it shows the incorporation of the notion of reasonable accommodation formulated in Article 2, 13 and 14 of the CRPD.

It is interesting to see how the CRPD plays a role in the EChHR case law. The convention is explicitly mentioned, for example, in the motivation of the case *R.P. and Others v. the United Kingdom*<sup>275</sup>, where it is reaffirmed that the State must provide appropriate accommodation to facilitate a disabled person's effective role in legal proceedings<sup>276</sup>.

Other cases concern the accessibility of justice buildings (*Farcas v. Romania*<sup>277</sup>, *inadmissible*), and legal capacity and guardianship (*Shtukurov v. Russia*<sup>278</sup>, *Stanev v. Bulgaria*<sup>279</sup>). Moreover, it might be useful to look at the *Bloshin v. Russia*<sup>280</sup> 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, condemning Russia because a 12 year old boy was questioned by the police without legal assistance.

Article 8 (right to respect for private and family life) is interestingly mainly connected to cases concerning accessibility of public buildings and facilities in general. In these cases, Article 8 is understood as the right to develop one's personality, similarly to the German and Italian Constitution. In these cases, for example, in spite of affirming the strong need to address accessibility, the Court often fails to recognize the violation of article 8 by member states or strikes off the case as inadmissible. In *Botta v. Italy*<sup>281</sup>, the leading case in this field, the Court elaborates a test in order to assess the direct link between denial of access and the duty for the State to take measures. Other cases on Article 8 involve legal capacity (*Shtukurov v. Russia*<sup>282</sup>, *Ivinovic v. Croatia*<sup>283</sup>, *A.N. v. Lithuania*<sup>284</sup>), a field in which the Court is usually more prone to recognize a

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<sup>275</sup> *R.P. And Others V. The United Kingdom*, Application No. 38245/08, 9 October 2012

<sup>276</sup> 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.

<sup>277</sup> Decision On The Admissibility, *Farcas V. Romania*, 14 September 2010

<sup>278</sup> *Shtukurov V. Russia*, Application No. 44009/05, 27 March 2008

<sup>279</sup> *Stanev V. Bulgaria*, Application No. 36760/06, 17 January 2012, Grand Chamber

<sup>280</sup> *Blokhin V. Russia*, Application No. 47152/06, 23 March 2016 Grand Chamber

<sup>281</sup> *Botta V. Italy*, 24 February 1998, no.153/1996/772/9739

<sup>282</sup> *Shtukurov V. Russia*, Application No. 44009/05, 27 March 2008

<sup>283</sup> *Ivinović V. Croatia*, Application No. 13006/13, 18 September 2014

<sup>284</sup> *A.N. V. Lithuania*, Application No. 17280/08), 31 May 2016

substantive violation, or consent in medical treatment (*Glass v. the United Kingdom*<sup>285</sup>) or even assisted suicide (*Pretty v. United Kingdom*<sup>286</sup>).

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, which concerns 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*<sup>287</sup>, the judges explicitly mentioned *Recommendation 1592* by the Parliamentary Assembly on social inclusion 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 thereafter guide the case law on this matter. Observing once more the continuum between the work of the European Courts of Human rights and the CRPD, a case on discrimination in the field of education (*Cam v. Turkey*<sup>288</sup>) was decided against the State involved, Turkey, also for not having provided reasonable accommodation to facilitate access by persons with disabilities to education (specifically at the Turkish National Music Academy). This reasonable accommodation was considered, in this case, vital for the exercise of human rights.

In general, we can observe that the jurisprudence of the European Court of Human Rights, in spite of not being particularly audacious, is being contaminated by the CRPD and, as such, is slowly and increasingly implementing a social/human rights model of disability<sup>289</sup>.

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<sup>285</sup> *Glass V. The United Kingdom*, Application No. 61827/00, 9 March 2004,

<sup>286</sup> *Pretty V. The United Kingdom*, Application No. 2346/02, 29 April 2002

<sup>287</sup> *Glor V. Switzerland*, Application No. 13444/04, 30 April 2009

<sup>288</sup> *Çam V. Turkey*, Application No. 51500/08, 23 February 2016

<sup>289</sup> *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

### 3.3.3. *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 disability are to be considered as subjects and equal citizens, who must be granted primary rights such as «independence, social integration and participation in the life of the community<sup>290</sup>». Throughout the years Article 15, composed of three different parts corresponding to three distinct areas of intervention, has been interpreted as a provision that must be applied to all persons with disabilities, irrespective of age, nature and origin of their disability<sup>291</sup>. The principle of non-discrimination represents the core of the norms provided for by Article 15<sup>292</sup>.

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». Education for children and people with disabilities in general is seen as a key factor in order to grant citizenship rights and guarantee the enjoyment of fundamental rights more broadly<sup>293</sup>. Indeed, the right to education is elaborated as a way to promote independence, integration and participation of persons with disabilities. It was stated by the Committee that States do not have a wide margin of appreciation in choosing how to enact provisions on education: mainstream schools are the sole way to enforce Article 15<sup>294</sup>.

The Committee also noted 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 on the one hand, but also the obligation for the school to accept the disabled student, taking into account his/her/their best interest and

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<sup>290</sup> 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.

<sup>291</sup> Committee “Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 NOVEMBER 2003, §48.

<sup>292</sup> Conclusions 2003, Statement of Interpretation on article 15

<sup>293</sup> “Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, §48.

<sup>294</sup> European Action of the Disabled (AEH) v. France, complaint No. 81/2012, Decision on the merits of 11 September 2012, § 78.

evaluating his/her/their peculiar abilities and educational needs<sup>295</sup>. 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<sup>296</sup>.

This provision must be applied in conjunction with the general principle of nondiscrimination, meaning that legislation from the Member States should require a compelling justification for special or segregated educational systems and give effective remedy for those being excluded by mainstream education unlawfully<sup>297</sup>. Of course, in consideration of the fact that the provision under Article 15.1 is exceptionally complex and also 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 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 to be consistent with this article, policies must be effective<sup>298</sup>. 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<sup>299</sup>.

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 a State to adopt a comprehensive non-discrimination legislation covering public and private spheres and to provide effective remedies for those who are unlawfully denied access<sup>300</sup>.

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<sup>295</sup> MDAC v. Belgium, Complaint No. 1009/2014 Decision on the merits of 16 October 2014, § 66.

<sup>296</sup> Conclusions XX-1 (2012), Austria

<sup>297</sup> Conclusions 2007, Statement of Interpretation on Article 15 § 1-

<sup>298</sup> Conclusion XIV2 (1998), Belgium

<sup>299</sup> Conclusion XVII-2 (2005), Czech Republic

<sup>300</sup> Conclusion 2012, Estonia

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Moreover, Article 15 requires the State to enact positive action to achieve social integration and full participation. It is particularly important to underline that the Committee stated that disabled people themselves should be consulted when it comes to implementing and reviewing such policy and in the design thereof<sup>301</sup>.

From this brief analysis of Article 15, it can be argued that the Committee 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.

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<sup>301</sup> Conclusion 2008, Statement of interpretation on Article 15§3.

CHAPTER II  
THE FIELD WHERE SEXUALITY, DISABILITY AND LAW MEET:  
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In this chapter, attention will be focused on investigating the underdevelopment of the topic of sexuality in disability law. From the previous chapter it emerges clearly that, slowly, the law is adopting a new view of disability and new instruments based on the social model, in order to overcome social barriers and discrimination experienced by people with disability.

However, we have noticed that the issues addressed by critical disability studies are still far from being addressed in the law. In this chapter, we will observe how sexuality itself is a very peculiar field in law, which has never been comprehensively investigated, and where many tensions and social conflicts remain deeply unsolved.

Nonetheless, it is possible to intercept a growing interest for sexuality, both on the international and domestic level, where gradually it is emerging as a fundamental rights/human rights issue. The discourse around sexuality and disability, however, is still absent or marginal within international and domestic law trends.

We will move on from this observation to try to understand which statute sexuality-related rights we have nowadays in the Italian constitutional system and try to understand which possible framework could be provided 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 XIX Century, and is now a central field in western society<sup>302</sup>, globally investigated and with increasing significance. It is a key a concept through which we understand ourselves both as individuals and as members of communities<sup>303</sup>. If sexuality was initially understood as an instinctive drive, linked to genes, it is now clear that sexuality is socially malleable, shaped by a multitude of interventions, prohibitions, and definitions. This interaction

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<sup>302</sup> E. Kosofsky Sedgwick, *Epistemology of the closet*, Berkeley, 1990

<sup>303</sup> L. J. Moran, *Introduction*, in Moran L. J. (eds.), *Sexuality and Identity*, London, New York, 2017, p. XII

creates meanings, subjectivities and sexual categories arranged in hierarchies<sup>304</sup>. All these categories have recently come 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. *Sexuality and law in a historical perspective: tensions and contrasts*

For a long time, the law played a huge role in the perpetuation of sexuality as something fixed, natural and pre-given, providing discipline and restraint. This was at the beginning highlighted by Foucault, on the matter of criminal provisions around homosexuality, while discussing sexuality as a category of identity<sup>305</sup>.

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 values such as public morality, public order and decency.

This was fulfilled by means of criminal law. Sexual offences, for example, were conceived as a matter of public morality until 1996<sup>306</sup>.

It is not by chance that the earliest struggle in the field of sexuality was the demand for the decriminalization of consensual sexual conducts, for example sodomy or buggery<sup>307</sup>.

These social battles came alongside sexuality studies, which started to address the social construction of sexuality, showing how society was shaping sexuality with importance and significance<sup>308</sup>. The so-called “sexual revolution”, which happened in

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<sup>304</sup> K. Plummer, *Intimate Citizenship: Private Decisions and Public Dialogues*, Montreal, 2003

<sup>305</sup> He argued specifically how the criminal provisions around “buggery” or “sodomy” were to be read as marks on the person performing the action, capable of revealing the “truth” on that person. See: M. Foucault, *History of Sexuality. The will to knowledge*, Vol. 1, New York, 1978

<sup>306</sup> See the comment on the famous criminal law book from 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 crime against the person for the first time.

<sup>307</sup> J. Lauristen, D. Thirsted, *The early homosexual rights movement (1864–1935)*, New York, 1974; L. J Moran., *The homosexuality of Law*, London, New York, 1996

<sup>308</sup> Gagnon J. H., Simon W., *Sexual Conduct: The Social Sources of Human Sexuality*, London, 1973; M. Foucault, *History of Sexuality. The will to knowledge*, Vol. 1, New York, 1978;

K. Plummer K., *Telling Sexual Stories: Power, Intimacy and Social Worlds*, London, 1995

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Europe and the USA during the 1960s and 1970s was, in fact, broadly evoking the notions of liberation from biological science and view of sexuality as a natural phenomenon<sup>309</sup>.

Traditionally oppressed categories of people, such as women, with the feminist movement<sup>310</sup>, and transgender, lesbian and gay people<sup>311</sup>, turned this into their claim for freedom and deregulation in the field of sexuality.

This revolution, which is still unfinished, has accelerated in the past two decades. According to scholars, these struggles have as their main goal the “transformation of intimacy<sup>312</sup>”, which is progressively resulting in the 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<sup>313</sup>.

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

We can affirm that the law is a sort of epicentre of all the tensions in the relationships between sexuality, identity and society<sup>314</sup>. This tension is reflected in the fact that the law has both lagged behind contemporary sexuality and challenged some traditional social views of it. This tension is also in the background of the investigation and debate on the role law should play in the process of sexual liberation.

The fact that the first social movements were denouncing a sort of hyper-juridification<sup>315</sup> in the field of sexuality is emblematic. 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

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<sup>309</sup> L. Gelsthorpe, *Introduction: Reflections on Sexuality Repositioned*, in Gelsthorpe L., Brooks-Gordon B., Bainham A. (eds), *Sexuality repositioned: Diversity and the Law*, Oxford, 2004

<sup>310</sup> S. Firestone S, *The dialectic of sex: The case for Feminist Revolution*, New York, 1971; K. Millett, *Sexual Politics*, New York, 1970

<sup>311</sup> D. Altman, *Homosexual: oppression and liberation*, New York, 197; J. N. Katz, *Gay American History*, New York, 1976

<sup>312</sup> A. Giddens, *The transformation of Intimacy. Sexuality, Love & Eroticism in Modern Societies*, Stanford, 1992

<sup>313</sup> L. Gelsthorpe, *Introduction: Reflections on Sexuality Repositioned*, in Gelsthorpe L., Brooks-Gordon B., Bainham A. (eds), *Sexuality repositioned: Diversity and the Law*, Oxford, 2004

<sup>314</sup> L. Gelsthorpe, *Introduction: Reflections on Sexuality Repositioned*, in Gelsthorpe L., Brooks-Gordon B., Bainham A. (eds), *Sexuality repositioned: Diversity and the Law*, Oxford, 2004

<sup>315</sup> Translation of the term “ultragiuridismo” used by Amato, see: G. Amato, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, Milano, 1985, p. 21

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social movements were, as a matter of fact, 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<sup>316</sup>.

It appears from here on that it is not possible to trace down a synallagmatic relationship between the claim for sexual freedom and the anti-juridification approach<sup>317</sup>.

As we will further explain in Paragraph 3, once the non-intervention of the State in spheres defined as “private” was obtained, it was revealed that where regulation is missing the situation is a *de facto* repression<sup>318</sup>.

In fact, we will suggest that, if a first step is that of removing all the regulations disciplining a certain field in a repressive way, a second step, consisting in the enactment of promotional measures, is often needed to secure the right to self-determination and equality. This discourse is strictly connected with the role of the dichotomy between private and public in the regulation of sexuality issues: this point will be developed in Paragraph 3. The main point of it is that, as Bobbio explains: «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<sup>319</sup>».

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<sup>316</sup> 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 ‘70s, 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;

<sup>317</sup> Amato states that: «ogni rivendicazione sembra incapace di sfigurerei 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 ott, 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*, Milano, 1985, p. 21

<sup>318</sup> G. Amato, *Sessualità e corporeità. I limiti dell’identificazione giuridica*, Milano, 1985, p. 21 , 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.

<sup>319</sup> 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*

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We can say that, currently, the initial demand for freedom and self-determination in the field of sexuality is being transformed into a request of protection and recognition in the eye of the law<sup>320</sup>. These instances in the field of sexuality are quite varied and touch a high number of issues which cannot be considered homogeneously and for this reason call to action 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<sup>321</sup>. These profiles, as we will see, are the ones emerging as fields of protection both by international and Italian domestic law.

### 1.2. *A glance at sexuality in International law with particular focus on the case-law of the ECHR*

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 as a relevant field and looking at the United Nations, 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. Other global or regional human rights treaties are also silent on the point.

Nevertheless, many human rights are applicable and are applied to the sphere of sexuality<sup>322</sup>: it is the case of the right to equality and non-discrimination, freedom of

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*dibattito*, in *Fenomenologia e società*, 5, 1982, pp. 171; N. Bobbio, *Pubblico, privato*, in *Enciclopedia*, Torino, 1980, vol XI, p. 401

<sup>320</sup> G. Amato, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, Milano, 1985, p 170

<sup>321</sup> For a work on this aspect in the sexuality rights umbrella, with a specific focus on the French legal system see: D. Borrillo, *Le droit des sexualités*, Paris, 2009

<sup>322</sup> 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, 2002; On this point see also the guidelines on sexuality rights and international law from IPPF, International Planned Parenthood Federation: *Sexual Rights an IPPF Declaration*, London, 2008. This document contains 6 guiding principle and also a charter of sexual rights. It is available online at the following link: [https://www.ippf.org/sites/default/files/sexualrightsippfdeclaration\\_1.pdf](https://www.ippf.org/sites/default/files/sexualrightsippfdeclaration_1.pdf)

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

The European Court of Human Rights based its decisions on human rights in the sexual area on the above-mentioned provision<sup>323</sup>. In general, this case law from the Court encompasses 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). In fact, Article 8 of the ECHR has been interpreted as a complex and comprehensive personality right, and sexuality and sexual life have always been the core of it. Article 8 became a key to affirming 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 one's 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.<sup>324</sup> The case law of the European Court of human rights on sexuality-related rights can be divided into different areas:

#### I. Non-discrimination on the basis of sexual orientation

One of the most important cases is that related to the criminalization of homosexual conduct. The Court overruled the previous decision with the *Dudgeon v. UK* case<sup>325</sup>, challenging the legislation of Northern Ireland which punished homosexual conduct.

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<sup>323</sup> On the case law of the ECtHR on sexuality see the following works from legal scholars: D. A. Gonzalez Salberg, *Sexuality and Transsexuality Under the European Convention on Human Rights A Queer Reading of Human Rights*, London, 2019; Law 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*, in *Journal of Homosexuality*, 48, 3-4, 2005, pp. 9-29

<sup>324</sup> See: P. Tahmindjis, *Sexuality and Human Rights in Europe*, in *Journal of Homosexuality*, in *Journal of Homosexuality*, 48, 3-4, 2005, pp. 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.»

<sup>325</sup> 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*

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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 and 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<sup>326</sup>». 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<sup>327</sup>, 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 the case *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 for having been prevented from having sexual relationships from the age of 14 to 18, with older adult men<sup>328</sup>.

Similarly, in *A.D.T. v. United Kingdom*<sup>329</sup> 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 as a relevant element. Sexual activity, involving a group of consenting adults, is to be covered by Art. 8.

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*Comparative Analysis of Dudgeon v. United Kingdom and Bowers v. Hardwick*, in *Arizona Journal of International & Comparative Law*, 1988, p. 200.

<sup>326</sup> Case Of Dudgeon V. The United Kingdom ,Application no. 7525/76, 22 October 1981

<sup>327</sup> *Sutherland v. UK*, Application n. 25185/94), 01.07.1997. On this decision see comments from: P. Tahmindjis, *Sexuality and Human Rights in Europe*, in *Journal of Homosexuality*, in *Journal of Homosexuality*, 48, 3-4, 2005, pp. 9 and H. Gaupner, *Sexuality and Human Rights in Europe*, in *Journal of Homosexuality*, 48, 3-4, 2005, p. 120

<sup>328</sup> *S. L. vs Austria*, Application n. 45330/99 , 9 January 2003 *S.L. vs. Austria*

<sup>329</sup> *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, which contained ‘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’.

In 1999 the Court stated against the ban for homosexual and bisexual people to serve in the military, by means of the case law *Lustig-Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom*<sup>330</sup>. 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 and sex<sup>331</sup>.

## 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 v. Austria*<sup>332</sup>), to the recognition for states of the obligation of introducing a form of legal recognition for same-sex unions (*Oliari and others v. Italy*<sup>333</sup>). The European Court of Human Rights is now working on access

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<sup>330</sup> *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

<sup>331</sup> *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 base of sexual orientation is involved, the margin of appreciation for States is narrow: difference in treatment can only be justified if they are necessary (reasonableness is not enough) to fulfill a legitimate aim, as stated in *Karner vs. Austria*, Application n. 40016/98, 24 July 2003

<sup>332</sup> 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 enjoy a 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 from 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 the 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"'

<sup>333</sup> *Case Of Oliari And Others V. Italy*, Applications nos. 18766/11 and 36030/11, 21 July 2015. For comments: 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. A Commentary on Oliari v Italy (August 21, 2015)*, in *Articolo29*, 2015;

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to reproductive technologies<sup>334</sup>, second parent adoption<sup>335</sup> and recognition of non-biological parents on birth certificates<sup>336</sup> (we should remember that in these areas a margin of appreciation is still left to the States).

III. Gender identity issues

In the area of sexuality as a recognition of identity, the jurisprudence on transgender issues is particularly interesting: the leading case on this matter is *Christine Goodwin v. UK*<sup>337</sup>. 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 granted the modification of their birth certificate and the possibility to 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<sup>338</sup> 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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<sup>334</sup> For example, on Medically-assisted procreation for lesbian couples. See: *Charron and Merle-Montet v. France* 16 January 2018 (decision on the admissibility) The applicants, a female married couple, complained that their request for medically assisted reproduction had been rejected claiming 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 rejecting 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 importance of the subsidiarity principle, the Court found that the applicants had failed to exhaust domestic remedies.

<sup>335</sup> *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 with the child (second-parent adoption). The applicants submitted that there was no reasonable and objective justification for allowing adoption of one partner's child by the other partner if 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.

<sup>336</sup> Pending applications *R.F. and Others v. Germany* (no. 46808/16); *S.W. and Others v. Austria* (no. 1928/19)

<sup>337</sup> *Goodwin v. United Kingdom*, Application no. 28957/95, 11 July 2002

<sup>338</sup> *Case A.P. Garçon And Nicot v. France*, Application No. 79885/12 And 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<sup>339</sup>, 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 to be mentioned is *Jimenez Alonso & Jimenez 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<sup>340</sup>.

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<sup>341</sup> sexual practice was then discussed by the Court in 2005 in *K.A. and A.D v. Belgium*<sup>342</sup>. Here the Court found no specific violation of Art. 8 by the Belgian court; however, what is interesting is that the judges acknowledged that BDSM sexual activity 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 doesn't imply permanent damages IV) there is no specific national legislation prohibiting it<sup>343</sup>. In a very recent decision, *Carvalho pinto de sousa morais v. Portugal*,

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<sup>339</sup> 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

<sup>340</sup> *Jimenez Alonso & Jimenez Merino vs. Spain*, Application n. 51188/9, 25 March 2000

<sup>341</sup> 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.

<sup>342</sup> *K.A. and A.D v. Belgium*, Application nos. 42758/98 and 45558/99, 17 February 2005

<sup>343</sup> What is particularly interesting of 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 against article 8 because the plaintiff did not respect the safe word mechanism.

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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.

It is interesting to see how the Court openly detaches 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 in a deeper way, digging through stereotypes and misconceptions, the value of sexuality for self-determination and self-fulfilment, opening up to the investigation of the cultural and social elements hidden in the construction of sexuality in the legal arena.

In general, we can see how sexual rights are a matter of growing interest for the European Court of human rights. They are framed as rights of dignity, self-determination and identity and also in the form of freedom to express one's sexuality, it should be also considered however that all case law are not detached from a trend in public attitudes<sup>344</sup>.

### 1.3. *A glance at sexuality in the Italian legal system*

The same growing interest that can be found in international law can be observed in Italian legislation and case law. Here too, however, the development is strictly connected to the evolution of social sensitivity towards specific issues. A specific focus on the constitutional framework of sexuality will be discussed in Paragraph 4.1 and this will allow us to argue for promotional measures in the field of sexuality and

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<sup>344</sup> 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 the book: A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford, 2012

disability, while in the present paragraph a brief overview on collateral legislation and case law will be sketched out. Although Italy never had criminal laws punishing acts of sodomy, this doesn't mean that law has always had a positive attitude towards various aspects of human sexuality.

A different and more inclusive approach, as already mentioned, was affirmed during the social and feminist revolution which started in 1968. One of the first reforms was that regarding divorce: with Law no. 898/1970<sup>345</sup> the possibility of dissolution of marriage was first introduced, then in 1978 the law on the interruption of pregnancy<sup>346</sup> was approved. The latter, inspired by the decision of the Constitutional Court no. 27/1975<sup>347</sup>, in spite of not being explicitly grounded in the idea of bodily autonomy and self-determination of women<sup>348</sup>, represented a step towards taking sexuality out of the narrow spaces traced by family and procreation<sup>349</sup>. The decision was a starting point also for a public and political discussion capable of putting self-determination and individual choices at the centre of the discourse around sexuality.

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<sup>345</sup> On the law on divorce see some comments from scholars at the time of the approval of the law: V. Baratta Vincenzo, *In tema di divorzio: considerazioni sulla impostazione di una legge sul divorzio*, in *Diritto e giurisprudenza*, 1971, 5, pp. 633-646; L. Barca, *Il nuovo divorzio e l'unità dei "laici"*, in *Rinascita*, 1971, 49, pp. 1972; Tamassia Franco, *Secolarizzazione e diritto di famiglia*, in *Iustitia*, 1972, 1, pp. 20-37

<sup>346</sup> For a comment 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 profiles of this law are the ones concerning 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, p. 11-23

<sup>347</sup> Here the Constitutional Court declared article 546 of the Criminal Code unconstitutional for the part where it did not configure the possibility of interruption of pregnancy when it implies a serious and medically assessed damage or a danger for the health of the mother. For comments 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 Alberto, *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 *Il diritto di famiglia e delle persone*, 1975, 2, 1, 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 *Il diritto di famiglia e delle persone*, 1975, 2, 2, pp. 594-616; D. Ugo, *Prospettive sull'aborto. nota a C. Cost. 18 febbraio 1975, n. 27*, in *La giustizia penale*, 1975, 7, 1, pp. 203-209; E. Fortuna Ennio, *L'aborto dopo la sentenza della Corte Costituzionale*, in *Giurisprudenza di merito parte IV*, 1975, 3, 4, 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*, 1975, 3, 2, pp. 183-190

<sup>348</sup> T. Pitch, *Per un buon uso di diritto e diritti*, in *Studi sulla questione criminale*, V, 2, 2010, pp. 2738

<sup>349</sup> M. Ferrara Marcella, *Dalla rabbia all'impegno politico: com'è cresciuto il Movimento femminile attorno alla battaglia per l'aborto*, in *Rinascita*, 1976, 15, pp. 4-5

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This trend was somehow anticipated by Law 29 July 1975 no. 405 which creates in every region family counselling centres (*Consultori familiari*)<sup>350</sup> with the aim of reinforcing responsible parenthood and procreation and supporting the health of women (Article 1). Accessible for free to everyone and spread uniformly throughout the territory, these structures were a very important step to foster independence and self-determination of women in the field of sexuality and procreation, despite original and occurred important limits<sup>351</sup>. At the same time, in 1996, as already mentioned, criminal law on sexual offences changed<sup>352</sup>, underlining a different understanding and value of sexuality in the Italian juridical and legislative 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 view is now also expressed by a constant jurisprudence. 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<sup>353</sup> and no. 13547/2009<sup>354</sup>. The former involved a man who, due to a car accident, suffered from erectile dysfunction and a consequent anxious-depressive syndrome.

The latter concerned damage deriving from medical error after a hysterectomy. In both cases, the Court clearly stated that the damage accorded must be calculated by

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<sup>350</sup> The so called “*Consultori familiari*”. See: R. E. Marcoz, *Sessualità e consultori familiari*, Roma, 1980; E. Protetti, M. T. Protetti, *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

<sup>351</sup> We are referring to limits related to a mixture of different factors, some of these were already present when the Law was written while others emerged during the years. First of all we need to consider that these kind of structures, organized on a regional level, present important differences from regions to regions. Another important limit pertains the very scarce economical resources that these kinds of structures have. The work of *Consultori famigliari* cannot often be carried on 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 this link: <https://www.ingenere.it/articoli/consultori-30-anni-disuguaglianze>

<sup>352</sup> For an analysis of the social campaign before this reform was enacted and its impact in 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

<sup>353</sup> Cass. civ. Sez. III, 02 febbraio 2007, n. 2311. Comment in: A. Negro, *la compromissione della sessualità: danno biologico e danno esistenziale (nota a sentenza)*, in *Nuova Giurisprudenza Civile*, 2007, 11, p. 11195

<sup>354</sup> Cass. civ. Sez. III, 11 giugno 2009, n. 13547. For a comment: L. Viola, *Sex&Law: anche la lesione del diritto alla sessualità va risarcita (nota a sentenza)*, in *Diritti della personalità, Responsabilit civile*, 2009, p. 11

considering both the biological damage and an existential damage<sup>355</sup>, meaning that adequate compensation must be given for the psychological impact that a loss or partial loss of sexuality might have on a person's life.

Sexuality was confirmed as a founding part of individual identity also by Law no. 164/1982. This law stipulates the recognition of transgender people in front of Italian law. It considered the right to legal gender recognition of a transgender person as part of a broader notion of the right to health (Art. 32), but more importantly it embraced a complex idea of sexuality and gender, as an interaction of many factors, of which the one related to identity is to be considered prevailing<sup>356</sup>. 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<sup>357</sup>. This approach became the prevalent one after Decision 221/2015 of the Constitutional Court<sup>358</sup>, with a decision that inscribed legal gender recognition primarily in Article 2, as a matter of self-development and self-determination.

In 2016, with Law no. 76, civil unions were introduced as a form of recognition of same-sex unions<sup>359</sup>. In this way, the Italian legal system finds its 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 adoption<sup>360</sup> and recognition of parents on birth certificates are being discussed<sup>361</sup>.

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<sup>355</sup> Here 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».

<sup>356</sup> See decision from the Constitutional Court n. 161/1985. For comments and explanation of the relevance of this decision see paragraph 4

<sup>357</sup> See the reconstruction of this jurisdictional panorama in A. Lorenzetti, *Diritti in transito. La condizione giuridica delle persone transgenere*, Milano, 2014

<sup>358</sup> See in paragraph 4 for further discussion and comments on this decision

<sup>359</sup> 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

<sup>360</sup> On this matter the Court of Cassazione stated clearly in favour of second parent adoption affirming that law 184/1983, article 44, paragraph 1, letter d) can be used to the 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

<sup>361</sup> See the recent decision from the Corte di Cassazione that stated against the possibility of transcribing the birth certificate of a baby born in another country through surrogacy and having to fathers, because of limits deriving from the domestic international public order. The Court affirmed that, in that case the

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Another element that should be considered is that, when discussing cases involving BDSM, the Court of Cassation rejected the notion of public order, giving value to the consent of involved parties. It was with these arguments that the Court stated that these sexual practices do not find a legal limit in Article 5 of the Civil Code<sup>362</sup>.

As a whole, we can affirm that there is a growing attention of the law towards sexuality-related issues, with a slow transition towards the enactment of positive measures in this field.

### 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 unsolved 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, as we will argue in the next paragraph. The reason for this can be found in the fact that the field of sexuality and disability is characterized by the presence of extremely well-rooted prejudices and social barriers, that have only recently been addressed by disabled scholars.

#### 2.1. *Sexuality and people with disability: prevailing stereotypes and misconceptions*

Indeed, the socially constructed nature of sexuality mentioned above is particularly evident when it intersects with the experience of disability. In fact, here this construction meets a field already permeated by stereotypes and misconceptions (on disability) and this generates a peculiar discourse of discrimination, highly influenced by the abnormal perception of disability in society.

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couple can use the institute of second parent adoption. See: Corte cass., sez. unite, n. 12193, 6 novembre 2018 (the decision went public on May 2019)

<sup>362</sup> See for example the case: Corte di cassazione, n. 44986, 26 ottobre 2016. For a comment: 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 profile related to 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;

The construction of disabled people's sexuality is surrounded by many stereotypes and misconceptions, it is a social taboo, a discourse which is widely absent and unexplored both outside and inside the disability movement. Usually the sexuality of people with disability is primarily dominated by denial, censorship and stigma<sup>363</sup>: this implies a process of desexualisation of these subjects.

We need to be aware that, if sexuality is a social construct, so must be barriers that inhibit the sexual life of people with disabilities: these obstacles are not inherently related to bodies but to the social perception of these bodies<sup>364</sup>. 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<sup>365</sup>". Some scholars argued that the absence or little presence of sexuality in disability literature and politics, shows how disabled people themselves mirror negative societal attitudes in this field<sup>366</sup>.

Some of these prevalent attitudes and stereotypes show disabled people alternatively as completely asexual people or sexually deviant people. 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

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<sup>363</sup> A. G. Arfini , *"Corpi che non contano? Processi di desessualizzazione dei disabili e narrazioni personali"*, in Inghilleri M., Ruspini E. (eds.), *Sessualità narrate. Esperienze di intimità a confronto*, Milano, 2011, pp. 101-122

<sup>364</sup>A. G. Arfini , *"Corpi che non contano? Processi di desessualizzazione dei disabili e narrazioni personali"*, in Inghilleri M., Ruspini E. (eds.), *Sessualità narrate. Esperienze di intimità a confronto*, Milano, 2011, pp. 111

<sup>365</sup> A. Finger, *Forbidden fruit*, in *New Internationalist*, 233, 1992, p. 9

<sup>366</sup> T. Shakespeare , Davies D., Gillespie-Sells K., *Sexual Politics of Disability: Untold Desires*, London, 1996;

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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<sup>367</sup>.

These stereotypes and prejudices play a key role in perpetuating the situation of marginalization of disabled people<sup>368</sup>. Sexual agency, the capability and desire to engage in sexual activity and express sexuality is considered, in western societies, an element of adulthood. This is denied to disabled people, who are infantilized and undermined in their sexual potential<sup>369</sup>.

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.

It is clear that, in the field of sexuality, the predominant medical view of disability as a personal tragedy is still widely pervasive, playing a key role in the denial of disabled people's sexuality. According to such model, indeed: sexuality is either not a problem, because it is not an issue, or it is an issue, because it is seen as a problem.

Some scholars have argued that disabled people involuntarily take part in a process of desexualisation, ending up in the denial of sexual subjectivity.

Sexual subjectivity is composed of two main elements which are both missing in the social construction of disability<sup>370</sup>. On the one hand, as mentioned above, disabled people are not seen as capable of engaging in sexual activity; on the other hand, they are also denied gender. The erasure of disabled people's gender identity plays a crucial role in the process of desexualisation.

The way it works is evident when we look at the symbol of the person on a wheelchair which is shown on the door of accessible toilets<sup>371</sup>. From the fact that there are toilets for men, toilets for women and toilets for the disabled we should deduce that disability

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<sup>367</sup> J. Morris, *Pride against Prejudice. Transforming the attitudes to disability*, London, 1991, p. 20

<sup>368</sup> Shakespeare argues that they play a critical role in disabling social relations, see: T. Shakespeare, *Disability Rights and Wrongs Revisited*, cit., p. 209

<sup>369</sup> T. Shakespeare, Davies D., Gillespie-Sells K., *Sexual Politics of Disability: Untold Desires*, London, 1996, p. 14

<sup>370</sup> A. G. Arfini, *Corpi alterabili. 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

<sup>371</sup> «The practice of using unisex accessible toilets exposes the fact that able-bodiedness overdetermines the assignment of gender. In the game of signifying practices, the difference between ability and disability trumps the difference between Ladies and Gentlemen every time» T. Siebers, *Disability theory*, Michigan, 2008, p. 168

is a sort of third gender<sup>372</sup>: people with disability are allowed to transcend masculinity and femininity because their bodies are not seen as sexual by society.

From a philosophical point of view, Shildricks<sup>373</sup> 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 of sexuality and disability cannot but be perceived as a threat. If, taken separately, both disability and sexuality challenge the notion of independent and rational subject, together, according to Shildrick, they push for the disintegration of it<sup>374</sup>.

The condition of fragility and vulnerability of the body is usually successfully managed by abled-body people during sexual encounters, but this is not always possible or it is harder 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.), which is why the disabled person is considered inadequate for sexuality.

From this point of view, the fact that people with physical impairments may need to use prostheses or implements of support during intimacy is seen as an obstacle to fulfil a normative sexual life. The way people with disability are capable of expressing their sexuality, in this way, risks always being perceived as abnormal.

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<sup>372</sup> Arfini also notice that sometimes the disabled toilet comes jointed with the toilet for women. This one can give us the evidence of the process of desexualization of disabled people. Men with disability are the ones who can cross a space which is usually dominated by a strong gender segregation norm, just like children. See: A. G. Arfini, *Corpi alterabili. 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

<sup>373</sup> M. Shildricks, *Dangerous Discourses of Disability, Subjectivity and Sexuality*, New York, 2009

<sup>374</sup> M. Shildricks, *Dangerous Discourses of Disability, Subjectivity and Sexuality*, New York, 2009

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In general, the fact that two naked bodies are not enough for sexual intercourse is not seen favourably, and on the contrary, it has usually been interpreted as a form of sexual deviancy<sup>375</sup>.

Apart from this speculative dimension, it must be noticed that design of functional support for people with disability is being developed now. However, these highly functional pieces still have an aesthetic which recall the medical/hospital field, which can inhibit intimacy<sup>376</sup>. In spite of the fact that some scholars pointed to a radical exclusion of disabled people from the realm of intimacy due to this normative construction of sexuality<sup>377</sup>, Shakespeare argues that there is widespread evidence that disabled people are having sex in great numbers<sup>378</sup>. On this matter, he cites studies showing that people with disabilities are sexually active in similar ways to people without disabilities<sup>379</sup>. All these considerations have been recently taken into account by some scholars from the disability movement who decided to address sexuality as a social issue. Their goal is to let sexuality step outside of the private/individual dimension perpetuated by the medical approach or by the single person living their experience of sexuality in isolation<sup>380</sup>.

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<sup>375</sup> G. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality* (1984), in P. M. Nardi, Schneider B. E. (eds.), *Social perspectives in Lesbian and Gay Studies: a reader*, London, 1998, pp. 100-134

<sup>376</sup> T. Shakespeare, Davies D., Gillespie-Sells K., *Sexual Politics of Disability: Untold Desires*, London, 1996

<sup>377</sup> 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

<sup>378</sup> «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 Revisited*, cit., p. 210

<sup>379</sup> E. Brunberg, 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. 139–153

<sup>380</sup> T. Shakespeare, Davies D., Gillespie-Sells K., *Sexual Politics of Disability: Untold Desires*, London, 1996; A. G. Arfini, "Corpi che non contano? Processi di desessualizzazione dei disabili e narrazioni personali", in Inghilleri M., Ruspini E. (eds.), *Sessualità narrate. Esperienze di intimità a confronto*, Milano, 2011, p. 108

## 2.2. *Claiming sexual citizenship and sexual accessibility for people with disabilities*

To tackle these widespread barriers in the sexuality arena, one of the theoretical instruments chosen by disability scholars is sexual citizenship<sup>381</sup>.

Elaborated in the field of LGBT<sup>382</sup> issues, this notion can be an effective solution to address sexuality in the spheres of desire and rights, intimacy and legal recognition, sexual body and legislative corpus<sup>383</sup>.

The notion of sexual citizenship challenges all the normative assumptions on sexuality we have mentioned, 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.<sup>384</sup> ».

Another important theoretical instrument is to be found in the notion of sexual accessibility: the latter 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<sup>385</sup>». This goal can be reached by improving media representation of disabled people's sexuality but can also depend on the «access to cultural, social and psychological supports aimed at synergistically improving the possibilities for sexual expression and negotiating sexual relationship for disabled people.<sup>386</sup> »

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<sup>381</sup> 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*, Montreal, 2003; K. Plummer, *Telling Sexual Stories: Power, Intimacy and Social Worlds*, London, 1995

<sup>382</sup> LGBT is an acronym for Lesbian, Gay, Bisexual and Transgender people

<sup>383</sup> 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

<sup>384</sup> T. Shakespeare, *Disability Rights and Wrongs Revisited*, cit., p. 213

<sup>385</sup> R. P. Shuttleworth, L. Mona, *Disability and Sexuality: Toward a Focus on Sexual Access*, in *Disability Studies Quarterly*, 22, 4, 2002, pp. 2-3;

<sup>386</sup> R. P. Shuttleworth, L. Mona, *Disability and Sexuality: Toward a Focus on Sexual Access*, in *Disability Studies Quarterly*, 22, 4, 2002, pp. 2-3

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If all scholars agree on the importance of tackling negative attitudes towards disabled sexuality working in social perception and public representation, it is still widely discussed 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<sup>387</sup>». One of the main reasons behind this scepticism is based on the idea that sexuality, as a private matter, should not be in any way regulated by law. This argument is strongly connected to the reflection on sexuality we made in Paragraph 1.1 and reconnects to a trend that is now overcoming this approach. We will discuss the issue of the “private” argument later in this chapter, and we will also try to understand a possible framework for promotional measures in the field of sexuality and disability.

To continue our analysis, we need to see first how and if these negative attitudes on disabled people's sexuality are reflected by law, both at the international and national level.

### *2.3. When the law meets disabled people's sexuality: the debate during the elaboration and approval of the CRPD*

Looking at the international level, it might be interesting to analyse the itinerary of sexuality in the UN system, with particular attention to the Convention on the rights of persons with disability. This document, widely analysed in the previous chapter, is the leading international treaty on disability, and is the only international arena where the topic of sexuality was discussed and brought to light.

Back in 1993, when sexuality began to be discussed as a topic within critical disability studies, the *UN Standard Rule* contained some provisions surrounding sexuality.

For example, Rule 9 underlined the need to balance correctly between the urge of protection from sexual abuse, while not impeding the fulfilment of a sexual and affective life for people with disabilities<sup>388</sup>. Moreover, quite interestingly, the Standard

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<sup>387</sup> A. Wilkerson, *Disability, Sex Radicalism, and Political Agency*, in *NWSA Journal*, 14, 3, 2002, p. 35

<sup>388</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Resolution A/RES/48/96, December 20, 1993.

Rule imposed on States the need to enact positive measures to contrast negative attitudes towards the sexuality of disabled people and to grant sexual education supporting a full, free and consensual sexuality against every form of abuse<sup>389</sup>.

We could imagine that these provisions would then be reproduced or maybe further implemented in the CDPR, as a consequence of the growing knowledge, research and evidence on the topic of sexuality.

On the contrary, the CRPD's provisions on sexuality are a step back compared to the Standard Rule, revealing how negative perceptions and stereotypes around sexuality are still pervasive and influence law.

Scholars 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, limiting their possibility of expressing and acting upon desire consensually<sup>390</sup>. Many provisions were initially designed to affirm positive rights in the field of sexuality but were then cut and reformulated during the negotiation process. What is now left, apart from the affirmation of negative rights (*freedom from* rights), are some indirect references to sexuality, mostly on issues such as marriage, right to family and sexual and

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<sup>389</sup> Here 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.»

<sup>390</sup> R. Addlakha, J. Price, S. Heidari, *Disability and sexuality: claiming sexual and reproductive rights*, in *Reproductive Health Matters*, 25:50, 2017, pp. 4-9

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reproductive health. Those are all very important fields of inquiry; however, they do not fully encompass the variegated spectrum of sexuality.

This process, aimed at narrowing the protection of sexuality in international law, is particularly 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 of the discussion, especially by the *Holy See*, but also by the NGO National Rights to Life. The point they made was that using the word “service” would promote the use of genetic testing on unborns, and - in the end - would promote 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 bought up by governmental delegations, such as the ones from Qatar, Iran, Kenya, Jamaica, Yemen, Syria, Pakistan, Sudan, Bahrain, Kuwait, Oman, and the United Arab Emirates. In particular, they contested that the word “service” would imply the creation of new rights, in particular the right to abortion. Many country delegations backed the text, such as Brazil, Canada, Croatia, Ethiopia, Mali, Norway, Uganda, and the European Union (EU)<sup>391</sup>.

At that point, the Chair atypically intervened in order to reaffirm the exclusion of abortion from the phrase “health service” and made countries aware that the latter had already been 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.

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:

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<sup>391</sup> In particular the EU strongly underlined that sexual and reproductive health services did not include abortion, having also received the support of 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>

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« 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 »<sup>392</sup>

As regards Article 23, this was initially drafted using the provision of the Standard Rules as a starting point (see the charter at the end of the paragraph). From the beginning, many countries, such as Libya, Syria, Qatar, Iran and Saudi Arabia, urged the need to link sexuality to marriage. For example, Saudi Arabia was in favor of accepting the term, but only with a marriage caveat<sup>393</sup>. Again, strong opposition came from the Holy See: in particular, the latter stated that the phrase *experience their sexuality* would imply the elaboration of a set of new rights. On this matter, the Society of Catholic Social Scientists and the Pro-Life Family Coalition, in line with the Holy See, affirmed that such a phrase would have let the CRPD go into «uncharted and controversial directions<sup>394</sup>».

The opposition from NGOs and governmental delegations to these kinds of arguments was not steady. In the end, several compromises were proposed and repeatedly failed<sup>395</sup>.

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<sup>392</sup> 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>

<sup>393</sup> Reported on: 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>>

<sup>394</sup> 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 21 right to health and rehabilitation. Available at: <http://www.un.org/esa/socdev/enable/rights/ahc3sum21.htm>

<sup>395</sup> 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 above-mentioned 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 to 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

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After an attempt at mediation made by the Chair, who noticed that this would have been the first time that sexual relationship would take part in an international treaty, the provision was removed during the seventh session due to “numerous cultural concerns about the word sexuality<sup>396</sup>»

The discussion on forced sterilization was included in the one concerning marriage and family life. Some groups managed to create a tension between freedom from forced sterilization and right to sexual expression, which resulted in a strong emphasis on negative rights and no space for promoting the sexual freedom of disabled people. In the end, what happened is that the CRPD incorporated a discursive silence<sup>397</sup> about disabled 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<sup>398</sup>.»

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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.

<sup>396</sup> *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>

<sup>397</sup> 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

<sup>398</sup> 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

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Domain	Draft presented by Committee Chair at the Fifth Session (1)	Convention as adopted (2)
Marriage and family life	That persons with disabilities are not denied the equal opportunity to [experience their sexuality,] (3) have sexual and other intimate relationships [through a legal marriage] and experience parenthood [in accordance with the national laws, customs and traditions in each country].	(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;  (b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided
Awareness-raising	States parties shall take [all] appropriate and effective measures to promote awareness, and provide education and information to the public in accessible formats, aimed at changing negative perceptions and social prejudices towards [sexuality marriage and parenthood] [in all matters of marriage and family relations] for persons with disabilities."	States Parties undertake to adopt immediate, effective and appropriate measures:  (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;  (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life
Freedom from exploitation, violence, and abuse	States parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities both within and outside the home, from [all forms of exploitation, violence and abuse] [all forms of harm, including] [all forms of exploitation, violence and abuse, including abandonment, violence, injury or mental or physical abuse, abduction, harassment, neglect or negligent treatment, maltreatment or exploitation, including economic and sexual exploitation and abuse].	1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.  2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.
Right to health	Provide persons with disabilities with the same range and standard of [affordable/free] health [and rehabilitation services] as provided other persons, [including sexual and reproductive health services] and population-based public health programmes (4)	Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes

(1) This draft was presented at the fifth session, and is a good representation of the initial and bracketed text.

(2) United Nations (2011a).

(3) Brackets delineate text that was supported by some delegates, and disputed by others.

(4) The right to health article was not presented until the sixth session.

This charter was elaborated by M. Schaaf (2013, 130), and shows exactly how the texts of the relevant articles changed during the negotiations.

2.4. *When the law meets disabled people's sexuality: the Italian domestic level*

We can say that the field where disability, sexuality and law meet is not a fertile one. The attention is very scarce both at the legislative and the academic level, and the legal literature on this topic very scarce.

An Italian scholar mentions that this silence should not be interpreted as a view of sexuality as a private matter (see the discussion at Paragraph 3, which will follow), but as a stereotypical and negative idea of disabled people's sexuality<sup>399</sup>.

Although it is hard to find positive provisions on sexuality and disability, looking at a national level we can see how often in many countries, especially in the past years, disabled sexuality has been the object of criminal provisions. This observation can be put inside the same pattern described more broadly in the area of sexuality and law: many of these provisions, in fact, were recently modified, abolished or cancelled. Nonetheless, no enactment of positive measures followed.

In general terms, the criminal law provisions mentioned aimed at protecting the person with disability from sexual violence and abuse, taking into account the state of particular vulnerability this person may find herself in (see further Chapter 3).

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 (*malate di mente*) or in condition of physical or psychological inferiority (*condizioni di inferiorità fisica o psichica*).

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<sup>399</sup> 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 from a person with disability is perceived as something unnatural, pervert 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: Marella, *Art. 8 Legislazione*, in Cendon P. (ed.), *Handicap e diritto, Legge 5 febbraio 1992, n. 104, legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate*, Torino, 1997

This provision which, allegedly, was meant to protect people with disability, turned out to be stigmatizing and repressive<sup>400</sup>. The presumption, constructed as unchallengeable, had the result of discouraging the expression of consensual and aware sexuality on the part of people with disability.

From the point of view of legal discourse, Article 519(2)(3) was affirming that people with disability (especially with mental disability, but arguably people with physical impairments as well) were unable to carry out any act of self-determination in the sexual sphere. In 1996, a law reformed sexual offences in general and abolished this article.

That reform represented the apex of twenty years of feminist struggles in Italy, and together with reforms in the field of family law, represented a new approach of the law 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<sup>401</sup>.

Article 519 was cancelled and replaced with Article 609-bis<sup>402</sup>.

This criminal offence can be defined as *disability-neutral*<sup>403</sup>, meaning that there is no special provision for people with disability, who are treated, in the field of criminal law, on an equal basis as everyone else.

In this way, the previous discrimination enacted by Article 519 of the criminal code and the denial of basic human rights ceased<sup>404</sup>.

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<sup>400</sup> See for example V. Musacchio, *La nuova legge sulla violenza sessuale*, in *Rivista Penale*, 1997, p. 257

Qui lo studioso fa notare come “*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”.*”

<sup>401</sup> 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

<sup>402</sup> Here 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.

<sup>403</sup> 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

<sup>404</sup> F. Eramo, *Handicappati: diritto alla sessualità, diritto al matrimonio e diritto all'adozione*, in *Famiglia e diritto*, 2002, 4, 2002, pp. 435-441

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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<sup>405</sup> regardless of disability.

Disability still remains, residually, as an aggravating circumstance of the above-mentioned criminal offence, implying a punishment longer by 1/3<sup>406</sup>.

3. *The use of private in law regulating and protecting sexuality: why to reject a strict public/private dichotomy*

In the previous paragraphs, it emerged how it is quite common to contrast the private nature of sexuality to any possibility of a regulation in this field.

In this paragraph, we will discuss how this use of the category of private is not a fully satisfactory argument, and, on the contrary it can constitute a subtler form of perpetuating inequalities and oppression. We can observe how this kind of argument, namely belonging to the private as opposed to the public dimension, has been used against other subjects that have historically faced discrimination and oppression: women and LGBT people.

The strong connection between women, LGBT people and disabled people, as we already highlighted in Chapter I when discussing critical disability studies, is the common core of the oppression they face. They all form the recessive part in a relation of power where, historically, the dominant position was occupied by the standard represented by white, heterosexual, cisgender and able-bodied men.

It is for this reason that in this paragraph, *mutatis mutandis*, we will use the argumentation developed by feminist legal scholars (Paragraph 3.1) and case studies from the US jurisprudence on homosexuality (Paragraph 3.2). These reflections can indeed be useful to understand how this argument is developed in our specific field of inquiry (Paragraph 3.3).

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<sup>405</sup> Ricca è la giurisprudenza della Cassazione penale in materia. Esemplicativamente si fa riferimento a 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.

<sup>406</sup> Art. 36 legge 5 febbraio 1992, n.104

3.1. *Private/public dichotomy in sexuality law*

The discourse on the public and private dichotomy surrounding sexuality is strongly connected to that on the tension between regulation and de-regulation we articulated in Paragraph 1. In fact, one of the most commonly brought up arguments is that in regulating this field the law would intrude 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<sup>407</sup>.

Even Sedgwick noticed that, when talking about sexuality, the dominant spatial category is the binary public/private<sup>408</sup>.

This discursive construction was decisive, according to sexuality historians, in early demands for law reform<sup>409</sup>, when the political stance was for the State to be less intrusive in people's sexual life.

Enlightening on this matter is the example of the legal treatment on homosexuality: it is the case of the Wolfenden Committee, a group working on the decriminalization of certain homosexual acts in private<sup>410</sup>, or of the *Lawrence v. Texas* judgment, overruling the infamous *Bowers v. Hardwick*, where the privacy of the home and the committed nature of the relationship<sup>411</sup> are the main arguments against the law criminalizing sodomy (see at 2.2).

The main argument that revolves around this dichotomous view of public/private is that sexuality as a private matter should not be the object of any State regulation or interference which, regardless of the kind of intervention, should always be considered undue.

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<sup>407</sup> S. Amato, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, Catania, 1985 p. 59. Here 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. »

<sup>408</sup> E. Kosofsky Sedgwick, *Epistemology of the closet*, Berkeley, 1990

<sup>409</sup> J. Lauristen, D. Thirsted, *The early homosexual rights movement (1864–1935)*, New York

<sup>410</sup> L. J. Moran LJ, *The Homosexual(its) of Law*, London, 1996

<sup>411</sup> 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

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However, for several reasons, this lens on sexuality, in spite of being partially effective<sup>412</sup>, has proven itself in the end to be a reductive approach to an increasingly complex issue.

This observation can be, once again, linked to the sequence we sketched (Paragraph 1) in the evolution of the relationship between sexuality and law. Although at first the use of the argument of “private” was decisive to gain freedom rights in many spheres, this asset is no longer adequate to grant protection and promotion in the current scenario.

Amato observes that the spread of polymorphic sexualities and the many articulations of possibilities give life to situations that can no longer be read through the public/private scheme<sup>413</sup>.

Faced with these important social changes, public/private seem to be extremely outdated categories<sup>414</sup>: «new subjects, new dimensions of the experience, new behaviours emerge and ask for legitimacy, both with regards to already affirmed spheres/subjects and the public, in this way the public and the private and their relationship is recomposed<sup>415</sup>».

As we have already mentioned, this reasoning is part of the wider transition from the liberal State to the welfare State, as the quotation from Bobbio used in Paragraph 1.1 explains well<sup>416</sup>.

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<sup>412</sup> The reason why I mention the partial effectivity is that if on the hand this strategy was useful to develop argument 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. See:

<sup>413</sup> S. Amato, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, Catania, 1985 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»

<sup>414</sup> S. Amato, *Sessualità e corporeità. I limiti dell'identificazione giuridica*, Catania, 1985, p. 172 talks about “categoric logore”. Moreover, Amato states that this category miss 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.

<sup>415</sup> 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»

<sup>416</sup> 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*, in *Fenomenologia e società*, 5, 1982, pp. 171

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In this discourse 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.<sup>417</sup> ».

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 different 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 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.<sup>418</sup> »

Interestingly, this analysis was connected to the idea according to which, by «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<sup>419</sup>».

In a nutshell, leaving the individual “alone” in her private sphere is simply not enough to secure privacy and affirm self-determination<sup>420</sup>. The so-called private sphere, in fact, is not neutral and resents and perpetuates the power relations present in the public sphere.

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<sup>417</sup> C. Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in Pateman C. (eds.), *The disorder of women: democracy feminism and political theory*, Cambridge, 1989, pp. 118-140

<sup>418</sup> J. Weintraub, *The theory and politics of the Public/Private distinction*, in Kumar K., Weintraub J. (eds.), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, Chicago, 1997, pp. 28-29

<sup>419</sup> T. E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, in *Chicago-Kent Law Review*, 75, 1999, p. 20

<sup>420</sup> A. C. 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»

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The “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<sup>421</sup> .

This is the main reason for which the traditional public/private dichotomy should nowadays be rejected: the State should, in fact, intervene positively in the private sphere whenever power imbalances, discrimination and inequalities take place.

The main point of this argument 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 wants the public sphere to be regulated by the State and the private sphere free from any form of State intervention.

This implies that the privacy of individuals must be granted by law: any intervention in the field of sexuality should be aimed at promoting self-determination, not at normalization.

### 3.2. *US jurisprudence on homosexuality and the use of the private*

As we mentioned above, an interesting case study that shows how the private sphere argument might be used in a problematic way can be found in US case law and regulations on homosexuality. The argument of privacy, at an early stage, allowed homosexual conducts to be decriminalized indeed. On the other hand, however, it established not only a right to express sexual orientation in private, but a specular duty to confine sexual orientation to the domestic arena, while not providing any form of recognition outside the house (so called private) dimension. We can call it a “*compulsory closet*”<sup>422</sup>, where the private sphere turns into a repressive argument, not just a right, but above all a duty.

A similar observation was made by MacKinnon<sup>423</sup> when discussing the right to abortion in the US: she argued that *Roe v. Wade*<sup>424</sup>, despite being a remarkable

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<sup>421</sup> T. E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, in *Chicago-Kent Law Review*, 75, 1999, p.

<sup>422</sup> The reference is at E. Kosofsky Sedgwick, *Epistemology of the closet*, Berkeley, 1990

<sup>423</sup> MacKinnon, *Privacy vs. Equality: Beyond Roe v. Wade*, 1983, pp. 93-102

<sup>424</sup> *Roe v. Wade*, 410 U.S. 113 (1973). This case is very well known and commented by legal scholars worldwide. Here, ex multis, some US legal scholarship on the decision. For articles/comments: R. B.

decision, relegated interruption of pregnancy to a private matter not to be safeguarded by the State, against the interest of - for example - poor women. Indeed, it was by using the argument of the private sphere that in *Harris v. McRae*<sup>425</sup> the Supreme Court affirmed that States were not obliged to grant financial coverage for women seeking abortion (because abortion was a private decision, after all<sup>426</sup>).

### 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 famous case *Bowers v. Hardwick*<sup>427</sup>. The facts behind this case took place in Virginia, where § 16-6-2 of the Code of Georgia punished sodomy<sup>428</sup>. In spite of the fact that the public persecutor

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Ginsburg, (1984). *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*, 1973, 82.5, pp. 920-949; D. H. Regan, *Rewriting Roe v. Wade*, in *Michigan Law Review*, 1979, 77.7, 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. Higgings, *Roe v. Wade: Abortion and a Woman's Right to Privacy*, Minneapolis, 2013

<sup>425</sup> *Harris v. McRae*, 448 US 297(1980). For comments see: M. C. H. Dunlap, *Harris v. McRae*, in *Women's Rights Law Rep.*, 1979, pp. 6, 166; K. Palencia, *Harris v. McRae: Indigent women must bear the consequences of the Hyde Amendment*, in *Loy. U. Chi. Law Journal*, 1980, 12, p. 255; G. C. Nixon, *Harris v. McRae: Cutting Back Abortion Rights*, in *Columbia Human Rights Law Review*, 1980, 12, p. 113; V. M. Brock, *Harris v. McRae: The Court Retreats from Roe v. Wade*, in *Loy. Law Review*, 1980, 26, p. 749.

<sup>426</sup> 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 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 indigency falls within the latter category.»

<sup>427</sup> *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, 487; Rich, T. (1987). Sexual orientation discrimination in the wake of *Bowers v. Hardwick*. *Ga. Law Review.*, 22, , 1987, p. 773; Y. L. Tharpes, *Bowers v. Hardwick and the Legitimization of Homophobia in America*, in *Howard LawJournal*, 1987, 30, p. 829; M. F. Kohler, *History, Homosexuals, and Homophobia: The Judicial Intolerance of Bowers v. Hardwick*, in *Conn. Law Review*, 1986, 19, p. 129; D. J. Langin, Daniel *Bowers v. Hardwick: The Right of Privacy and the Question of Intimate Relations*, in *Iowa Law Review*, 1986, 72, 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*, 1989, 31, p. 375

<sup>428</sup> 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

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Bowers decided to drop the charge, the American Civil Liberty Association (ACLU) convinced Hardwick to pursue strategic litigation to obtain the abrogation of the above-mentioned law and its declaration of unconstitutionality. With a *writ of certiorari*<sup>429</sup>, the Supreme Court took on the case and decided not to repeal the law (5 judges against 4)<sup>430</sup>.

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 having excluded the applicability of any of the previous rulings

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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 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 be 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 comments 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.

<sup>429</sup> The Certiorari is an institute of common law jurisdiction. It is a writ for the reexamination of an action from a lower court issued by a superior court also Certiorari can also be issued by an appellate court, to obtain information on a case pending before it. The use of the certiorari in US, is prerogative of the Supreme Court. Through this writ the Supreme Court review questions of law, correct errors, and ensure 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.

<sup>430</sup> ACLU already knew that there would have been 4 judges in favor of repealing the law and 4 probably against. The judge Powell was the decisive one, but ACLU was quite sure that he would vote in favor 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 the president Burger with an argument built around the similarity between sodomy, rape and pedophilia. See: D. A. J. Richards, *The Sodomy Cases: Bowers V. Hardwick and Lawrence V. Texas*, Kansas, 2009

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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 adopted the slippery slope logic: the judges argued 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 strengthen this argument, the judges referred to the notion of morality, and in particular to the ancient roots of the proscriptions against sodomy, which left no doubt about the ways in which these conducts should be considered by the law. 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 XIV Amendments 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. In this sense, the judges stated that the fact that the majority of people considered sodomy to be against morality was already enough for the law to be considered legitimate.

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3.2.2. *Lawrence v. Texas: protection in the domestic and private dimension*

*Bowers v. Hardwick* was overruled<sup>431</sup> in 2003 by *Lawrence v. Texas*<sup>432</sup>.

In Texas, criminal law punished “Homosexual Conduct”<sup>433</sup> (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 the strong opposition of many religious groups. In 1998, the case of *Lawrence and Garner* reached the Supreme Court, with a certiorari on three main questions: 1) the compatibility of this provision with the Equal Protection Clause; 2) the compatibility 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 in their bedroom having sexual intercourse. Caught *in flagrante delicto*, they were charged for Homosexual Conduct and arrested, in spite of the fact that the punishment for this offence was by law a financial penalty. The judges decided to overrule *Bowers v. Hardwick* (with 6 votes in

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<sup>431</sup> 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 the Amendment 2 to Colorado Constitution, aimed at prohibiting any anti-discrimination measure on the base of sexual orientation (for the protection of homosexual and bisexual people). With a majority of 6 judges against 3 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 Rights Journal*, 1997, 6, p. 89; M. Coles, *The Meaning of Romer v. Evans*, in *Hastings Law Journal*, 1996, 48, p.1343; B. J. Flagg, *Animus and Moral Disapproval: A Comment on Romer v. Evans*, in *Minnesota Law Review*, 1997, 82, p. 833

<sup>432</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003). For comments from 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*, 2003, 88, p. 1233; W. N. Eskridge, *United States: Lawrence v. Texas and the imperative of comparative constitutionalism*, in *International Journal of Constitutional Law*, 2004, 2.3, 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*, 2004, 16, 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*, 2005, 23, pp. 235-249; R. E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, in *Cato Sup. Ct. Review.*, 2002, p. 21;

<sup>433</sup> 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.

favour and 3 against), and Justice Kennedy was responsible for writing the opinion of the court.

Here 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», believing that the question behind the case was 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 common to a «homosexual lifestyle». The judges recognized that these criminal law provisions perpetuated the stigma on homosexual people<sup>434</sup>, nevertheless the decision was mainly justified through the protection of the private/domestic sphere. That is why the Court firmly stressed the difference between such a case and a hypothetical one involving any public «conduct or prostitution».

Of course, this decision represented a milestone for homosexual people's rights and was a huge step towards equality. However, the emphasis on the argument of privacy can be read in a critical way.

### *3.2.3. The DADT policy in the US army: when protection of the private turns into a compulsory closet*

Although right after *Lawrence v. Texas* it was possible for homosexual couples to live their relationships in their own homes, this was far from implying the public acceptance of the homosexual identity<sup>435</sup>. On the contrary, as highlighted in the

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<sup>434</sup> 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»

<sup>435</sup> 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*, 2005, 57, pp. 1011; A. J. Seligsohn,

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decision itself, this notion of protection of the private sphere soon transformed into a duty to privacy, which resembles the concept of “repressive tolerance<sup>436</sup>” elaborated by Marcuse. After all, the private dimension argument was the one behind the so called DADT policy in the US army<sup>437</sup>, which was defined as an expression of institutional homophobia<sup>438</sup>.

This policy, approved in 1993 by the Clinton administration, was supposed to end the ban for homosexual people to serve in the military and the many discharges for homosexuality. The policy mainly established the possibility for homosexual people to work inside the military ranks, upon condition that their sexual orientation remained hidden.

If person engaged in homosexual acts and this was discovered, or he/she declared his/her/their homosexual/bisexual orientation, then the person could be separated from the force using armed force. Simultaneously, the policy established the prohibition of asking specific questions about one’s sexual orientation.

In the DADT, apparently, there was protection for private life. But in fact, this apparent protection was not the result of a choice of a person: private life needed to remain private.

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*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

<sup>436</sup> R. P. Wolff, B. Moore, H. Marcuse, *A Critique of Pure Tolerance*, Boston, 1969, pp. 95-137.

<sup>437</sup> 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 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.

<sup>438</sup> K. Dyer, *Gays in Uniform: The Pentagon's Secret Reports*, Boston 1990, p. XVIII;

This resulted in the fact that the LGBT military had to remain in the closet, hide their relationships and private life, and be careful not to reveal anything about it.

When in 2003 the Supreme Court ruled in *Lawrence v. Texas*, the decision had very little impact on this policy. On the contrary, in the case *Cook v. Gates*<sup>439</sup>, decided by the Court of Appeal for the First Circuit, *Lawrence v. Texas* was used to legitimize protection of homosexual relationships only in the domestic sphere (as such, not extended to any other context).

This problematic use of the private, moving between the recognition of homosexuality as legitimate and the perpetuation of invisibility and institutional homophobia, ended in two main stages. The first one is the definitive abolition of the DADT policy by the Obama administration in 2011<sup>440</sup>. The second one is the case *Obergefell v. Hodges*<sup>441</sup>, decided in 2015 by the Supreme Court<sup>442</sup>. With this decision, the Supreme Court stated in favour of same-sex marriage, declaring it law of the land<sup>443</sup>, and definitively ending the segregation to the private sphere for homosexual people in the United States.

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<sup>439</sup> *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008)

<sup>440</sup> To show evidence of the inefficiency of this policy it can be noticed how from 2003 to its cancellation (2011) under the DADT policy about 13650 persons were discharged from the military. As Viggiani noticed DADT created a mechanism of homosexual panic, where homosexual people are to be considered as the one who cannot be, and cannot be called. See G. Viggiani, *Dal diritto alla privacy al diritto al matrimonio. L'omosessualità della giurisprudenza costituzionale statunitense*, Milano, 2015, p. 100

<sup>441</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015). For some comments see:

K. Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*. *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*, 2015, 49, p. 367; M. Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, in *California Law Review*, 104, 2016, p. 1207; K. G. Porter, *Obergefell v. Hodges*, *Ohio NULaw Review*, 42, 2015, p. 331

<sup>442</sup> In this reconstruction we are not explicitly mentioning the intermediate passage, such as the ones related to the 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 *Same-Sex Couples before National, Supranational and International Jurisdictions*, in D. Gallo, Paladini L., Pustorino P. (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions*, 2014, pp 33-71

<sup>443</sup> For a comparison between the US case law on homosexuality and the European supranational one, with an accent of 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

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This case study shows us 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 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 a common one also in the disability field. If the State does not have to be present in issues regarding sex and sexuality and “able” people, because those are private matters, similarly there is no reason why it should interfere with disabled people’s sexuality.

On the contrary, we want to argue that to secure self-determination and autonomy in the sexual sphere, the State should not withdraw from this area. In particular, positive measures by the State in this area are aimed at addressing the fact that the position of disabled people in the sexual sphere is not a neutral one, as discussed in Paragraph 1.2. For this reason, the non-intervention of the State justified through the use of the category of private reveals itself as a strategy that perpetuates inequalities and oppression.

Disability theory, just like feminist theory, recognizes the separation between the private and public sphere as a source of gender and sexual oppression<sup>444</sup>.

This source of oppression has relevant peculiarities when it comes to the condition of people with disability, where the private sphere is not so obviously characterized, out of necessity, by privacy. Scholars argued in fact that for disabled people «privacy is abandoned at a terrible cost»<sup>445</sup>.

This sentence shifts our attention towards the fact that, for a person experiencing and embodying disability, the boundaries between the private and public dimensions are already very thin and blurred.

For example, a person in need of personal assistance shares the domestic dimension with a complete stranger, who is usually employed to give support in a significant number of everyday life activities. This could involve, just to mention a couple of

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<sup>444</sup> T. Siebers, *Disability theory*, Michigan, 2008, pp. 143-145

<sup>445</sup> T. Siebers, *Disability theory*, Michigan, 2008, p. 143

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hypotheses, assistance in very intimate moments, such as dressing/undressing, washing, general self-care and sometimes even going to the toilet.

For people living in group homes or in institutions the discourse 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, the essential nucleus of everyone's intimacy, 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 that we rethink the use of these apparently neutral categories when discussing disability and sexuality.

It is important to underline that arguing for the deconstruction of a rigid dichotomy between private and public does not mean belittling privacy as a legitimate stance.

On the contrary, the demand for personal privacy is in some cases essential to grant sexual accessibility to people with disabilities (see further discussion on this matter in Chapter 3). The fact that the intimate lives of some disabled men and women, mainly the ones living in institutions, are highly monitored, documented and discussed, generates concrete social barriers<sup>446</sup>. Sometimes for people with disability enacting measures of promotion of their sexuality-related rights might imply being granted space for intimacy and privacy.

This is not in contrast with what we have been saying about the rigid private/public dichotomy: our analysis does not neglect the idea of right to privacy as a right which every individual should enjoy on an equal basis with others. That is why some interventions in the field of disability and sexuality should be aimed at affirming the personal privacy of people with disability, as a form of promotion of space for intimacy and self-determination in the sexual sphere.

That is because, as we will argue, there is nothing like a monolithic right to sexuality, but on the contrary a multitude of sexuality-related rights connected to the exercise of fundamental rights. In the case of people with disability, this can imply providing them with freedom of association in institutions and privacy on demand, it means the demedicalization of their sexuality, it means healthcare capable of addressing sexual needs and desire, the re-professionalization of caregivers in order to take sexuality into

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<sup>446</sup> T. Siebers, *Disability theory*, Michigan, 2008, p. 148

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account<sup>447</sup>, and many other possibilities that will be further discussed. All these kinds of interventions, however, need specific policy and regulation, which must be constitutionally oriented.

4. *Sexuality, Law, Disability: a statute under Italian constitutional law*

This last part of the chapter is aimed at understanding how the constitutional framework for the intersection between disability and sexuality moves.

By analysing the Italian constitutional jurisprudence, we will try to understand what kind of role sexuality plays in the constitutional arena, and how we can qualify sexuality-related rights. Drawing from this result, we will identify the possible guiding parameters in the field of sexuality and disability, from a Constitutional point of view.

4.1. *For a Constitutional roadmap on sexuality-related rights*

Already during the 1980s, constitutional scholars started discussing sexuality as a topic within the broader notion of “new rights” (c.d. *nuovi diritti*<sup>448</sup>).

It is difficult to sketch a comprehensive analysis of the field of sexuality and law from a constitutional point of view, nonetheless, it is possible to say that this peculiar dimension of human life is seeking more protection from the legal sphere and is gaining more attention.

By analysing some key constitutional law decisions, it is possible 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<sup>449</sup>.

The case originated from a trial on sexual violence, perpetrated by three soldiers against a woman. She wanted the State to grant her a war pension according to Law

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<sup>447</sup> T. Siebers, *Disability theory*, cit., 2008, p. 148

<sup>448</sup> 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

<sup>449</sup> Corte Cost. n. 561/1987. Comment from scholars: P. Vitucci Paolo, *Pensione di guerra a Ida e a 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*, 1989, fasc. 7-8, pt. 1, pp. 2113-2119

no. 648/1950<sup>450</sup>, 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 a sexual violence perpetuated during war time.

Apart from this specific case, attention must be given to some specific passages of this decision of the Constitutional Court. 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 being<sup>451</sup>».

For this reason, the right to sexual freedom was considered by the Court as a fundamental right. The Court also affirmed that sexuality was to be covered by Article 2 of the Constitution, stating that the right to dispose freely of one's sexuality is an absolute subjective right not to be compressed in any way<sup>452</sup>.

The Court also assured that this right was connected to Article 32: in fact, any violation of sexual freedom (in case of violence, for example) is a violation of the right to health. One year before, 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<sup>453</sup>, the first of many on this law<sup>454</sup>, the Court stressed the need

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<sup>450</sup> This, together with Law 1968 n. 311, and Dpr n. 915/1978 were the object of the judgment). To be specific art. 10(1), which extent 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 both from the national armed forces or allies or even military forces.

<sup>451</sup> Here the sentence in Italian: «Essendo la sessualità uno degli essenziali modi di espressione della persona umana»

<sup>452</sup> Here the quotation from the decision: «Il diritto di disporre 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.»

<sup>453</sup> Corte cost. 6 May 1985, decision n. 161. For comments see: M. Dogliotti Massimo, *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

<sup>454</sup> 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 the 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, pp. 16; P. Veronesi, P., *Un'anomala additiva di principio in materia di "divorzio imposto": il*

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to find space for and protect even the most minority instances in the Constitutional system.

It was affirmed that sexual identity - not to be identified with mere biological characteristics - is part of a self-development constitutional project.

The right to sexual identity in relation to others must be granted under Article 2<sup>455</sup>.

In Decision no. 221/2015<sup>456</sup>, this right 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<sup>457</sup>, the Court was asked to decide on Law n. 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

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“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

<sup>455</sup> 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.»

<sup>456</sup> 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 to obtain legal gender recognition. Some comments: C. Meoli Chiara, *La correzione dell'interpretazione sulla correzione 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, pp. 4; A. Lorenzetti Anna, *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, pp. 17; I. D'Adrea 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. 221 in *Consulta online*, 2016, 1, pp. 16; C. M. Reale, *Corte costituzionale e transgenderismo: l'irriducibile varietà delle singole situazioni*, in *BioLaw Journal - Rivista di BioDiritto*, 1, 2016, p. 13

<sup>457</sup> For a comment 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

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 the discretion of the legislative power. Nonetheless, some passages of the Order give us some more hints on the statute of sexuality under constitutional law. The Court stated that the issue of intimate and sexual life of inmates is a real and deeply rooted one, which our legal system is only partially addressing. The Court added that, in relation to the observation of the *a quo* judge, the right to sexual expression for inmates should not regard only those involved in a marriage or in a co-habitation regime, but everyone. This was justified by using the notion of dignity, which - according to the Court - is connected to the possibility of explicating one's own sexuality. In the arguments of the *a quo* judge, the right to sexual expression is part of the set of 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. This stance, however, needs to be balanced properly with the concurring need for social security. 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 the complex sphere of sexuality was also 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). What we should notice is that at the beginning of this decision the Court affirms that in the Constitutional system each individual is granted the right to express his/her own sexuality as a means to express his/her personality (with the limit of respect for other people's rights and freedom)<sup>458</sup>.

From all these decisions, we can deduce a growing attention and an increasing importance of sexuality in the eye of Constitutional law.

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<sup>458</sup> Here 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.

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The Constitution today grants to 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. The latter is constitutionally 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 - meaning 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).

### 4.2. *Discussing a possible constitutional framework for measures in the field of sexuality and disability*

From constitutional law jurisprudence it emerges how sexuality touches and is covered by a number of important Constitutional dispositions. Addressing sexuality from a legal and constitutional point of view implies understanding that the object of our inquiry is complex and multifaceted, capable of involving a number of core issues related to the human being.

If there is nothing like a unitary corpus of "sexual rights", we can affirm that sexuality comes in questions -in its multiple implications- in the realization of 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 matters to Constitutional law, as well as to human rights law. The explication of sexuality, in fact, often calls into action and is supported by one or more already existent and well-recognized fundamental rights.

We can observe this through the Constitutional case-law.

It for this reason that each time the explication of sexuality, in one of its many forms, finds an obstacle, the law should intervene to grant the full enjoyment of the connected fundamental rights. Historically, for some people sexuality-related rights were frustrated by stereotypes, social prejudices and misconceptions, said people facing serious discrimination.

It is the case, for example, of women and homosexual people. In all these cases the law intervened with measures to overcome discrimination, protect and secure the rights in question and lastly, promote them.

These reflections are valid also in the field of disability and sexuality: if fundamental rights meet at this frontier, then the law should ensure the full enjoyment of these rights to everyone. This statement is valid if we embrace a view that understands rights as something that we do, rather than something that we are given, that is to say rights as relations, rather than objects<sup>459</sup>.

These fundamental rights can be found in the common grounds between the constitutional jurisprudence on sexuality and the constitutional jurisprudence on disability.

It is this intersection we should look at when sketching a constitutional status for the protection and promotion of disabled people's sexuality.

#### *4.2.1. Article 2 of the Constitution: sexuality as a personal development and social factor*

The first link between sexuality and disability is to be found in Article 2 of the Constitution<sup>460</sup>. 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 connection with the relational and social dimension protected by this article.

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<sup>459</sup> 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 patti di esercitarli, sono relazioni, non cose (...), si riferisco piuttosto al fare che non semplicemente all'aver»

<sup>460</sup> As one of the fundamental principle of our Constitution this article is widely commented amongst italian legal scholars, a part from the contributions that will be mentioned in this paragraph, ex multis see: A. Baldassarre, *Diritti della persona e valori costituzionali*, Torino, 1997; P. Barile, *Diritti dell'uomo e libertà fondamentali*, Bologna, 1984; 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*, Torino, 1995; O. Pizzolato, *Finalismo dello Stato e sistema dei diritti nella Costituzione italiana*, Milano, 1999; A. Pace, *Problematica delle libertà costituzionali*, Padova, 2003

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Similarly, the constitutional case law on disability is increasingly anchored to Article 2: the accent is on the need to overcome social barriers and grant people with disability the possibility of developing their personality and fully participating in social life.

Article 2 represents one of the most important articles of the Constitution, which comes to life and must be applied each time there are situations and norms referring to the moral and physical sphere of the person<sup>461</sup>.

It consists in a synthesis of the individual and the social dimension of the person in front of the Constitutional Law System, in a strong connection between personalism and pluralism<sup>462</sup>.

On the side of the protection of the person (*principio personalista*), the article refers to the recognition and guarantee of the implementation of the inviolable rights of the person<sup>463</sup>.

The inviolable rights of the person find their common origin in the need to protect the “inner autonomy<sup>464</sup>” of the individual, to enact the idea that the State must be in function of human beings, not the contrary<sup>465</sup>. This was also confirmed by the Constitutional Court, which affirmed that this principle implies setting the development of every single human being as the ultimate goal of social organizations<sup>466</sup>. The manifestation of inner autonomy is what we call today, the right

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<sup>461</sup> P. Caretti, *I diritti fondamentali. Libertà e diritti sociali*, Torino, 2002, p. 137

<sup>462</sup> E. Rossi, *Art. 2*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Milano, 2006, p. 36. The original quotation: «L’aspetto che risulta maggiormente significativo rispetto a tale formulazione è rappresentato (...) soprattutto dalla stretta connessione che si evidenzia tra personalismo e pluralismo»

<sup>463</sup> We already summed up the terms of the discussion amongst scholars around the open or close character of article 2 (see chapter I, paragraph 2.2). Here we renew the consideration according to which, apart from the position of the Constitutional Court on the matter which propends for the openness of this disposition, the debate reveals sterile nowadays. This because undoubtedly the Constitutional Court has an increasingly important role in defying 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.

<sup>464</sup> 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 contraposition with the fascist past of the nation. See Discussion 9 september 1946, First Subcommission.

<sup>465</sup> See C. Mortati, *Istituzioni di diritto pubblico*, I, Padova, 1975, pp. 155. This is the original quotation: «non è l’uomo in funzione dello stato, ma quest’ultimo in funzione dell’uomo»

<sup>466</sup> Corte cost. 167/1999 (il principio personalista) «pone come fine ultimo dell’organizzazione sociale lo sviluppo di ogni singola persona umana»

to self-determination, which is often connected to issues related to identity<sup>467</sup> and body, seeking protection under the Constitutional umbrella.

This personal dimension, however, to avoid becoming an individualistic dimension needs to be considered in its 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”<sup>468</sup>».

According to Article 2 of the Constitution, in fact, the person must be understood in their multiple relations and in the social context<sup>469</sup>. It is here, in fact, that he/she/they can be valued and find their ultimate role in society: «Favorire lo sviluppo della personalità dei singoli significa infatti garantire loro la possibilità di essere parte attiva nella società<sup>470</sup>».

It is in this personal and social dimension of full development of the human being that the instances which are the focus of this work may find answers, supporting the idea that we are not referring to a set of “new rights”, rather to «new formulations and projections» of something that is «always and fully» ascribable to the Constitution<sup>471</sup>. From this analysis, it is possible to deduce what it would mean to root any possible measure in the field of sexuality and disability in Article 2. It would imply promoting sexuality as part of the self-development constitutional project, self-determination in the sexual sphere, and contrasting social barriers. In the end, it would mean being granted full participation in society also as sexual agents.

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<sup>467</sup> C. Picocchi, *I diritti inviolabili*, in C. Casonato (ed.), *Lezioni sui principi fondamentali della costituzione*, Torino, 2010, p. 88-89. She 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.

<sup>468</sup> A. Barbera, *Art. 2*, cit., p. 106

<sup>469</sup> 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 *Persona e comunità. Saggi di diritto privato*, Bologna, 1966, p. 58

<sup>470</sup> E. Rossi, *Art. 2*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Milano, 2006, p. 53

<sup>471</sup> 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 A. D’Aloia (ed.), *Diritti e Costituzione. Profili evolutivi e dimensioni inedite*, Milano, 2003, p. XVIII

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4.2.2. *Article 3 of the Constitution: equality as anti-subordination*

Article 2, in its main objective of granting the fullness of the person within the Constitutional system, must be necessarily read together with Article 3<sup>472</sup> and in particular Article 3.2<sup>473</sup>, which is considered a complementary disposition to this article and one capable of summarizing all the constitutional goals<sup>474</sup>. In the Constitutional State, in fact, many fundamental rights do not become resolved merely in their negative aspect, but demand a promotional commitment on the part of 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<sup>475</sup>». This is because Article 3, together with Paragraph 1 and Paragraph 2, aims at realizing social justice, firstly by implying equality by law and in the law, but also by reinforcing this statement with the possibility of enacting interventions for social change<sup>476</sup>. As Calamandrei stated, in fact, this article represents a «polemic against the present», it

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<sup>473</sup> 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. Aini, *Azioni positive e principio di eguaglianza*, in *Politica del diritto*, 1999; N. Bobbio, *Eguaglianza ed egualitarismo*, in *Rivista italiana di filosofia del diritto*, 1976, pp. 361 ss; 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 C. Esposito, *La costituzione Italiana. Saggi*, Padova, 1954, p. 17 ss; 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;

<sup>474</sup> 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

<sup>475</sup> V. Onida, *La Costituzione. La legge fondamentale della Repubblica*, Bologna, 2004, p. 62

<sup>476</sup> L. Ferrajoli, *Diritto e ragione*, Roma-Bar, 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»

represents a critique against the social structures of inequality and imbalance that this norm wants to change by addressing inequalities but also by embracing differences<sup>477</sup>. The connection between Article 2 and Article 3 becomes evident in this sense if we think that the whole Article 3 tends to the full development of the person and her effective participation in political, social and economic rights, with a connection between rights to participate and social rights<sup>478</sup>. These two goals are in mutual relationship: there can be no emancipation and development of the person without participation in society, but participation already implies the existence of conditions allowing personal development and dignity<sup>479</sup>.

To promote these conditions, legal measures need to consider the individual conditions of a subject and his/her concrete image<sup>480</sup>: this does not imply the recognition of specific and exclusive rights for each category of people, but a gradation of policies and interventions based on specific needs and capable of overcoming the heterogeneous obstacles faced<sup>481</sup>. For this reason, Article 3 is mainly characterized by its evolutionary profile: it is a norm open to the continuous demand for recognition, guarantee and protection of instances inherently related to the complexity of human existence. We can affirm that Article 3 acts like a propulsive channel of social change, bringing innovation inside the legal system, in strong connection with the social fabric. It was stated that Article 3 «contiene certamente un programma di trasformazione sociale il cui invero 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<sup>482</sup>»

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<sup>477</sup> P. Calamandrei, *Introduzione storica sulla Costituzione*, in Branca G. (eds.), *Commentario alla costituzione italiana*, I, Firenze, 1960, p. CXXXV. Calamandrei talks about a «polemica contro il presente»

<sup>478</sup> 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;

<sup>479</sup> Here 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

<sup>480</sup> G. Autorino, P. Stazione, *Diritto civile e situazioni esistenziali*, Torino, 1997, p. 249

<sup>481</sup> A. D'Aloia, *Eguaglianza sostanziale e diritto diseguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale*, Padova, 2002, p.97

<sup>482</sup> A. D'Aloia, *Eguaglianza sostanziale e diritto diseguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale*, Padova, 2002, p.63

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These advanced legislative solutions, however, must start from a proper understanding and definition of what equality means.

In the field of disability, the flexible notion of equality becomes particularly insidious, and can be the subject of very different approaches (which are responsible for the implementation of certain laws and policies)<sup>483</sup>. For our purpose, the idea of equality as a “mobile parameter<sup>484</sup>” can be useful. If it is clear that violations of the principle of equality may come from different forms of discrimination, it should be noticed that behind them there is always a form of social oppression<sup>485</sup>, and this needs to be addressed when applying the principle.

In order to do so, critical law theory argued that it is necessary to understand how in the operation of comparing two situations, a typical form of reasoning of principle of equality (for example the situation of abled people and disabled people), it is not neutral, but implies a power relation between the two terms of comparison<sup>486</sup>. At the same time, in the articulation of this reasoning, the group which is enduring the

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<sup>483</sup> A. Lorenzetti, *Dis-eguaglianza e disabilità*, in *Rivista Gruppo Pisa*, 2015. Available online at the following link: [https://www.gruppodipisa.it/images/rivista/pdf/Anna\\_Lorenzetti\\_-\\_Dis\\_-\\_eguaglianza\\_e\\_disabilita.pdf](https://www.gruppodipisa.it/images/rivista/pdf/Anna_Lorenzetti_-_Dis_-_eguaglianza_e_disabilita.pdf)

<sup>484</sup> See M. G. Bernardini, O. Giolo, *Il parametro mobile. Note sul rapporto tra eguaglianza e differenza*, in *Filosofia Politica*, 3, 2014, pp. 505-520

<sup>485</sup> See: L. Gianformaggio, *L'identità, l'eguaglianza, la somiglianza e il diritto*, in L. Gianformaggio, *Eguaglianza, donne e diritto*, A. Facchi, C. Faralli, T. Pitch (eds.), Bologna, 2005, p. 90;

In general, on this point, see the complex reflections of Letizia Gianformaggio around the principle of equality, gathered in the book: L. Gianformaggio, *Eguaglianza, donne e diritto*, A. Facchi, C. Faralli, T. Pitch (eds.), Bologna, 2005;

This idea was mainly articulated in relation to the condition of women in connection with feminist reflections. For some elaboration of this topic from Italian legal feminist scholars see: T. Mazzaresse, *Eguaglianza, differenze e tutela dei diritti fondamentali. Nuove sfide e crisi dello Stato costituzionale di diritto*, in T. Casadei (a cura di), *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; T. Pitch, *Un diritto per due. La costruzione giuridica di genere, sesso e sessualità*, Milano, 1998. 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

<sup>486</sup> See the quotation from M. G. Bernardini, O. Giolo, *Il parametro mobile. Note sul rapporto tra eguaglianza e differenza*, in *Filosofia Politica*, 3, 2014, pp. 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»

situation of power is always compared to the one exercising power: in this way, it is assumed that the dominant part must be the reference standard. Namely, in our case it supports a view that puts in a hierarchically dominant position an abled person, compared to a disabled person. This approach has a strong “normalizing” or “assimilating” approach, where diversity doesn’t find a specific constitutional place, but is pushed towards the standard model<sup>487</sup>. For this reason this approach must be refused.

The process of inclusion and elaboration of measures must be rearranged in consideration of power imbalances, starting from the assumption and implicit that cause oppression and discrimination, moving towards substantial equality<sup>488</sup>.

At the same time, when the power dynamics hidden in the discrimination process are brought to light, the relational component of the equality principle is highlighted. On this point, scholars have argued that the disadvantaged part of the relation should herself become the parameter of the evaluation. Her point of view and needs should be considered *ab origine*, and not in relation to the dominant subject<sup>489</sup>.

In this way, the equality parameter would become plural and mobile, to be defined each time, ending up with the impossibility of recognizing a traditionally dominating subject anymore. This also implies that the perception and conception of the needs coming directly from the oppressed group becomes central in defying equality and elaborating legislation and policy<sup>490</sup>.

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<sup>487</sup>A. Lorenzetti, *Dis-eguaglianza e disabilità*, in *Rivista Gruppo Pisa*, 2015

<sup>488</sup> This analysis is developed also in terms of “anti-subordination” principle by Barbara Pezzini, specifically in the field of gender issues, but can be extended also the other subjects who deviates from what is considered the norm. This principle was defined as an instrument to recognize the need to remove the relationship of subordination and read the related conditions as a power asset (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

<sup>489</sup> M. G. Bernardini, O. Giolo, *Il parametro mobile. Note sul rapporto tra eguaglianza e differenza*, in *Filosofia Politica*, 3, 2014, 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?”)»

<sup>490</sup> According to Bernardini and Giolo some good examples of this application might be the law on education for people with disability and law on environmental barriers. See: M. G. Bernardini, O. Giolo, *Il parametro mobile. Note sul rapporto tra eguaglianza e differenza*, in *Filosofia Politica*, 3, 2014, pp. 513-516

4.2.3. *Article 32: the explication of sexuality as part of a state of comprehensive well-being*

Another point of contact between the two fields can be found in Article 32. Indeed, 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, as being able to fully live her own sexuality might be seen as part of a broader well-being that each individual should enjoy.

The right to health is to be configured as a fundamental right of the person<sup>491</sup>, as the Constitution states. This right is very complex and was capable of generating, in its actuation, many obligations for the State, but also non-interference duties and positions of interest in relation to other consociates<sup>492</sup>. This article addresses health, both as an individual and collective good, refuses the typical distinction between positive and negative freedom<sup>493</sup>, and is capable of challenging also the classical distinction between programmatic and perceptive norm<sup>494</sup>. Health must be understood, even in our field of inquiry, as a “state”, a condition of well-being to be maintained in time, but also a value perceived by each subject depending on a complex and interdependent mixture of internal and external factors<sup>495</sup>.

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<sup>491</sup> On article 32, and right to health in its variegated aspects, ex multis, a part from the ones 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, Carpani G. (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 (eds.), *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, *Biotecnologie 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

<sup>492</sup> B. Pezzini, *Il diritto alla salute: profili costituzionali*, in *Diritto e società*, 1983, p. 125

<sup>493</sup> Because the profile of non -intrusion of the State, is inherently connected to the request for positive measures, as noticed by A. Baldassarre, *Diritti pubblici subiettivi*, in *Enciclopedia Giuridica*, IX, Roma, 1989

<sup>494</sup> V. Crisafulli, *La costituzione e le sue disposizioni di principio*, Milano, 1952, pp. 75

<sup>495</sup> A. Simoncini, *Articolo 32*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Milano, 2006, p. 657. Here the original quotation in Italian: «essa in realtà è uno “stato”»,

The right to health is typically understood as a multi-dimensional element, which includes the physical and mental spheres but also the social sphere, and for this aspect 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 (related to bodily integrity) is pertinent in the discussion of the issue of forced sterilization of people with disability<sup>496</sup>, in particular women, and in general in the field of reproductive rights which are 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 which is compromised by different barriers of architectural but also of social nature (Chapter III).

However, if we think about other issues and protection instruments, for example sexual assistance, sexual counselling and inclusive sexual education (we will further discuss all of them in the following chapters) we should consider right to health as a comprehensive state of well-being, as a factor that can be influenced by human actions. This view is well-represented by a passage from the Constitutional Court, in a decision concerning environmental barriers, where it is explained 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<sup>497</sup>».

Given this, it can be said that, if the right to health must be considered as a necessary requisite for the development of the person, it is not sufficient for his/her full realization<sup>498</sup>.

The right to health always needs to be addressed in combination with other constitutionally protected rights and values, and in this field, there is no exception.

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condizione di benessere da conservare nel tempo, un valore percepito dal soggetto e generato da una serie complessa e interdependente di fattori esterni ed interni al soggetto stesso»

<sup>496</sup> See: P. Gemma, *Sterilizzazione e diritti di libertà*, in *Rivista trimestrale di diritto e procedura civile*, 1977, pp. 245 ss; 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

<sup>497</sup> Corte cost. n. 251/2008, here 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»

<sup>498</sup> A. Simoncini, *Articolo 32*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Milano, 2006, p. 655

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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 wants to reduce the sexuality of disabled people to the field of 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 requiring health care measures. However, even in this case, focus must be maintained on the need to overcome barriers to reach self-development and foster self-determination, keeping in mind that the core issues around disabled people's sexuality revolve around stereotypes and negative attitudes in society<sup>499</sup>.

Otherwise, the risk would be that of implementing policies based on the medical model of disability, which detaches from the Constitutional understanding of disability and is a model responsible for the oppression and discrimination of disabled people.

To sum up, we argued that the idea according to which law should not regulate this field because of its private nature cannot be considered persuasive. Just as the critical race theory and the feminist theory showed that a colour-blind and gender-blind regulation is simply 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 we affirmed that the 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 derive from an idea of the existence of sexuality-related rights as a complex asset of situations relevant for Constitutional law and involving already existing fundamental rights. To secure these rights, the power imbalances generating social barriers must be tackled by adopting a paradigm that puts the person with disability in a central position inside the policy-making and legislative process. In fact, to be effective these actions should be based on the real-life experience of people with disability, who should be involved in the policy-making process.

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<sup>499</sup> B. Casalini, *Disabilità, immaginazione e cittadinanza sessuale*, in *Etica & Politica / Ethics & Politics*, XV, 2, 2013, pp. 301-320;



### CHAPTER III

#### IN THE EYE OF THE LAW: SPECIFIC ISSUES ON DISABILITY AND SEXUALITY

In the previous chapter we discussed the theoretical framework of sexuality and disability.

In Chapter III, before moving to the analysis of the tool of sexual assistance, which is currently being discussed in Europe, we will go deeper into some specific questions around sexuality and disability.

The focus will be, in particular, on fields in which the law is more involved, both on a jurisdictional and legislative level. For this reason, among the many practical issues arising at the point of intersection between disability and sexuality, we will mostly discuss:

1) the forced sterilization of people with disability 2) the explication of sexuality for people with intellectual disability.

In considering these topics, we will provide examples from significant experiences of other legal systems, in a comparative perspective<sup>500</sup>.

These issues mainly affect people with intellectual disabilities: for this reason, a specific introduction on their condition in the sexual sphere will be articulated.

The first issue we are going to face is the one related to sterilization. Here we will discuss the origins and significance of this practice, perpetrated mainly against women with intellectual/cognitive impairments. Then, we will go deeper into the current arguments developed in comparative jurisprudence and discuss the legal framework in international law. To conclude this first part, the Italian situation will be analysed, with a specific focus on the jurisdictional level.

Afterwards, we will move to the issue related to sexuality and people with intellectual disability, showing how criminal law has perpetuated stereotypes and deprived people

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<sup>500</sup> As we mentioned in the introduction, here we will proceed on a the so called micro-level of comparative legal analysis, while at Chapter V we are going to elaborate some models. For the discussion of this distinction inside comparative law and its validity see: See L. J. Constantinesco, *Introduzione al diritto comparato*, Torino, 1996, in particular p. 220, and K. Zweigert, H. Kötz, *An introduction to comparative law*, v. I, Oxford, 1997, p. 5, according to which «the dividing line between macro comparison and micro comparison is admittedly flexible». For a more punctual discussion of this profiles see notes 5 and 6.

with intellectual disability of sexual agency, and we will argue for a disability-neutral approach in laws concerning sexual violence.

In particular, we will discuss the recent reform in Ireland, and we will go deeper into the application of law when it comes to the sexuality of people with intellectual disability in Italy. This paragraph will be closed by the discussion of the experience of Denmark in fostering the sexual agency of people with intellectual disability living in group homes and public institutions, throughout the elaboration of Guidelines on the topic and the professional figure of the sexual advisor. 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. Specific issues regarding disability and sexuality: the condition of people with intellectual impairments*

The universe of disability is vast and articulated. Many different experiences can fall within the label disability and a distinction must be made to avoid further stigmatization and invisibilization of the experiences of those who live in the most complex situations<sup>501</sup>.

It is the case of people with intellectual disabilities: what we have mentioned about the barriers, discrimination and prejudices faced by people with disabilities in general, in the field of sexuality, is particularly true for them. It has been shown that, in spite of being a crucial aspect of life for every human being, the importance of sexual expression is underestimated as far as people with intellectual disability are concerned, while, of course, it is an essential part of self-expression and relationships<sup>502</sup>.

The social stigma on people with intellectual disability and the social attitude that does not see them as capable of acting as agents of their own life, taking their own decisions,

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<sup>501</sup> A case to be cited is the one related to invisible disabilities and chronic illness. We can define invisible disability is an umbrella term for various kind of impairments, having in common the fact that they are not immediately apparent. Between these we can mention challenges of neurological nature, visual or auditory disabilities, and conditions related to chronic pain and diseases. These kinds of disabilities are subject to further stigmatization because, often, they are 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.

<sup>502</sup> M. Parchomiuk, *Specialists and sexuality of individuals with disability*, in *Sexuality Disability*, 30, 4, 2012, pp. 407-419

and choosing for their own well-being, has an impact also on the sexual and intimate sphere, with significant legal implications. For instance, these ideas are responsible for gross human rights violations, such as forced sterilization, which we will discuss further in this chapter.

Also, medical staff and, in general, service providers working with people with intellectual disabilities perceive this topic as a sensitive one and treat it as a taboo<sup>503</sup>. It has been reported that caregivers, who are highly 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<sup>504</sup>.

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<sup>505</sup>».

This is strictly connected to their condition of social isolation, which affects relationships and interaction with other people<sup>506</sup>, aggravated by the fact that people with intellectual disability are perceived mainly as in need of protection in the sexual sphere<sup>507</sup>. This is evident if we look at the legal approach towards the expression of the sexuality of people with intellectual disability, as we already briefly discussed (Chapter II) and will further investigate (in Paragraph 3).

There are very few opportunities for people with disabilities to learn about their sexuality, experiment and engage in social activities<sup>508</sup>. We should also consider that 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 no privacy for intimacy and sexual life<sup>509</sup>, also in

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<sup>503</sup> M. Parchomiuk, *Specialists and sexuality of individuals with disability*, cit., p. 409

<sup>504</sup> N. Wings-Yanez, *Why all the talk about sex? An autoethnography identifying the troubling discourse of sexuality and intellectual disability*, in *Sexuality Disability*, 32, 1, 2014, pp. 107–116

<sup>505</sup> J. A. Cook, *Sexuality and People with Psychiatric Disabilities*, cit., p. 197

<sup>506</sup> A. Isler, F. Tas, D. Beytut, Z. Conk, *Sexuality in adolescents with intellectual disabilities*, in *Sexuality and Disability*, 27, 1, 2009, pp. 27–34.

<sup>507</sup> 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

<sup>508</sup> 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

<sup>509</sup> 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

addition to policies discouraging sexual expression (e.g. the *No sex between residents policy*)<sup>510</sup>.

While there is a need for people with intellectual disabilities to express their sexuality and be supported in doing so, it is also true that this population is currently more vulnerable as regards abuse, sexually transmitted diseases and so on<sup>511</sup>: this matter must be addressed.

It was also reported that it is young people who mostly suffer from abusive behaviours<sup>512</sup> and these conducts are usually perpetrated by those who are responsible for their care and education<sup>513</sup>.

In the closing remarks we will discuss some possible solutions to solve this apparent conflict: we will argue that broader sexual education aimed at people with disabilities, affordable and accessible contraception, safer sex materials should be made available. Moreover, programs addressing the issue of sexuality, affectivity, consent, rights and legal aspects should be implemented to minimize the risk of sexual abuse and foster self-determination.

## 2. *Controlling the sexuality of people with disability: forced sterilization of disabled people and, in particular, disabled women*

At the beginning of the XX century, in the US the idea of the possibility of "correcting" society by using science started spreading. The need to inhibit certain people (the so-called "degenerated") from the possibility of procreating was justified by the protection of collective health.

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<sup>510</sup> 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 and J. A. Cook, *Sexuality and People with Psychiatric Disabilities*, cit., p. 197

<sup>511</sup> 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

<sup>512</sup> 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

<sup>513</sup> 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

It was a common belief that these people could threaten the entire collectivity by transmitting their ill genes to their children. These ideas were at the basis of the so-called "negative eugenics<sup>514</sup>", which also inspired European scientists and resulted in the forced sterilisation of many people with disability worldwide<sup>515</sup>. At the same time, in the US many States approved laws to forcefully sterilise women with disability to inhibit the birth of other people who would be considered a burden for the State<sup>516</sup>. Together with people with disability, mentally ill people, racial minorities, and poor women were forced to undergo sterilization<sup>517</sup>.

The United States were not the only Country where sterilisation became a State public policy: Sweden was another one and abandoned this practice only in 1975<sup>518</sup>.

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<sup>519</sup>.

This coercive medical practice has particularly affected, and still affects, women with disability rather than men. We have already discussed how people with disability, 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 (see Chapter II). These stereotypes and misconceptions are responsible for discriminations and violations of human rights,

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<sup>514</sup> Negative eugenics is aimed at impeding the gene transmission and inhibit the reproductive capabilities of a certain group of people. During the nazifascist regimes, negative eugenics was also accompanied by forced euthanasia against people with disability. See E. Girmenia, *L'eutanasia nazista. Lo sterminio dei disabili nella Germania di Hitler*, Roma, 2016

<sup>515</sup> Cfr. N.W. Gillham, *Sir Francis Galton and the birth of eugenics*, in *Annual Review of Genetics*, 35, 2001, p. 83 ss, E. Girmenia, *L'eutanasia nazista.*, cit., pp. 55, M. Schianci, *La terza nazione del mondo. I disabili tra pregiudizio e realtà*, Milano, 2000, pp. 103-105 and M. Schianci, *Storia della disabilità*, cit., p. 188 e ss.

<sup>516</sup> P. 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 in the United States*, in *História, Ciências, Saúde-Manguinhos*, 23, 1, 2016, pp. 195-212

<sup>517</sup> 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

<sup>518</sup> T. Tännsjö, *Compulsory sterilisation 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.

<sup>519</sup> Open society foundation, *Sterilization of women and girls with disabilities*, November 2011. Available at this link: <https://www.opensocietyfoundations.org/publications/sterilization-women-and-girls-disabilities-0>

which particularly affect the sexual sphere of women with disability: the possibility of pregnancy makes them highly exposed to unwanted sterilisation.

In the field of reproductive rights, the discrimination women with disability suffer is double, and it depends both on their gender and their impairment, resulting in a limitation of their possibility of making autonomous choices<sup>520</sup>. Forced sterilization of girls and young women with disabilities is considered a gross violation of human rights which still happens worldwide for reasons such as eugenics, menstrual management and pregnancy prevention<sup>521</sup>. In particular, women living in institutions are the ones who suffer the most from these abuses. At the same time, women are those who are more likely to be institutionalized<sup>522</sup>.

A very significant example of gross violation of human rights against women with disability in this sphere is the case of Ashley X, known as the “Ashley treatment case<sup>523</sup>”.

A young woman with severe intellectual and developmental disability, on the impulse of her parents and for her putative best-interest, was subject to a hysterectomy, breast removal and growth attenuation with a very high dose of oestrogens<sup>524</sup>. The case

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<sup>520</sup> We can suggest it depends on an intersectional view of identity and a consequential view of intersectional discriminations. For the elaboration of the notion of intersectionality, which was born from feminist black 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*, 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 the book: S. Carnovali, *Il corpo delle donne con disabilità. Analisi giuridica intersezionale su violenza, sessualità e diritti riproduttivi*, Roma, 2018.

<sup>521</sup> 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 here: [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/72/133](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/72/133)

<sup>522</sup> L. Servais, R. Leach, D. Jacques, J. P. Roussaux, *Sterilisation of intellectually disabled women*, in *European Psychiatry*, 19, 7, 2004, pp. 428-432; L. Lennerhed, *Sterilisation on eugenic grounds in Europe in the 1930s: news in 1997 but why?*, in *Reproductive Health Matters*, 5, 10, 1997, pp. 156-161

<sup>523</sup> It was called such by the parents of the young woman on the blog they opened about their daughter.

<sup>524</sup> The case came to light when the CNN pointed at 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-yr-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.

opened a wide debate on the legal, bioethical and medical issues involved<sup>525</sup>. While a small number of scholars found some profiles 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 is happening despite the increasing importance of assisted decision-making processes with people with psycho-social and intellectual impairment, as an alternative to substitute decision making<sup>526</sup>.

In this paragraph we will show how, at an international level, these unlawful medical procedures are condemned. However, across the globe, judges, health care professionals, guardians and families still consent to sterilization procedures on behalf of persons with disability, using the argument of the "best interest" (and its corollaries), often in an apodictic way, with insufficient case analysis.

Recurring arguments, with a substantial gender bias base, are that sterilization would imply better protection from sexual abuse or protection from the burden of a pregnancy.

In the following paragraph, we will analyze some case laws using these arguments, starting from the infamous case from the USA Supreme Court, *Buck v. Bell*.

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The case raised many critiques and a strong debate. Doctor Gunther, further 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

<sup>525</sup> 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, 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

<sup>526</sup> 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*, in *International Journal of Human Rights*, 20, 4, 2016, pp. 471-490; E. Flynn, A. Arstein-Kerslake, *Legislating Personhood: Realizing the Right to Support in Exercising Legal Capacity*, *International Journal of Law in Context*, 10, 4, 2014, pp. 81-104

Afterwards, we will frame sterilization within the international panorama and we will discuss it through the lens of Italian law and case law. Some conclusive remarks will close the paragraph.

### 2.1. *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 so likely to reach the Courts, as they often happen in situations in which it is hard to make any abusive situation emerge, for example against severely disabled people living in institutions<sup>527</sup>. 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.

As we have mentioned already, the most common argument is the one of the best interest, often of the woman involved, but also of other subjects such as the family or society in general.

More recently, this argument incorporated some considerations related to the supposed inadequacy of the pregnant woman to be a decent parent. In all these judgments it is still possible to find traces of the eugenics ideology underpinning the main arguments of the judges, which are often insufficiently built on concrete cases.

One of the most infamous cases in the field of sterilization and disability is the one discussed by the Supreme Court of the US in 1927, *Buck v Bell*<sup>528</sup>.

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<sup>527</sup>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

<sup>528</sup> *Buck v. Bell*, 274 U.S. 200 (1927). Here some comments from American 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, M. Pearce 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*,

Here, the Supreme Court declared the constitutionality of a law of the State of Virginia, allowing the sterilization of people living in state institutions<sup>529</sup>. The case involved Carrie Buck, a woman with an intellectual impairment (or believed to have an intellectual impairment), 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 judged to be "feebleminded"<sup>530</sup> as well, at the age of seven months. She was required to undergo sterilization according to the law of Virginia, being labelled as "promiscuous" and "feebleminded", just like her mother. The Amherst County Circuit Court<sup>531</sup> approved the operation after having verified that she could have been «the probable potential parent of socially inadequate offspring». The case passed to the Virginia Supreme Court of Appeal on the 12 November 1925, and the Supreme Court accepted the case for review in 1926. Here, the defence of the woman argued that the sterilization of the woman implied a violation of the equal protection clause and the XIV amendment. The Supreme Court, with a decision written by Judge Holmes and only one dissenting opinion<sup>532</sup> (out of 8 judges), ruled in favour of the constitutionality of the law of Virginia, observing that the measure aims 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

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in *European Journal of Pragmatism and American Philosophy*, 3, 2011, pp. 2-16. See also the book: P. A. Lombardo, *Three generations, no imbeciles: Eugenics, the Supreme Court, and Buck v. Bell*, Baltimore, 2008;

<sup>529</sup> 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, feeble-mindedness 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 here: [https://www.encyclopediavirginia.org/Chapter\\_46B\\_of\\_the\\_Code\\_of\\_Virginia](https://www.encyclopediavirginia.org/Chapter_46B_of_the_Code_of_Virginia)

<sup>530</sup> J. P. Radford, *Sterilization versus segregation: Control of the ‘Feebleminded’, 1900–1938*, in *Social Science and Medicine*, 33, 4, 1991, pp. 449-458

<sup>531</sup> See the decision at this link: [https://www.encyclopediavirginia.org/Judgment\\_Against\\_Carrie\\_Buck\\_April\\_13\\_1925](https://www.encyclopediavirginia.org/Judgment_Against_Carrie_Buck_April_13_1925)

<sup>532</sup> 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. Tompson, *Silent Protest: A Catholic Justice Dissents in Buck v. Bell*, in *Catholic Lawyer*, 43, 1, 2004: this article is available here: <https://scholarship.law.stjohns.edu/tcl/vol43/iss1/6>

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».

The leading case in the UK was decided almost 60 years later. 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.<sup>533</sup>, known as Jeanette, a 17-year-old young woman 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 having a pregnancy, and the council of the institution applied to have a ward of Court and to obtain leave on the operation of sterilization. The case reached the House of Lords as a result of an appeal of the Official Solicitor against the decision of the Court of Appeal, which had ruled in favour of sterilisation, given that the woman would have never been capable of expressing consent, according to the judges<sup>534</sup>. The House of Lords unanimously rejected the appeal, stating that the only arguments to be considered were the ones related to the best interest and the welfare of Jeanette, which is why sterilisation had to be authorised. The judges, indeed, claimed the irrelevance of the distinction between therapeutic and non-therapeutic sterilisation, in this case, considering that any pregnancy would have caused severe harm to the woman. In this case, sterilization was authorized 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

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<sup>533</sup> *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 *Discrimination in the Law*, 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. McK. Norrie, *Sterilisation 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, *Sterilisation and mental handicap: sapping the strength of the state*, in *Journal of Law & Society*, 15, 1988, pp. 229; L. Micheline, *Non-Therapeutic Sterilization of Intellectually Disabled Women*, in *Legal Service Bulletin*, 13, 1988, pp. 199.

<sup>534</sup> *Court of Appeal decision [2008] EWCA Civ 282*

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*<sup>535</sup>. Here, 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. The 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 something necessary in the case. The operation, indeed, was in the patient's best interest and as such should be authorized by the court. Here, again, no substantial and objective argument was given to support such an invasive operation, no attempt to reach even a basic form of consent from the woman was made, nor was any less invasive means of birth control considered; 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 jurisprudence alone, as a similar decision was taken in 2015 by the UK Court of Protection<sup>536</sup>, which decided for the coerced sterilization of a woman with an intellectual disability, who was already the mother of 6 children. In this case<sup>537</sup> the Court, which was solicited by

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<sup>535</sup> (Mental Patient Sterilisation) [1990] 2 AC 1

<sup>536</sup>. 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 to decide 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 were narrowed. Since the guardian could not decide on medical treatment anymore, nor the person itself could, it was the Court of Protection with its decision to decide through the doctrine of necessity, these issues. 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 capacity to make autonomous decisions.

<sup>537</sup> 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) (Sterilisation)* [2015] EWCOP, Available at this link: <http://www.bailii.org/ew/cases/EWCOP/2015/4.html>

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<sup>538</sup>, ordered the decision not to be notified to her, in order to facilitate forced entry into her home, her removal to hospital and her forced sterilisation<sup>539</sup>. The latter circumstance is particularly alarming, given that it clearly shows the violent and coercive nature of this act.

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 disability, is not directly mentioned, due to the increasing social disapproval of control of the reproductive capabilities of people with disability<sup>540</sup>. 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 disability is still ongoing in this field (see further).

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 argument without particular argumentative effort. This kind of motivation is often reinforced by considerations

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<sup>538</sup> She claims «my body is mine, by human rights» point 17 of the decision, reporting a letter from the woman

<sup>539</sup> 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, Judge. Cobb*, in *perosnaedanno.it*, 05/02/2015, available at this link: <https://www.personaedanno.it/articolo/e-lecita-la-sterilizzazione-forzata-dellincapace-court-of-protection-422015-judg-cobb-stefano-rossi>

<sup>540</sup> In fact, we can notice 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 authorize such invasive treatments. This happens because an argument such as the one on social cost, is immediately linked, nowadays, to eugenics and the Nazi socialist eugenics programs. 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 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.

related to the parental inadequacy of the disabled person, which has become an increasingly common argument of contemporary jurisprudence<sup>541</sup>.

These arguments 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 her/his capability: it is taken for granted that a person with disability could never be a suitable parent.

Clear evidence of this assumption can be found in the case decided by the Constitutional Court of Colombia in 2014<sup>542</sup>, where the interested subject was a minor<sup>543</sup>. 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<sup>544</sup>».

Another relevant example is to be found in the case discussed in Argentina by the Superior Tribunal de Justicia<sup>545</sup>, where the Court decided in favour of the sterilization of J.V.A, a young woman of 23 years old with intellectual disability. The authorization

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<sup>541</sup> Scholars affirm that there is a presumption that the woman with disability will never be able to bear her child and for this reason he/she 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

<sup>542</sup> Available at this link: <http://www.corteconstitucional.gov.co/relatoria/2014/C-131-14.htm> for a comment 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

<sup>543</sup> Indeed, the court rules in favor of the law that creates a general exception on the possibility of accessing for free to sterilization for everyone for the minors of 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.

<sup>544</sup> The translation is done by the author. Here 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»

<sup>545</sup> Superior Tribunal de Justicia, Re J.V.A, Application n. 24837/10, n. 48/2011

for the irreversible operation was asked for 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<sup>546</sup>: 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/wish for parenthood.

A similar argument can be found in the decision issued on 18 August 1998<sup>547</sup> by the Constitutional Court of Spain. The judges, in affirming the constitutionality of Article 428 Criminal Code last subsection<sup>548</sup>, 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<sup>549</sup>»

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<sup>546</sup> S. Carnovali, *Il corpo delle donne con disabilità*, cit., p. 360 defines the use of this principle as “distorted”

<sup>547</sup> 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 this link: <https://www.globalhealthrights.org/wp-content/uploads/2014/01/STC-215-1994.pdf>

<https://www.globalhealthrights.org/wp-content/uploads/2014/01/STC-215-1994.pdf>

<sup>548</sup> Article 428 of the criminal Code in made in accordance with art. 6 of Ley Organica 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.»

<sup>549</sup> The translation is done by the the author, here 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 unavigilancia 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 materity nidad comportan, ni cumplir por sí mismo los deberes (art. 39,3 CE) inherentes a tales situaciones». Indeed, the Court states that any intervene on the right to physical

Apart from the obsolete argument regarding social interest, we must acknowledge that very delicate issues might arise in this field. Specifically, in cases involving people with severe intellectual disabilities, arguments such as the best interest one or the one related to parental capabilities are not completely inconsistent, but underline relevant ethical and legal issues. What should be highlighted is that evaluation on the part of the judges must follow objective criteria and supported decision-making processes and the less intrusive solution should always be valued. The sterilisation 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 grant 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 sexual-reproductive health matters.

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 streamrolled in the name of commodity<sup>550</sup>.»

## 2.2. *Forced sterilization in international law: the CRPD and the case law of the ECHR*

Even before the entry into force of the *Standard Rules* and then the *Convention on the rights of persons with disabilities*, the sterilisation of women with disability was internationally condemned, just like forced sterilisation against 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*

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integrity must be justified by a contrary right and value recognized by the Constitution, whose protection covers the violation of the right to physical integrity.

<sup>550</sup> M. D. A. Freeman, *Sterilising the Mentally Handicapped*, in M. D. A. Freeman (eds.), *Medicine, Ethics and the Law*, 1998, London.

### CHAPTER III

*Violence Against Women* (CEDAW) in 1992<sup>551</sup> and 1999<sup>552</sup>, where forced sterilization was qualified as a violation of fundamental rights, a coercion over women's body and, as such, something violating their free and informed consent and their dignity<sup>553</sup>.

Forced sterilization of women and in general of people with disability is now explicitly forbidden by the CRPD, and in general it is contrary to several dispositions of it. We will proceed by starting from the most general provisions and concluding with the more detailed ones. The first relevant article is Article 12<sup>554</sup>. Here it is stated that any person with disability is recognized equally as person before the law (1) and that the State shall recognize his/her/their legal capacity in every aspect of life on an equal basis with others. At Paragraph 3, States are called to take appropriate measures to provide people with disability with the support they might require to exercise their legal capacity. At Paragraph 4, States are called to take appropriate and effective measures to grant 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.» It is undoubted that a medical practice of sterilization without or even against the consent of the person involved represents a violation of the abovementioned principle of equal recognition as a person in front of the law, and more broadly of the legal capacity of the person with disability. Another general

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<sup>551</sup> 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 this link: <https://www.refworld.org/type,GENERAL,CEDAW,,453882a422,0.html>

<sup>552</sup> CEDAW, *General Recommendation No. 19: Violence against Women*, cit. Adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women, in 1992 (Contained in Document A/47/38) available at this link: <https://www.refworld.org/type,GENERAL,CEDAW,,453882a422,0.html>

<sup>553</sup> CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) available at this link: <https://www.refworld.org/type,GENERAL,CEDAW,,453882a73,0.html>

<sup>554</sup> 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*, in *International Journal of Human Rights*, 20, 2016, p. 471; 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 Right of Persons with Disabilities*, cit., 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;.

principle that can be applied is contained in Articles 15<sup>555</sup>, 16<sup>556</sup>, and 17<sup>557</sup> which protect the person from inhuman and degrading treatments, from exploitation, violence and abuse and protect her/his integrity.

It is evident that forced sterilization implies a substantial intrusion in the personal freedom of the person by causing irreversible damage to her/his psycho-physical integrity, which is qualified by international law as torture<sup>558</sup>. This damage, for our national system, is to be considered as “very serious<sup>559</sup>”, as we will further discuss.

Coerced sterilization is also relevant for Article 25<sup>560</sup> of the Convention, in particular letters a) and b) provided they affirm the need 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

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<sup>555</sup> 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 Right of Persons with Disabilities*, cit., pp. 426-466

<sup>556</sup> 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 Right of Persons with Disabilities*, cit., pp. 466-494

<sup>557</sup> 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 Right of Persons with Disabilities: A Commentary*, Oxford University Press, 2018, pp. 494-508

<sup>558</sup> Sterilization was qualified as cruel, inhuman and degrading treatment by both 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, (2016), para. 32, available at this link [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en](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 this link: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/000/97/PDF/G1600097.pdf?OpenElement>.

In addition we need to mention that in 2018 the Special Rapporteur on the rights of persons with disabilities, in 2018, 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 programs, seek informed consent prior to any medical treatment, respect privacy and 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 here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/75/PDF/N1822475.pdf?OpenElement>.

<sup>559</sup> Art. 538 paragraph 2 n. 3 of the Italian Criminal Code, see the following paragraph.

<sup>560</sup> 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*, in I. Bantekas, M. Ashley Stei, D. Anastasiou (eds.), *The UN Convention on the Right of Persons with Disabilities*, cit., pp. 705-734

### CHAPTER III

minimize and prevent further disabilities, including among children and older persons».

Both are applicable to the case of forced sterilization. Article 23<sup>561</sup> is even more relevant. Forced sterilization represents a manifest violation of the duty of each State to adopt measures to contrast discriminations against people with disability 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*<sup>562</sup>. In this report, sterilization is described as a very widespread medical practice still happening worldwide nowadays, Europe included. Here, 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 in front of 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*<sup>563</sup>, 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 ECHR, as we mentioned before, we could apply the principles formulated in the case-law regarding sterilization, in general and in particular that of

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<sup>561</sup> V. Dalla 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 Right of Persons with Disabilities*, cit., pp. 628-656

<sup>562</sup> 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 this link: [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/72/133](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/72/133)

<sup>563</sup> *Gauer and Others v. France*, Application n. 61521/08, 23 October 2012

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*<sup>564</sup>, where three Roma women complained they were sterilized without their consent and their country failed to successfully investigate in order to find and punish those responsible for such a violation. The three women affirmed that their ethnic origin was the main reason behind what had happened. 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<sup>565</sup>. 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*<sup>566</sup>, 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<sup>567</sup>. Of course, the case here is different because we are talking about women who were fully capable of expressing their consent; however, the analogy is still functional if we want to highlight the fact that the Court condemns the violation of informed consent and physical integrity using Article 3 and Article 8 of the Convention.

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<sup>564</sup> *I.G., M.K. and R.H. v. Slovakia*, Application no. 15966/04, 13 November 2012. On the issue of forced sterilisation 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.

<sup>565</sup> Another similar case to analyze are *K.H. and Others v. Slovakia*, Application no. 32881/04, 24 August 2011, and *V.C. v. Slovakia*, Application no. 18968/01, 8 November 2001 both concerning Roma women and the fact that they found they were sterilized 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.

<sup>566</sup> *Y.F. v. Turkey*, Application no. 24209/94, 22 July 2003

<sup>567</sup> 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 comment by: J. Dute, *European Court of Human Rights. ECHR 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

### 2.3. *Forced sterilization: the Italian legal framework*

In 1998, the Italian Committee for Bioethics expressed its opinion on forced sterilization, where it was clearly stated that any form of coerced sterilization - even if aimed at controlling social phenomena- influencing the demographic asset or the reproductive capability of people with genetically transmissible diseases or the libido of sexual crime perpetrators, must be considered intrinsically illicit<sup>568</sup>. The Committee affirmed that the guiding principle in this field must be that of the inviolability of the body (*intangibilità del corpo*), which finds an exception in the consent of the interested person.

The Committee unanimously stated that the sterilization of people with disability cannot be covered by any bioethical justification. The Committee had no doubt that the main aim behind the sterilization of people with disability is always of eugenic nature, which is considered unacceptable in a society where absolute respect for the human being is the primary value<sup>569</sup>. Forced sterilization is also punished by the Criminal Code, as we will further discuss.

#### 2.3.1. *Forced sterilisation in Italy according to legislation and Constitution*

We have already mentioned how sterilisation is regulated and conceived on the international level. We will now analyse the laws regulating sterilisation in our domestic legal system and ascertain which constitutional parameters are relevant in this case.

Just like forced abortion, forced sterilization in Italy is a crime<sup>570</sup>. Article 583, Paragraph 2 no.3, of the Criminal Code qualifies any damage/injury implying the loss

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<sup>568</sup> See: Comitato Nazionale per la Bioetica, *Il problema bioetico della sterilizzazione non volontaria*, Roma, 1998, p. 24, with the following quotation: «è in definitiva in nuce illecita ogni forma di sterilizzazione coattiva anche se diretta al contenimento di fenomeni sociali o individuali, capaci gli uni di realizzare grave turbamento per l'equilibrio demografico, gli altri di inibire la funzione procreativa in soggetti portatori di tare ereditarie trasmissibili o ad attenuare la libido in soggetti inclini alla violenza sessuale». See also: F. D'Agostino, *La sterilizzazione come problema biogiuridico*, Torino, 2002; A. Romano, *Sterilizzazione umana e legalità costituzionale*, Napoli, 2000

<sup>569</sup> Comitato Nazionale per la Bioetica, *Il problema bioetico della sterilizzazione non volontaria*, Roma, 1998, p. 25

<sup>570</sup> See T. Padovani, *Sterilizzazione*, in *Enciclopedia del diritto*, XLIII, Milano, 1990, p. 1085 ss and the following notes.

of an organ or reproductive capacity as a very serious personal injury (*lesione personale gravissima*)<sup>571</sup>.

An exception is made for voluntary sterilisation, which falls outside criminal law provisions and outside Article 5 of the Civil Code (*atti di disposizione del proprio corpo*)<sup>572</sup>.

The abovementioned provisions are probably referred 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<sup>573</sup>. As we have mentioned before, this is the case for arguments such as that of the best interest or the therapeutic treatment argument.

Forced sterilization is contrary to the Italian Constitution, in particular it is against Article 2, Article 13 and Article 32.

Article 2 refers to the notion of self-determination in the area of medical treatments, Article 32 states that it is not possible to force anyone to undergo medical treatments, except when specific law provisions impose them. Article 13 reinforces Article 32, setting forth a legislative and jurisdictional guarantee on any limitation of personal freedom.

We must also note that 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.

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<sup>571</sup> Article 552 cp (*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., V section, 18 March 1987, in *Foro Italiano*, 1998, 111, 2, 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*, Vol. X, Milano, 2000, 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*, Milano, 2011, pp. 419-422.

<sup>572</sup> The literature on the topic is very vast. On the profile related to 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 sterilisation 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 e ss.; E.M. Ambrosetti, *Sterilizzazione e diritto penale*, in S. Canestrari, G. Ferrando, C.M. Mazzoni, S. Rodotà, P. Zatti (eds.), *Il governo del corpo, Trattato di Biodiritto*, I, Milano, 2011 p. 738.

<sup>573</sup> S. Carnovali, *Il corpo delle donne con disabilità*, cit., p. 348

The notion that immediately comes to mind is that of dignity, and it is not a coincidence that during the Constitutional Assembly sterilization was specifically mentioned<sup>574</sup>: «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<sup>575</sup>». Moreover, Article 32 is essential for its generic protection of the right to health which, as declared by the Constitutional Court early in the 1990s, is an individual right that can be justified *erga omnes* and is comprehensive both of physical and psychological integrity<sup>576</sup>.

The combination of these articles (2, 13, 32) was used in 2008 by the Constitutional Court in the elaboration of the notion of informed consent, which is at the intersection of the right to health and self-determination<sup>577</sup> and is relevant when it comes to sterilization and disability. In this regard, it should be noted that informed consent,

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<sup>574</sup> It is the case to remember that eugenics was a reality in Italy, especially during fascism, and it ended at the beginning of the seventies. For further information on the Italian case see F. Cassata, *Molti, sani e forti. L'eugenetica in Italia*, Torino, 2006

<sup>575</sup> The translation of this passage from Aldo Moro is done by the author, here 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» during *Assemblea Costituente*, 28 January 1947. See *Atti della Commissione per la Costituzione, Resoconto 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

<sup>576</sup> Constitutional Court, decisions n. 365/1991 and 485/1991 which adopted a jurisprudence from the Court of Cassation (Cass.civ., n. 3025, 1985). This decisions pertain the so called “biological damage” by affirming the need to restore it, for an overview of the jurisprudential evolution of this profile see: C. Castronovo, *Danno biologico: un itinerario di diritto giurisprudenziale*, Milano, 1998

<sup>577</sup> 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](http://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; See the following note for further comments.

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 of the Constitution, which establish, respectively, that personal freedom is inviolable and that no one can be obliged to a particular health treatment except by law<sup>578</sup>.

This principle was then formulated by Law no. 219/2017<sup>579</sup>, which explicitly refers to the condition of a person who has lost legal capacity (*interdetto* ex Art. 414 of the Civil Code<sup>580</sup>) and has a legal guardian and the person whose legal capacity is only partially missing (*inabilitato* ex Art. 415<sup>581</sup>) or is supported by an administrator (*amministratore di sostegno* ex art. 404 of the Civil Code<sup>582</sup>). 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/his/their capacity of understanding and making decisions (Paragraph 1). For the person who is under legal guardianship

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<sup>578</sup> The translation is done 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 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.

<sup>579</sup> On Law n. 219/2017 see *Biolaw journal- Rivista di Biodiritto*, n. 1, 2018, pp. 1-104, with a specific Focus dedicated to Law on informed consent.

<sup>580</sup> 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 on the legal doctrine and case-law on article 414 of the Civil Code see: P. Baccharini *Art. 414 cc Persone che possono essere interdette*, in P. Cendon (eds.), *Commentario al codice civile*, Milano, 2009, pp. 927-997

<sup>581</sup> The observation on the matter of article 414 Civil Code (see the previous note) is valid for article 415 Civil Code as well. This article provides a softer protection of the person, limiting her/his legal capacity for the purpose of some precise acts (*atti di straordinaria amministrazione*) when her/his condition is not so serious. This article needs to be coordinated now with article 404 on Support Administration. For an overview on the legal doctrine and case law on article 414 of the Civil Code see: A. Bulgarelli, *Art. 415 cc Persone che possono essere inabilite*, in P. Cendon (eds.), *Commentario al codice civile*, Milano, 2009, pp. 999-1026.

<sup>582</sup> This law was object of analysis 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 on legal doctrine and case law on Article 404 see: R. Masoni, *Art. 404 Amministrazione di sostegno*, in P. Cendon (eds.), *Commentario al codice civile*, Milano, 2009, pp. 545-612

the guardian will express consent, but the will of the 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, his/her/their dignity (Paragraph 3)<sup>583</sup>. As far as the person who has partially lost legal capacity is concerned, she/he needs to express her/his consent, but if this person has an administrator in the field of medical decisions, then he/she must be involved in this decision, partially or fully taking into consideration the will of the beneficiary and her/his capacity to want and understand (Paragraph 4)<sup>584</sup>. 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<sup>585</sup>. In this case, the controversial notion of legal capacity<sup>586</sup> becomes even more problematic because it may happen that a person who is legally capable of acting is not 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 his/her will and must be involved in choices concerning his/her fundamental rights<sup>587</sup>. This is when, specifically in the medical field, a notion of *de facto* capacity should be embraced<sup>588</sup>, with an assessment carried out case by case, depending on the specific medical treatment.

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<sup>583</sup> On this matter see G. Ferrando, Art.3, Focus I. 219/2017, in *Biolaw journal- Rivista di Biodiritto*, n. 1, 2018, pp.46-53

<sup>584</sup> G. Ferrando, Art.3, Focus I. 219/2017, in *Biolaw journal- Rivista di Biodiritto*, n. 1, 2018, pp.46-53

<sup>585</sup> See M. G. Bernardini, *Disabilità e consenso libero ed informato ai trattamenti sanitari*, in *InformareH*, 2018 available online at this link: <http://www.informareunh.it/disabilita-e-consenso-libero-ed-informato-ai-trattamenti-sanitari/>.

<sup>586</sup> 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 graduated and limited to specific notion, while at the same time the notion of capacity of understand and want was overlapped with the notion of legal capacity. See also P. Stanzione, *Capacità (diritto privato)*, in *Enciclopedia giuridica*, V, Roma, 2010, p. 21 ss.

<sup>587</sup> 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.

<sup>588</sup> See P. Zatti, *Il processo del consenso informato*, in L. Klesta Dosi (eds), *I nuovi diritti nell'integrazione europea: la tutela dell'ambiente e la protezione del consumatore*, Padova, 2000, p. 214; U.G. Nannini, *Il consenso al trattamento medico Il consenso al trattamento medico. Presupposti teorici e applicazioni giurisprudenziali in Francia, Germania e Italia*, Milano, 1989, 247e ss. 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.

As we have already seen, forced sterilization is prohibited under the CRPD, sanctioned, albeit in different contexts, by the EHCR and by the Oviedo Convention<sup>589</sup>, and as such it becomes relevant also under Article 117 of the Constitution<sup>590</sup>.

### 2.3.2. *Forced sterilisation in Italy according to the Tribunals and Courts*

As regards Italy, it should be acknowledged that in our system forced sterilisation, as well as forced abortion, are crimes disciplined by the Criminal Code.

Despite this, it is not easy to ascertain how many decisions on sterilization of people/women with disabilities reach Courts. The competent judge on this matter is the *Giudice tutelare*<sup>591</sup> 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<sup>592</sup>.

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<sup>589</sup> 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 like this: «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*. Costituzione e fine vita. Disposizioni anticipate di trattamento ed eutanasia, Milano, 2018, p. 36 s. 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 and 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 also: C. Picicocchi, *Costituzione e fine vita. Disposizioni anticipate di trattamento ed eutanasia*, in *Diritto pubblico comparato ed europeo*, III, 2001, p. 1301

<sup>590</sup> Here we refer to the technique of the so called *parametro interposto*, relevant in the constitutional legitimacy scrutiny. 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 from 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.

<sup>591</sup> 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

<sup>592</sup> S. Carnovali, *Il corpo delle donne con disabilità*, cit. p. 334. This affirmation is also supported by interviews carried by Carnovali on the topic with judges, lawyers and social actors in the field of disability.

This was the case for the decision of the Tribunale di Catanzaro dated 18 November 2013<sup>593</sup>. 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 sterilisation, without her consent<sup>594</sup>. 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 constitute a solution to protect the woman, who was described as young and good-looking, from abuse she would not have been able to prevent herself.

After a long and articulated phase of inquest, the judge decided to reject the petition, once he had summoned the doctor, the guardian, but 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 for the person by her parents or her legal guardian<sup>595</sup>.

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 prosecution of the pregnancy would be harmful for the woman and for the baby<sup>596</sup>.

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<sup>593</sup> The full text of the decision is available online at this link: <http://www.ilcaso.it/giurisprudenza/archivio/10118.pdf>

<sup>594</sup> Pretura di Nicosia, 23 gennaio 1997, in *Diritto di famiglia*, 1998, p. 1533

<sup>595</sup> S. Rossi, *Per il suo bene: note sulla sterilizzazione coatta dell'interdetta*, in *Persona e Danno*, 2014, Available at this link: <https://www.personaedanno.it/articolo/per-il-suo-bene-note-sulla-sterilizzazione-coatta-dellinterdetta-trib-catanzaro-decr-18112013-gt-de-lorenzo-stefano-rossi>. See also but also S. Carnovali, *Il corpo delle donne con disabilità*, cit., pp. 334-336

<sup>596</sup> 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 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»

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 having heard 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 to be a parent. Considering that there were no substantial medical reasons related to her physical condition, and given her positive view of maternity, 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 sterilisation 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 mutilate 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<sup>597</sup>».

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 disability, due to double oppression<sup>598</sup>.

Scholars have positively considered this judgement<sup>599</sup>, 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 disability, balancing the need for protection and the right to self-determination in the sexual sphere. We must observe that there might be cases in

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<sup>597</sup> Translation done by the author, here 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»

<sup>598</sup> Some scholars talk about a patriarchal view see: S. Carnovali, *Il corpo delle donne con disabilità*, cit., p. 374

<sup>599</sup> For comments on this decision see: S. Rossi, *Per il suo bene: note sulla sterilizzazione coatta dell'interdetta*, in *Persona e Danno*, 2014; M.G. Bernardini, *Il soggetto tra cura e diritti. Disabilità, relazioni e inclusione*, in T. Casadei (ed.), *Donne, diritto, diritti. Prospettive dal giusfemminismo*, Torino, 2009, 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](http://www.sanita24.ilsole24ore.com).

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 authorized by a judge, but these cases are to be considered residual.

3. *The right to sexuality of people with intellectual disability: how the law can inhibit or facilitate the expression of sexuality*

After having analysed unlawful practices affecting the sexual sphere of people with disability by injuring their reproductive capability, we will now move to the broader dimensions of sexual expression and the ways in which law can inhibit or facilitate it.

3.1. *(Over)protection: criminal law and sexual agency of people with intellectual disabilities*

We have already discussed how sexuality constitutes an essential part of personhood and identity and how scholars have recently been asserting that people with disability should have legal agency in all fields of life, including the sexual one<sup>600</sup>. In the previous chapter we mentioned the Italian legislative approach towards disability and sexuality, referring to previous legal offences which had the result of denying the possibility for people with disabilities to express consent to any sexual act. This kind of provision does not constitute an exception: criminal law has also assumed this kind of 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<sup>601</sup>».

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 tests of capacity, aimed

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<sup>600</sup>T. Shakespeare, *Sexual politics of disability*, cit.; K. Q. Hall, *Feminism, Disability, and Embodiment*, in *NWSA Journal*, 14, 3, 2002, pp. vii- xiii; A. L. Wilkerson, *Disability, Sex Radicalism, and Political Agency*, in *NWSA Journal*, 14, 3, 2002, p. 33-57

<sup>601</sup> A. Arstein-Kerslake, E. Flynn, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex*, in *Social & Legal Studies*, 25, 2, 2016, p. 237

at assessing the person's potential to understand the relevant elements of sexual acts. These instruments are commonly used in common law jurisdictions<sup>602</sup>.

An example of how these tests work can be found in two recent decisions from the United Kingdom, where the Court of Protection declared the involved person to be incapable of consenting to sex. The first case was *D Borough Council v AB*<sup>603</sup>, 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 that Alan be moved to other 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<sup>604</sup>.

Similar principles were used in the case of *A Local Authority v H*<sup>605</sup>, which involved a woman with mild learning difficulties and atypical autism of 29 years of age. The Court declared she was incapable of consenting to sex because she could not understand the health implications of sexual relations, and that she could not effectively deploy the information she had in the decision-making process (in other words, she was not able to say no to having sex)<sup>606</sup>.

Apart from this example from case law, the above-mentioned legislation assumes that people with intellectual disabilities are vulnerable when it comes to expressing their

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<sup>602</sup> See for example, section 30, *Sexual Offences Act 2003* (England and Wales).

A. Arstein-Kerslake, E. Flynn, *Legislating Consent*, cit., p. 226

<sup>603</sup> *D Borough Council v AB* [2011] EWHC 101 (COP)

<sup>604</sup> 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 has 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 online: <https://ssrn.com/abstract=2332259>

<sup>605</sup> *A Local Authority v H* [2012] EWHC 49 (COP)

<sup>606</sup> For further comment see: Jonathan Herring (2012) Mental disability and capacity to consent to sex: *A Local Authority v H* [2012] EWHC 49 (COP), *Journal of Social Welfare and Family Law*, 34:4

sexual needs and desires<sup>607</sup>, while many disability activists have fought to be free from disproportionate interferences in their sexual lives<sup>608</sup>. While it is true that people with disabilities and women and young people with intellectual disability 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<sup>609</sup>.

All these factors, «which are also risk factors for sexual abuse in the general adult population<sup>610</sup>», are the ones to be contrasted if we want to protect people with disability from abuses in the sexual sphere. On the contrary, laws that inhibit and sometimes deny the expression of sexuality of people with disability 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 disability can be supported by international treaties, specifically by the CRPD, even though the right to sexual agency has not perfectly found its place in human rights law<sup>611</sup>. Indeed, the fact that these laws often target people with cognitive disability 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<sup>612</sup>, which requires non-discriminatory treatment in the field of relationships and equal recognition of legal capacity, granted by Article 12<sup>613</sup>.

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<sup>607</sup>This legal provision mainly affects women see M. McCarthy, *Sexual violence against women with learning disabilities*, in *Feminism & Psychology*, 8 (4), 1998, pp. 544-551 and M. McCarthy, *Women with intellectual disability: their sexual lives in the 21st Century*, In *Journal of Intellectual and Developmental Disability*, 39 (2), 2014, pp. 124-13

<sup>608</sup>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*, London, 1991

<sup>609</sup>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, pp. 1-140

<sup>610</sup>A. Arstein-Kerslake, E. Flynn, *Legislating Consent*, cit., p. 227

<sup>611</sup>T. Shakespeare, *Disability rights and wrongs*, cit.

<sup>612</sup>A. Arstein-Kerslake, *Understanding sex: the right to legal capacity to consent to sex*, in *Disability & Society*, 30, 10, 2015, pp. 1459-1473,

<sup>613</sup>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*, in *International Journal of Human Rights*, 20, 4, 2016, pp. 471-490

### 3.1.1. *The recent reform in Ireland*

Ireland, just like Scotland and England<sup>614</sup>, was one of those countries in which criminal law contributed to the creation of barriers to the expression of sexuality by people with disabilities<sup>615</sup>.

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*<sup>616</sup> amongst *Sexual offences*, by criminalizing a person who had or attempted sexual intercourse with a mentally impaired person.

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<sup>614</sup> 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 Maher, *Rape and Other Things: Sexual Offences and People with Mental Disorder*, in *Edinburgh Law Review*, 14, 2010, p 131.

For what concerns Scotland 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 disability would not be treated differently from 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

<sup>615</sup> 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

<sup>616</sup> Here 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,  
 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 two 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. »

The mentally impaired person is the one, according to paragraph 85, 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 is not a defence for this offence, which is why we can define it as a *strict liability offence*<sup>617</sup>. The only defence possible is for the person accused to show that he/she 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 for 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 affirmed that the law proves to be a denial of the sexual agency of people with cognitive disability, rather than the criminalization of perpetrators who might take advantage of this hypothetical vulnerability<sup>618</sup>.

Many disability groups called for a legal change, affirming the discriminatory nature of this offence and highlighting the negative impact the law had on the sexual expression of people with cognitive disabilities<sup>619</sup>.

During the years, evidence emerged on the fact that this separate offence had not led to increased prosecution, but had had what was defined as a «chilling effect<sup>620</sup>» on the expression of sexuality for people with cognitive disabilities, by creating more barriers for 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*<sup>621</sup>, dated 2011. Simultaneously, this Commission opened up to the submission of recommendations on the part of 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

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<sup>617</sup>A. Arstein-Kerslake, E. Flynn, *Legislating Consent*, cit., p. 3

<sup>618</sup>A. Arstein-Kerslake, E. Flynn, *Legislating Consent*, cit., pp. 6

<sup>619</sup>G. Minogue, R. Hopkins, *We want to get into relationships, not to go to goal!*, 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> (accessed 25 November 2014).

<sup>620</sup>A. Arstein-Kerslake, E. Flynn, *Legislating Consent*, cit., pp. 1-24

<sup>621</sup> Available here: [https://www.lawreform.ie/\\_fileupload/consultation%20papers/cp63.htm](https://www.lawreform.ie/_fileupload/consultation%20papers/cp63.htm)

*Mental Capacity Legislation*<sup>622</sup>). The Commission also recommended to retain strict liability offences, in very specific cases, such as the ones related to positions of trust or authority<sup>623</sup>.

This arrangement was confirmed in the 2013 Final Report of the Commission<sup>624</sup>, even though many organizations argued against any separate offence for people with cognitive disabilities and asked instead to introduce specific sexual education programs to grant informed decisions in the sexual sphere<sup>625</sup>.

After the final report, Senator Zappone, together with the *Centre for Disability Law and Policy* of NUI Galway and representatives of people with disabilities, elaborated a Private Member's bill<sup>626</sup>. Their proposal was to abolish Section 5 *in toto* and replace

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<sup>622</sup> The law in this field was reformed in 2015 and now is *The assisted decision making (mental capacity act) 2015*, available here: <http://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/print.html>. This law applies in 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

<sup>623</sup> Here 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] »

<sup>624</sup> Available here: [https://www.lawreform.ie/\\_fileupload/Reports/r109.pdf](https://www.lawreform.ie/_fileupload/Reports/r109.pdf)

<sup>625</sup> 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.

<sup>626</sup> Flynn reports being contacted by Zappone after having published a blog post of Human Rights in Ireland arguing for a disability neutral approach to sexual offences 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*, cit., p. 12

it with an offence of abuse of a position of power, built in a disability-neutral way<sup>627</sup>. 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 her/his 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<sup>628</sup>» (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 determinative 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 strictly anchored to a pre-given idea of people with intellectual disability. 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,*

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<sup>627</sup> «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*, in *International Journal of Law in Context*, 13(1), 2017, pp. 45

<sup>628</sup> 2014 Act, Section 2 <https://data.oireachtas.ie/ie/oireachtas/bill/2014/41/eng/initiated/b4114s.pdf>

*(b) evaluating relevant information for the purposes of deciding whether to engage in that act, or*

*(c) communicating his or her consent to that act by speech, sign language or otherwise.*

What happens here is that there is no perfect coincidence 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<sup>629</sup>.

At §22 of the renewed Act we find the offence related to the sexual engagement of a person in a position of authority<sup>630</sup> 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 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 highly unlikely to imagine this person arguing she/he was unaware of the disability of the person involved<sup>631</sup>.

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<sup>629</sup> See A. Arstein-Kerslake, E. Flynn, *Legislating Consent*, cit., p. 22-23 and A. Arstein-Kerslake, E. Flynn, *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.

<sup>630</sup> Accordig 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»

<sup>631</sup> Arstein-Kerslake, Anna and Flynn, Eilionóir, *Legislating Consent: Creating an Inclusive Definition of Consent to Sex* (May 12, 2016). *Social & Legal Studies*, Volume 25, Issue 2, 2016. 3

In the end, it seems that this defence is very unlikely to be applied in practice.

### 3.1.2. *Sexual offence in Italy: towards a disability-neutral approach*

It has already been mentioned that Italy abandoned the paternalistic and over-protective approach towards disabled people's sexuality with the comprehensive reform of sexual offences of 1996<sup>632</sup>. Before this reform, there was a strict liability offence<sup>633</sup> at Article 519(2)(3), specifically aimed at people *sick of the mind* (*malate di mente*) or in *condition of physical or psychological inferiority* (*condizioni di inferiorità fisica o psichica*), which disproportionately compressed the sexual agency of people with disability<sup>634</sup>.

Article 609-bis was introduced with the abovementioned reform. This offence substantially adopts a disability-neutral approach, and as such can be considered in line with the already mentioned Article 23 of the CRPD<sup>635</sup>. At Paragraph 1, the offence is built around the conduct of forcing someone to have sexual intercourse by using violence, blackmail or by abusing of one's authority<sup>636</sup>.

Article 609-bis Paragraph 2 punishes whoever 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). In particular the reform, with the aim of mediating between the need for protection from abuse and

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<sup>632</sup> 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. While for a general and more actual 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

<sup>633</sup> C. M. Grillo, *Handicap e reato*, in *Giurisprudenza Italiana*, 1994, p. 10

<sup>634</sup> See for example V. Musacchio, *La nuova legge sulla violenza sessuale*, in *Rivista Penale*, 1997, 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 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"»

<sup>635</sup> V. Dalla 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 Right of Persons with Disabilities*, cit., pp. 628-656

<sup>636</sup> 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. Canestrai, A. Manna, M. Papa (eds.), *Trattato di diritto penale, Parte speciale- IX*, Milano, 2011, pp. 81-92

exploitation and the need to give people with disabilities their sexual agency back, formulated the offence of induction<sup>637</sup>.

It was immediately established by the Court of Cassation that, in line with the reform, a presumption of incapacity of the person with disabilities to give consent for the sexual act must be avoided.

For this reason, there is a need to assess the factual situation case by case. This assessment must consider the persistence of the 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<sup>638</sup>».

It should be noticed that the offence of induction, as formulated in Article 609-bis, Paragraph 2, no. 1, does not consider disabled people only as passive subjects of the offence. This was confirmed by Courts immediately<sup>639</sup>, given that the relevant state of inferiority can depend upon many factors, both intrinsic and external to the subject. For instance, judges explicitly recognized that environmental factors may hinder the individual's capacity to decide.

A recent decision of the Court of Cassation<sup>640</sup>, for example, found that in a case regarding the sexual relationship between a school teacher and his 17 year old student with mild 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-determinate in a comprehensive, adequate way in response to the solicitation she received» from the teacher<sup>641</sup>.

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<sup>637</sup> Cass. pen. Sez. III, n. 12110, 24/09/1999

<sup>638</sup> Cass. Pen., Sez. 3, n. 15910 del 12/02/2009. More on the nature of consent Cass, Sez. 3, n. 52041, 11/10/2016; Cass. Pen., Sez., 3, n. 38261 del 20/09/2007.

<sup>639</sup> Cass. Pen., Sez. 3, n. 4114 del 3/12/1996

<sup>640</sup> Cass. Pen., Sez. 3, n. 45947/17, 6/10/2017

<sup>641</sup> The translation is done by the author, here 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. »

### 3.2. *How to support the sexuality of people with disabilities: the positive experience of Denmark*

As we saw how the law can hinder the possibility of sexual expression of people with disabilities, and how this aspect has recently evolved, we are now going to analyse the ways in which the law can actively promote spaces for sexual self-determination.

Denmark is the only country that has adopted a legal document addressing the needs of people with intellectual disability in the sphere of sexuality, providing a set of recommendations and concrete solutions for operators and caregivers<sup>642</sup>.

The document, which is not strictly binding, was approved, in the form of Guidelines, by the National Ministry of Social Affairs for the first time in 1989. We must briefly consider that the document was the result of years of debate at the political, social and scientific levels, mainly promoted by the socialist-inspired *Youth Circle of the National Association of Cripples*<sup>643</sup>.

It was in 1969 that the jurist Niels Erik Bank-Mikkelsen<sup>644</sup>, after a discussion over the possible legal responsibility of operators helping people with disability to fulfil a sexual life<sup>645</sup>, published an article in the *Mental Hygiene Journal (Mental Hygiejne)*,

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<sup>642</sup> 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, during this whole paragraph reference will be made to the one and only author who wrote about this Guidelines in English, translating some pieces of this text. For possible Danish speakers a link to the original text of the guidelines in Danes will follow.

<sup>643</sup> 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 the one 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;

<sup>644</sup> He was an advocate for the rights of people with intellectual disability. He is very well-known for the elaboration of the principle of normalization, according to which people with intellectual disability should live a life resembling the one of nondisabled as much as possible. He thought that this could be made by teaching self-help skills and providing a variety of supportive service. 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.

<sup>645</sup>Niels Erik Bank-Mikkelsen, *Udviklingshæmmede og deres seksualproblemer*, in *Mental Hygiejne*, 5-6, 1969 pp.120-125

establishing the basis for further developments of the Danish approach to sexual facilitation.

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,
- 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<sup>646</sup>.

On the basis of this elaboration and on the impulse of the Government, the National Board of Social Services presented, in October 1986, a report titled *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<sup>647</sup>.

The report highlighted the urgency to adopt national guidelines to ensure operators could engage with the sexual lives of people with disability 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 on how the staff who worked in institutions and group homes could address the sexuality of people with disabilities.

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<sup>646</sup> Niels Erik Bank-Mikkelsen, *Udviklingshæmmede og deres seksualproblemer*, cit., the translation of this part of the article in English is made by D. Kulick, J. Rydström, *Loneliness and its opposite. Sex, Disability, and the Ethics of Engagement*, Duhram, 2015, p. 47

<sup>647</sup> Socialstyrelsen undersøgelse af behovet for forbedringer af handicappedes muligheder for seksualliv, Socialstyrelsen, October 1986

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The outcome was the document *Guidelines about Sexuality - regardless of handicap*, presented on 10 February 1989<sup>648</sup>. This text contained specific and concrete recommendations for social workers and helpers to assist people with disability in the explication of their sexuality.

The guidelines were then amended in 2001, and further in 2012. It is necessary at first to depict the main contents of the Guidelines before the latest amendment, then the main amendments will be discussed.

According to Danish legislation, the Guidelines do not constitute binding law<sup>649</sup>, they are, on the contrary, a set of recommendations and good practices with a persuasive nature, but also, for people with disability, a «tool to argue for respect and assistance<sup>650</sup>».

As regards the field of application of the text, we need to clarify that 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<sup>651</sup>.

Thanks to the guidelines, however, in 1990 a course for social workers to obtain a special certification in the area of sexuality and disability and become a sexual advisor (*seksualvejleder*) was established. According to Kulick, in 2010 there were 400 certified sexual advisors in Denmark, and he also reported the creation of two more programs in this field<sup>652</sup>.

The *Guidelines* open with a statement reaffirming that people with reduced physical or psychological functionality have the same basic needs and rights as other people. Given this framework, the goal of this document is to improve social and personal

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<sup>648</sup> Available in Danish here: [https://dagsorden-og-referater.brk.dk/Sites/Politiske\\_Internet/Internet/2012/InfDag6711-bilag/Bilag893327.PDF](https://dagsorden-og-referater.brk.dk/Sites/Politiske_Internet/Internet/2012/InfDag6711-bilag/Bilag893327.PDF)

<sup>649</sup> See D. Melchior, R. Tamn, *Danish Law in a European Perspective*, Copenhagen, 1996 and following notes

<sup>650</sup> D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 80

<sup>651</sup> 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 this link: [http://ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=70908&p\\_country=DNK&p\\_count=244](http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=70908&p_country=DNK&p_count=244)

<sup>652</sup> The course was established in 1990, and it consists of 20 full days of meetings and coursework in one-and-half years. Students are provided materials on sexuality and disability, complete practical assignments and carry on personal project they will have to discuss together with the study group. D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 90

functionality of people with disabilities and their possibility to develop as persons. The measures to foster sexual agency need to find place in this landscape, and in particular they are connected to the need to assist individuals in the possibility of contacting and being together with others.

The Guidelines take 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».

Where *Rule 9* is formulated in a negative form (*persons should not be denied*), the Guidelines take it a step further.

This is done by affirming 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.<sup>653</sup> »

After having sketched a general framework, the Guidelines are articulated in 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.

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<sup>653</sup> D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 5

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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<sup>654</sup>.

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<sup>655</sup>. It might 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 burdening the single individual. Everything on the matter of sexual facilitation is punctually discussed and agreed, then written down in plan which is a source of guarantees for the parties involved.

One of the many examples provided by Kulick concerns a young woman with cerebral palsy in her late twenties with no verbal language but limited movement of her head<sup>656</sup>. She lives in a group home. This woman, who in the book is called Helle, expressed the need to be in contact with a sexual advisor. This professional figure worked with her and elaborated a specific and detailed plan based on her needs and desires, which was to be executed by another person, a helper. The helper was asked to support Helle in the act of masturbation: to facilitate her/his task, this action was discussed in detail in the plan and broken down in its single parts. This takes place so that the user can be supported with the minimal intrusion needed in her privacy and so that the assistant does not need to perform sex with her to facilitate her sexual activity. The role of the written agreement on sexual facilitation is crucial, and it must be noticed that 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 are never disclosed.

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 his/her sexual needs are

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<sup>654</sup> 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, on the contrary this reinforce the idea that they are responsibility of the team working him/her. See D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 80

<sup>655</sup> A breakdown of all the interviews can be found as Appendix in the Book. See D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 297-299

<sup>656</sup> D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 125

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<sup>657</sup>. Some group homes have also developed an internal written policy on sexuality, a set of indications and also rules, which is usually given to everyone who moves into the home.

The Guidelines also contain a part pertaining to *problematic sexual behaviours* where ways in which helpers should respond to socially inappropriate or illegal behaviours of residents are discussed<sup>658</sup>.

The Guidelines were reformed in March 2012, taking the name of Handbook (*Handbog*)<sup>659</sup>. With a higher number of practical examples and situations for caregivers, they provide more accurate advice on how to talk about sexuality and more precise descriptions of the organization of group discussions.

The new document, however, also made substantial pejorative changes, strictly linked to an episode which happened in 2006 and its implications for the Municipality of Copenhagen<sup>660</sup>.

This fact led the Copenhagen City Council to the adoption of a 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<sup>661</sup>.

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<sup>657</sup> Several groups also use theatre and role-playing, for general information on the methodology of education on sexuality for people with intellectual disability 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 and 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.

<sup>658</sup> D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 95

<sup>659</sup> 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*, cit., p. 190.

<sup>660</sup> 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 of the extra cost he had to pay to have a female escort to provide him sexual services at his home. The National Social Appeals Board stroke down this application ruling that these costs were not covered by article 84 of 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 at this link: [http://ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=70908&p\\_country=DNK&p\\_count=2442](http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=70908&p_country=DNK&p_count=2442)

<sup>661</sup> 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. To have a general idea of how hierarchy works in the constitutional Danish system see: P. Carrozza, A. Di Giovine, G. F. Ferrari, *Diritto costituzionale comparato*, Roma, 2014, pp. 327-372 and P. Letto-Vanamo, D. Tamm, B. O. Gram Mortensen, *Nordic Law in European Context*, Berlin, 2018 and D. Melchior, R. Tamm, *Danish Law in a European Perspective*, Copenhagen, 1996

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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, lost its positive statement on the matter of sexuality of people with disability and opens now with a literal transcription of Rule 9 (UN Standard Rule), which, as we have mentioned above, is formulated in negative terms. Another substantial change is that the part concerning the duty of the helper not to perform sexual facilitation, but to find another helper or qualified expert who is willing to assist the person who is asking for assistance, was eliminated.

For what concerns the controversial part mentioning sex work, the formulation 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<sup>662</sup>».

To understand the impact of this provision we need to consider it in combination with the fact that a social worker/helper does not have the duty to find a substitute person who is capable of helping the user when he/she no longer wants to. 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<sup>663</sup>», a passage which clearly legally validates 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, it was reported by Kulick that the work of operators, social workers and helpers in group homes was not substantially affected. This happened because of the fact that 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 are ask them to contact the sex worker instead<sup>664</sup>.

Kulick also points out the implication that this change in the policy implies. He stresses that the persons who are being negatively affected 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

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<sup>662</sup> The translation is done by D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 191

<sup>663</sup> The translation is done by D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 192

<sup>664</sup> D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 192

their helpers anymore<sup>665</sup>. Nevertheless, Denmark can still be considered a unique case and a virtuous country in this field.

4. *Some conclusive remarks on the need to balance protection and self-determination of people with disability in the sphere of sexuality*

To conclude, we must acknowledge that many of the topics we have treated in this paragraph mainly concern and involve people with intellectual disabilities. Indeed, they are the ones (but not the only ones) facing a greater burden of discrimination and denial of sexuality<sup>666</sup>, but the consideration that follows may be applied to people with different kinds of impairments.

We need to mention that another issue that specifically affects disabled people's sexuality is the one related to sexual health, the access to contraception and to sexual health services and facilities<sup>667</sup>. In Italy, for example, according to the survey *The accessibility of services of gynaecology and obstetrics for women with disability (L'accessibilità dei servizi di ginecologia e ostetricia per le donne con disabilità)*, published in 2013 by *Coordinamento Gruppo Donne UILDM*<sup>668</sup>, 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 related to the services<sup>669</sup>.

This results in a massive violation of the fundamental human rights of these women in the field of reproduction and sexuality. It is documented that the lack of access to sexual health is one of the factors making people with disability more vulnerable to risks connected at different levels to the practices of sexuality.

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<sup>665</sup> D. Kulick, J. Rydström, *Loneliness and its opposite*, cit., p. 330

<sup>666</sup> 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.

<sup>667</sup> In particular for a discussion of the issue of access to obstetrics and gynecology services for women with disability see the work of S. Carnovali, *Il corpo delle donne con disabilità*, cit, pp. 377-383

<sup>668</sup> The report can be found at this link: <https://www.uildm.org/wp-content/uploads/2013/09/ServiziSanitariDonneDisabiliRapporto2013.pdf>

<sup>669</sup> The survey was done in collaboration with different professionals working in the field of disability rights. It was made by involving several Hospitals and public health services on the national territory. Information is gained by giving the questionnaire to professionals and operators working in the structures. The indicators used were: 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 structure with public transport, the training of operators on intellectual disability and the training of professionals based on different kind of disabilities (physical, intellectual etc.)

### CHAPTER III

Indeed, as we pointed out earlier, this vulnerability is not intrinsically connected to the condition of (intellectual) disability but, on the contrary, it is generated by many social factors. Of course, we should not 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 disability, 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 disability 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 them, «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<sup>670</sup>.»

In this specific field, for example, many public institutions in Denmark worked on the sensibilization of people with intellectual disability against abuses, by elaborating and publishing materials on the topic in accessible formats<sup>671</sup>. 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 titled *Prevent sexual abuse of people with handicap* with brochures, publications, links and videos on the topic.

To prevent abuse and foster self-determination, it is necessary first of all to remove legal obstacles related to discrimination, unwanted medical practices such as forced sterilization or criminal laws denying the possibility for people with disability 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 formulated by (and based upon the

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<sup>670</sup> J. Rydstrom, V. Kulik, *Loneliness and its opposite*, cit., p. 264

<sup>671</sup> See. J. Rydstrom, V. Kulik, *Loneliness and its opposite*, cit., p. 80

ideas of) the dominating subjects, and do not incorporate the perspective of people with disability<sup>672</sup>.

This is the case of criminal laws that only see people with disability as subjects in need of protection, as we have already analysed. However, removing these legal obstacles and re-establishing a situation of non-discrimination in this field is necessary, but might not be enough. Other measures, policies and programs should be implemented and designed by starting from the voices and concrete needs of people with disabilities. This is applicable both to people with intellectual disabilities and to those with physical disabilities.

For example, if we discuss the case of sexual violence and sexual abuse, a disability-neutral law might not be enough. Indeed, these laws are usually and virtuously based on the case-by-case assessment of consent. This, however, does not impact the core issue behind violence, namely building the capability of engaging in consensual sexual relationships and distinguishing between consensual and non-consensual relations.

That it is why there is a need to elaborate and implement inclusive sexual education<sup>673</sup>, capable of taking into consideration the different needs of people with different kinds of impairments. For example, in Sweden, in which sexual education programs (SRE) have been compulsory in schools since 1995 and cover topics such as anatomy, sexually transmitted diseases, relationships, pregnancy, love, gender equality and the

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<sup>672</sup>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 widely showed that rape and sexual offences law had been constructed in a way that never questions power imbalances between genders. Rape and sexual offences law 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 the book S. Estrich, *Real Rape*, Harvard, 1987

<sup>673</sup>. 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*, in *Sexuality and Disability*, 34, (2), 2016, 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, p. 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.

prevention of sexual harassment<sup>674</sup>, a specific program aimed at students with physical impairment was elaborated<sup>675</sup>.

These kinds of programs work on the discrimination and difficulties that a young person with a mobility or physical impairment may face<sup>676</sup>, which of course are different from the needs of people with intellectual disability. Many programs specifically aimed at them have been elaborated throughout the years, both within and outside Europe<sup>677</sup>, in contexts such as schools or group homes, and Italy is not isolated in this landscape<sup>678</sup>.

As we continue to adopt a national perspective on good practices and instruments to support the sexuality of people with disabilities, it should be the case to mention the experience of the municipality of Turin. Here, an info point on disability and sexuality has been active and available for people with disability and operators since 2002<sup>679</sup>.

The info point offers educational, psychological and psycho-sexological counselling, with the aim of supporting the self-determination of each person in the sphere of sexuality and affectivity<sup>680</sup>. 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

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<sup>674</sup> RFSU, *What is It All About? Information on Sex and Relationship Education in the Swedish School*. Stockholm, 2011

<sup>675</sup> J. Bahner, *Crippling sex education: lessons learned from a programme aimed at young people with mobility impairments*, in *Sex Education*, 18, (6), 2018, pp. 640-654

<sup>676</sup> J. Bahner, *Crippling sex education: lessons learned from a programme aimed at young people with mobility impairments*, in *Sex Education*, 18, (6), 2018, pp. 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. 2015. *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.

<sup>677</sup> 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.

<sup>678</sup> 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.

<sup>679</sup> On this see the book 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

<sup>680</sup> See F. Veglia, *Handicap e sessualità*, cit.

multidisciplinary scientific committee<sup>681</sup>. 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<sup>682</sup>.

Going back to the survey on access to gynaecological and obstetrics services for women with disability, what emerged from that study is the need for specific training for medical personnel on disability-related issues. This measure was defined as a vital requisite to having quality services<sup>683</sup>.

From this specific outcome of the survey we can observe, in general, 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.

Of course, these programs should take into consideration the specificity of each disability and could be implemented by operators themselves, fostering the creation of internal good practice

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<sup>681</sup> More information on their website: <http://www.comune.torino.it/pass/disabilitasessualita/category/progetto-e-sportelli/gli-sportelli/>

<sup>682</sup> Website: <http://voltoweb.it/iphborgaro/disabilita-e-sessualita-a-borgaro-apre-uno-sportello-per-affrontare-temi-difficili/>

<sup>683</sup> 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 (eds.), *L'accessibilità dei servizi di ginecologia e ostetricia alle donne con disabilità*, cit., p. 64.



## CHAPTER IV

### SEXUAL ASSISTANCE IN ITALY: THE PROPOSAL AND ITS CONTEXT

In this chapter we will discuss sexual assistance as a possible tool to foster sexual access and self-determination in the sexual sphere for people with disability.

The first paragraph will set out a definition of sexual assistance and its relationship with sexual surrogacy and sex working. In the second paragraph we will outline the Italian state of the art, with particular attention to the experiences and the opinions of Italian target users, and to the proposal elaborated by the LoveGiver committee, the main social actor on this topic. In the third paragraph, the Italian law on prostitution (Law n. 75/1959) and the related recent decision from the Italian Constitutional Court will be analysed.

In paragraph four the law proposals elaborated during the previous legislative term will be presented and evaluated. To conclude, an analysis of the legal implications of the factual situation, namely the organization of the first training sessions for sexual assistants, promoted by the LoveGiver Committee, will be carried out.

#### *1. Sexual assistance and sexual facilitation: some definitions*

In this paragraph a broad definition of sexual assistance will be provided.

It is not always easy to draw clear boundaries between sexual assistance and similar commercial/medical practices involving the experience of sexuality. For this reason, we need to discuss the profile of distance and intersection between sexual assistance, sex working, and surrogate partners.

##### *1.1. Sexual facilitation and sexual assistance: uncertain perimeters*

Sexual assistance can be defined as a particular form of sexual facilitation. The latter is the act of receiving assistance with sexual activity.

We know indeed that people with disability might need to receive personal assistance for ordinary life activities: receiving support with mobility or personal hygiene, for example, are undoubtedly considered as rights.

We should, however, think about the fact that the same person who needs assistance in everyday life activities might need support in the sexual sphere, for example in having access to the possibility of masturbating or engaging in sexual activity with partners<sup>684</sup>.

Personal assistance in the field of sexuality is sexual facilitation.

It 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<sup>685</sup>».

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<sup>686</sup>».

And, according to them, 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

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<sup>684</sup> 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

<sup>685</sup> S. Earle, 2001, *Disability, Facilitated Sex and the Role of the Nurse*, in *Journal of Advanced Nursing*, 36, 3: 433-440, 2001, p. 447

<sup>686</sup> This information can be found in the website of the association: <http://www.epseas.eu/en/>

experience with the disabled person in a professional manner and for a specified amount of time.<sup>687</sup> »

The Platform was funded with the idea of creating a network of organizations in Europe working in the field of sexuality and disability and to create an epicentre of advocacy in favour of sexual assistance in Europe. In fact, the situation in Europe is highly inhomogeneous: some countries decided to regulate sexual assistance within sex working, while others, with legislation inspired by abolitionism or neo-abolitionism ideas, did not regulate on this matter, but engage in public debate and outside-legal solutions on the matters<sup>688</sup>.

Some of these organizations support the idea of a specific training needed 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 put all these different experiences from European countries in dialogue, to unite existing expertise and create new ones. At the same time, they aim at creating a sexual assistant training program and writing a manifesto of propositions and recommendations to improve the legal framework for sexual assistance in Europe<sup>689</sup>.

As we mentioned before, the current factual situation is very fragmented, and consequently there are as many definitions of sexual assistance as there are NGOs and organizations working in this field all over Europe. From this point of view, it will be discussed in Chapter V how the different approaches of organizations working with sexual assistance can be framed into models, by analysing their assumptions of the role and function of sexual assistants and the legislative approach towards sex working adopted in each Country.

From a theoretical point of view, we must point out that scarce attention has been given by scholars to the elaboration of a precise definition of sexual assistance, which remains very broad and capable of encompassing the many praxis existing on this matter.

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<sup>687</sup> This information can be found in the section of the website dedicated to “What in sexual assistance? Who are sexual assistants?”. See here: <http://www.epseas.eu/en/page/181>

<sup>688</sup> See Chapter V, for the elaborations of models in Europe.

<sup>689</sup> See the section “Aims and goals” of the website here: <http://www.epseas.eu/en/page/180>

An interesting theoretical framework is the one provided by the Spanish disability activist and philosopher A. 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 working (where one exchanges money for sexual pleasure)<sup>690</sup> ».

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 case she/he is not able to do it by her/himself.

Centeno explains that sexual assistance must be conceived as an expression of the right to access one's own body<sup>691</sup>.

The perimeter of sexual assistance is drawn by allowing a personal assistant to support the person in actions she/he cannot do alone due to her/his impairment. In this view, sexual assistance can be defined as a human tool (*erramiento humano*) within the philosophy of Independent Living<sup>692</sup>. 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<sup>693</sup>»

## 1.2. *Sexual assistance vs. sex working*

According to Centeno, within this framework, sexual assistance, which is paying for assistance in the sexual sphere, finds its place somewhere between sex working 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<sup>694</sup>.

The proposal of sexual assistance elaborated in Italy for example, as we will discuss later, is strongly characterized by a distancing from “simple” sex working due to its

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<sup>690</sup> A. Centeno, 2014, *Asistencia sexual para personas con diversidad funcional*, in DerechosHumanos, 2014. Available at the following link: <http://www.derechoshumanosya.org/node/1240>

<sup>691</sup> A. Centeno, 2014, *Asistencia sexual para personas con diversidad funcional*, cit.

<sup>692</sup> S. Arnau Ripolles, *La asistencia sexual a debate, Forum on Sexual Assistance*, in *Dilemata*, año,6, 15, 2014, p.12. In the same paper she also explains how, if personal assistance can be defined as a first order need, basic and universal, sexual assistance can be defined a second order need, basic but specific.

<sup>693</sup> A. Centeno, 2014, *Asistencia sexual para personas con diversidad funcional*, in DerechosHumanos, 2014. Available at the following link: <http://www.derechoshumanosya.org/node/1240>

<sup>694</sup> 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

nature and purposes (see further). 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 disability in Spain, clearly distinguishes the service they provide from sex working, explaining it as follows: «Here we don't have clocks, there is no lucrative intention but only vocation for the service, it's not just sex but personal growth, an improvement of the quality of life<sup>695</sup>».

Given this, the difference between sexual assistance and prostitution is the emotional connection and the intimacy that differentiate this experience from sex working. As a user of Tandem Team states: «(prostitution) was not what I was looking for (because) human connection and affection was missing<sup>696</sup>». Scholars recognised that this approach presents the correlated risk of perpetuating the already existent stigma around sex workers<sup>697</sup>.

According to the *Comitè Consultatif de Bioéthique de Belgique*, as expressed in their document on sexual assistance<sup>698</sup>, prostitution and sexual assistance can be deemed distinct for four main reasons:

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<sup>695</sup> The translation was done by the author, here the original quotation: «Aquí no hay relojes, no hay intención monetaria sino vocación de servicio, no hay solo sexo sino crecimiento personal, una mejora de la calidad de la vida». This statement is a fragment of an interview to Maria Clemented (co-Founder of TandemTeam), available, in Spanish, at this link [https://www.eldiario.es/retrones/Maria-Clemente-sexo-ofrecemos-intimidad\\_6\\_310129007.html](https://www.eldiario.es/retrones/Maria-Clemente-sexo-ofrecemos-intimidad_6_310129007.html). For an analysis of this interview and connected reflections 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

<sup>696</sup> The translation was done by the author, here the original statement from an interview made by Raúl Gay to a user of Tandem Team, Antonio Castillejos, available here: [http://www.eldiario.es/retrones/Antonio-Castillejo-demostrar-sociedad-podemos\\_6\\_312928722.html](http://www.eldiario.es/retrones/Antonio-Castillejo-demostrar-sociedad-podemos_6_312928722.html): «No era lo que buscaba (porque) faltaba el calor humano, el cariño. Era demasiado frío»

<sup>697</sup> A. García-Santesmases, C. Branco de Castro, *Fantasmas y fantasías*, 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, 2016, p. 99-114. She wants us to notice how sexual assistants are often pictured as heroines or saints who are ready to do what no-one else is willing to (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 draw our attention on the fact that this kind of discourse marginalize again people with disability, see, for example, the critiques to sexual assistance from 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.

<sup>698</sup> Comitè Consultatif de Bioéthique de Belgique, *Avis n° 74 du 13 novembre 2017 relatif à l'assistance sexuelle aux personnes handicapées*, available online at: [https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth\\_theme\\_file/avis\\_74\\_ass\\_sexuelle\\_aux\\_ph.pdf](https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/avis_74_ass_sexuelle_aux_ph.pdf)

## CHAPTER IV

- 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;
- 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 due to the fact that protection and moral, physical safety of users and assistants is granted;
- 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;
- The fact that sexual assistance is addressed both to 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 be collocated within the above-mentioned scheme<sup>699</sup>.

On the contrary, 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 disability<sup>700</sup>, concludes that there are not substantial differences between prostitution and sexual assistance: «The associations of disabled people claim this assistance challenges this equivalent with prostitution. However, it is difficult to qualify it otherwise (...)»<sup>701</sup>, then it continues: «The difficult question of instrumentalization, even if it is consented to, 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

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<sup>699</sup> Avis n° 74 du 13 novembre 2017 relatif à l'assistance sexuelle aux personnes handicapées, p. 37

<sup>700</sup> 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<sup>th</sup> September 2012*, available at: [https://www.ccne-ethique.fr/sites/default/files/publications/avis\\_ndegl118.pdf](https://www.ccne-ethique.fr/sites/default/files/publications/avis_ndegl118.pdf)

<sup>701</sup> The translation of the sentence is from the author, here 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 n°118*, cit., p. 10.

prostitution/pimping (*proxénétisme*), which is part of the chapter related to *Offences against the dignity of the human person* in the French Criminal Code.

On this 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<sup>702</sup>»

The same questions are the ones feeding the debate between scholars in the field of medical ethics.

Some of these scholars believe that even in a legal system condemning prostitution<sup>703</sup>, there should be a legal exception for people with disability. According to Thomsen the reasons are mainly two: « (1) Many or most persons have a sexuality that generates strong needs for sexual relations, and (2) Some disabled persons are partially or entirely incapable of satisfying this need except through the purchase of sexual services from a prostitute<sup>704</sup>. » Appel, who argues for the recognition of sexual pleasure as a fundamental right, states that «If sexual pleasure is a fundamental right, as this author believes, then 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<sup>705</sup>. »

On the contrary, other scholars show scepticism towards these arguments<sup>706</sup>.

For example, Di Nucci agrees on the urgency to address the sexual needs of people with severe disability but argues against the construction of a right to sexual pleasure, a state-funded service (supported by Appel) and in general against the idea of a legal exception from prostitution. In this sense, his alternative is the following one: «by making this service wholly voluntary and non-commercial, we likely guarantee a

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<sup>702</sup> The translation of the sentence is from the author, here 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

<sup>703</sup> 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

<sup>704</sup> F.K. Thomsen, *Prostitution, disability and prohibition*, in *Journal of Medical Ethics*, 41, 2015, p. 455

<sup>705</sup> J. M. Appel, *Sex rights for the disabled?*, in *Journal of Medical Ethics*, 36, 2010, pp.

<sup>706</sup> 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

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.<sup>707</sup> »

Other scholars from the field of social science reflected on the mutual influence that public debate and the elaboration of new policies around sex working and sexual assistance might have on each other. Sanders notices how «people living with impairments and sex workers are marginalized groups fighting for sexual rights, autonomy and freedom» and suggests social movements to cooperate and work on common pragmatic issues<sup>708</sup>.

Other scholars argued that both people with disability and sex workers would have many benefits from the decriminalization of sex working<sup>709</sup>.

The same findings emerged from an 18-month participative 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<sup>710</sup>». The researcher further affirms that an approach to sexual assistance rooted on 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<sup>711</sup>».

This topic of discussion is highly challenging, what emerges clearly is that the relationship between sex working and sexual assistance is a core issue in the debate on sexual assistance: these blurred lines separating them must be investigated.

### 1.3. *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.

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<sup>707</sup> E. Di Nucci, *Sexual rights and disability*, in *Journal of Medical Ethics*, 37, 3, 2011, p. 160

<sup>708</sup> T. Sanders, *The politics of sexual citizenship: Commercial sex and disability*, in *Disability & Society*, 22, 5, 2007, p. 453.

<sup>709</sup> 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

<sup>710</sup> 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.

<sup>711</sup> 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, p. 226

First of all, sexual surrogacy has a wider target: it is not for people with disabilities only. Sexual surrogacy is a specific medical therapy<sup>712</sup> for people who are facing issues with physical and emotional intimacy<sup>713</sup>, 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 a satisfactory sexual life, in order to accomplish sexual health. The fact that the framework of this relationship is a medical one is also revealed by the subjects involved in it. The surrogate partner, in fact, represents one of the actors in a triadic relationship, he/she is not contacted directly by the user, on the contrary, her/his presence is suggested by a doctor.

Sexual therapy is carried out by a three-way therapeutic team formed by the sex therapist (usually a professional of mental health), the sex surrogate partner and the client<sup>714</sup>. 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<sup>715</sup>.

Surrogate partners also have an international association, IPSA (International Professionals Surrogate Association), particularly active in the USA, which provides an ethical code of the profession<sup>716</sup>.

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.

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<sup>712</sup> Developed by Masters and Johnson in the 1970s, see: Masters, W.H., Johnson, V.E.: *Human Sexual Inadequacy*, Boston, 1970.

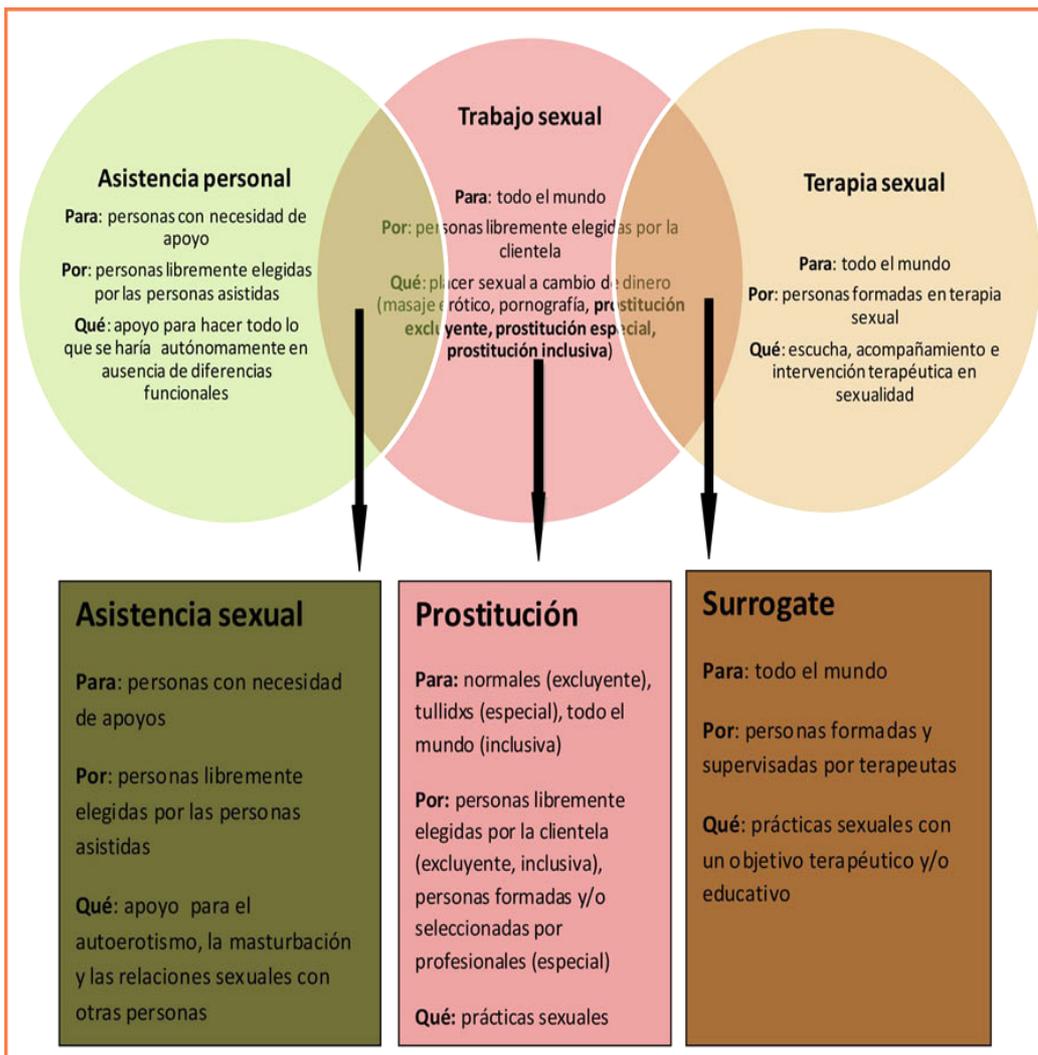
<sup>713</sup> T. Rosenbaum, R. Aloni, R. Heruti, *Surrogate Partner Therapy: Ethical Considerations in Sexual Medicine*, in *The Journal of Sexual Medicine*, 11, 2, 2013, pp. 321-329.

<sup>714</sup> T. Sanders, *The politics of sexual citizenship: commercial sex and disability*, in *Disability & Society*, 22, 5, 2007, p. 440

<sup>715</sup> B. Casalini, *Disabilità, immaginazione e cittadinanza sessuale*, in *Etica & Politica*, XV, 2, 2013, pp. 301-320

<sup>716</sup> See their website at <http://www.surrogatetherapy.org/ipsa/code-of-ethics/>. In our Country sexual surrogacy for people with this kind of needs is not a possibility. This is probably because of the abolitionist approach towards prostitution and its broader repercussion on sexual services

CHAPTER IV



To sum up what we have been discussing in the previous paragraphs a scheme will follow. This graphic element is an elaboration of the work of Centeno, and is based on his definition of sexual assistance. It can be useful to recap at a glance the main differences and similarities between sexual assistance, sex working and sexual surrogacy.

## 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 effort of Massimiliano Ulivieri, a disability rights activist, already well-known in the field of inclusive tourism<sup>717</sup>.

Together with other activists, professionals, and doctors he created an association, *LoveGiver* (then *Love Giver Committee*) aimed at promoting sexual assistance in Italy<sup>718</sup>.

The *Committee* elaborated its own proposal on sexual assistance and recently started the first training course for sexual assistants (for further details see paragraph 5).

Their advocacy work also inspired law proposals, that were elaborated during the previous legislature (see paragraph 4). Next to the work of this main association, in recent years, many other smaller associations have advocated on the issue by organizing public debates and projects in town and cities around Italy.

At the same time, mainstream media started to give more attention to sexual assistance, one of the most recent expressions of this growing interest is, for example, the program *Il corpo dell'amore* a show transmitted on the Rai3 channel, where one episode is entirely dedicated to the story of an aspiring sexual assistant and her disabled client.

### 2.1. *Target users and their experience*

According to the latest ISTAT survey in Italy (2013), if we embrace a wide definition of disability, there are approximately 13 million people with disability over the age of 15, which means 25.5% of the entire population (of the same age)<sup>719</sup>.

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<sup>717</sup> He was the mind behind the project *Diversamenteagibile.it*, a website to share and collect information about accessible tourism in Italy and Europe.

<sup>718</sup> The website of the project is where information, news and details on the association and their initiatives can be found. See: [www.lovegiver.it](http://www.lovegiver.it).

<sup>719</sup> The definition of disability used for the purpose of this data is very wide. It is comprehensive of severe functional limitation, light functional limitation, chronic conditions and permanent impairments.

For further inquire on the methodology used see: <https://www.istat.it/it/files//2015/07/Nota-metodologica-Inclusione-sociale.pdf>.

The sexual well-being of people with disability in Italy, and their potential interest in services such as sexual assistance is still widely unexplored<sup>720</sup>. Here we will report the main findings of two studies carried out in our territory.

The first one, dated 2016, aimed at exploring the opinions of potential users and aspiring sexual assistants in Italy, with qualitative methodologies, in particular semi-structured interviews. Twelve people with disabilities and ten aspiring sexual assistants were involved. The people with disabilities involved were mostly people with congenital physical disabilities<sup>721</sup>. What emerged from the interviews is an idea of sexuality as a normal and basic part of life<sup>722</sup>, and sex as something mostly related to romantic relationships. The respondents all agreed on the fact that, due to stereotypes («asexual and sick»), it is much more difficult for people with disability 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 answers collected it emerges how for most of the parents «it is unimaginable that their children may have sex<sup>723</sup>», while a 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.

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<sup>720</sup> 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 investigates 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, pp. 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, pp. 158

<sup>721</sup> 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*, in *Sexuality and Disability*, 34, 2, 2016, 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»

<sup>722</sup> The terminology used by most of the participants was: 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*, in *Sexuality and Disability*, 34, 2, 2016, pp. 163

<sup>723</sup> 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*, in *Sexuality and Disability*, 34, 2, 2016, pp. 163

On this point, some participants (5 men, 3 women) reported knowing male friends with disability who have had sexual encounters with prostitutes and have been rejected for 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<sup>724</sup>.». 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<sup>725</sup>. Nonetheless most of the participants would rather have a romantic relationship, so sexual assistance is not seen as the solution to the problem but a response to a “physiological need”.

The second study we are presenting was carried out in Italy in 2017, is based on quantitative analysis, and was conducted with the elaboration of three extensive questionnaires for people with disability, their family and operators<sup>726</sup>. Two hundred and twenty-three people with disability participated in the survey (58% men), most of them with an intellectual impairment<sup>727</sup>. 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 are in favour of the legalization of sexual assistance in Italy, 35% of them declared they did not know and only 8% are against it. 56% of participants declared they would use sexual assistance (of which 68% men, and 32% women). For 48% of the people involved, sexual life is absent but desired. The final part of the questionnaire was dedicated to proposals to improve the sexual life of people with disabilities; many

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<sup>724</sup> 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*, in *Sexuality and Disability*, 34, 2, 2016, pp. 163

<sup>725</sup> According to some participants this serve 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 ‘priority order money made available by the State for people with disabilities should be invested in other services. 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*, in *Sexuality and Disability*, 34, 2, 2016, p. 164

<sup>726</sup> The questionnaire, methodologies the 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.

<sup>727</sup> The author reports the difficulties and challenge in this part of the questionnaire, To know more see D. Dolfini, *Il diritto alla sessualità e la disabilità*, cit., pp. 43-44

## CHAPTER IV

different suggestions emerged from people with disability<sup>728</sup>. 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 having been involved the project.

Within this panorama a specific questionnaire was elaborated for the purposes of this work, giving tribute to the motto *Nothing about us without us*<sup>729</sup> and by applying participative methodology<sup>730</sup>. The questionnaire, anonymous and available online<sup>731</sup>, aims at investigating the needs and perceptions of people identifying as disabled around their sexuality and their sexual rights with quali-quantitative methodology. It is composed of 29 questions, of which 19 are multiple choice questions, 2 are formulated in scales, and the remainder are open to the respondent’s answer (the entire questionnaire, the single answers and an overview of the result can be found in Appendix of this work). The latter questions are conceived as spaces participants may

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<sup>728</sup> See the “box” in D. Dolfini, *Il diritto alla sessualità e la disabilità*, cit, pp. 97-98.

<sup>729</sup> Charlton J I, *Nothing about us without us*, cit.

<sup>730</sup> Participatory research is a particular approach to the construction of knowledge used to empower people by the process of construing and using their own knowledge to increase the relevance of the research. The persons involved are the one who are being touched directly by a research topic or belong to the category of people who’s subject of the research. This methodology wants to empower people from the community and believes that they can collaborate with researcher to better understand their own problems and find effective and possible solutions. For an introduction to this topic in relation to disability studies see F. E. Balcazar, C. B.Keys, , D. L. Kaplan, Y.Suarez-Balcazar, *Participatory Action Research and People with Disabilities: Principles and Challenges*, in *Canadian Journal of Rehabilitation*, 12(2), 1998, pp. 105-112 and, more broadly on the topic, W. F. Whyte, *Participatory action research*, Newbury Park, 199; D Selener, *Participatory action research and social change*, New York, 1997.

<sup>731</sup> The survey is available online at this link: [https://docs.google.com/forms/u/1/d/1jW-FJ5gL8UhiUqjm3bqWCJb7hSWdR5Bdtyi-u\\_SRnl4/edit?usp=mail\\_response\\_notification&urp=gmail\\_link](https://docs.google.com/forms/u/1/d/1jW-FJ5gL8UhiUqjm3bqWCJb7hSWdR5Bdtyi-u_SRnl4/edit?usp=mail_response_notification&urp=gmail_link). The survey is opened to anyone over 18 years old who self-identified as a disabled person. At the beginning of the questionnaire the respondent was given the following information on the research: I) that usually questions demand to choose one option only if not otherwise indicated, II) instruction on the use of inclusive language (in italian che symbol \* instead of the ending letter of the word), III) That in the question related to gender the option provided are male, femal, other in order to allow people to defy themselves as they deem more appropriate. No assumption was made on the fact that all the respondents are cisgender, the person can choose wheter or not let this data emerge; IV) Questions will present the terminology impairment because of the social model of disability V) The respondent is not oblige to fill the open questions, however that would be really important VI) Given answer might form part of the thesis or might be presented in public presentation VII) A final remark on the catheory “other” which must be used as a possibility to articulate more complex positions than the one already present in the possible answers. The survey was approved by the Ethical Committee of University of Trento (Comitato per la sperimentazione con l’essere umano) in June 2018.

## SEXUAL ASSISTANCE IN ITALY: THE PROPOSAL AND ITS CONTEXT

use to elaborate and tell of their personal experience of discrimination in the field of sexual health and sexual well-being. The survey is structured in five different sessions. The first one collects general information on the respondent (disability, origin, background in work and education, involvement in social movements). The second section aims at investigating the personal experience of the respondent with regard stereotypes, discrimination in the field of sexuality, with a particular focus on sexual education and sexual health. The third section concerns the tool of Sexual Assistance by exploring dimensions such as definition, status of the public debate and by asking the opinion of the respondent on some specific aspects of it. The fourth section looks into the opinion of the respondent on positive measures in the field of sexuality in general and in particular (a list of possible solutions is provided). The survey concludes with two scaled questions on sexual assistance. At the moment, 27 people have responded to the survey. 59.3% of respondents identified as women, one person as two-spirit and the remaining one as a man. They mostly come from North Italy, with a few exceptions and most of them have a physical impairment. Seventeen respondents reported not being actively involved in associations for disability issues, while 9 actually are. More than 48% of respondents gave a positive answer to the question "Have you ever felt invisible in your sexual needs because of your disability?", while half of the remaining respondents stated this was not related to his/her disability and the other affirmed he/she never felt invisible. 55.5% of respondents affirmed they have been discriminated in their sexual needs because of their disability. On these points one of the respondents affirms that the discrimination is related to the fact that people with disability are perceived as asexual. It is interesting to notice that all the participants responded positively when asked if they believe there are stereotypes in society regarding the sexuality of people with disability, for 59.3% of the respondents these are various and well rooted. For almost 60% of the respondents these stereotypes affected their sexual education and for almost 63% of the respondents this had an impact on their sexual and reproductive health. Nonetheless, 55.6% of the respondents affirmed they did not suffer from a violation of their rights in this field. Twenty-five respondents had already heard about sexual assistance, however according to more than half of them the public debate on the topic is little. For 21 respondents sexual assistance might be a useful tool, and most of them are in favour of a specific training

for these professionals on relational and/or medical aspects of disability. According to 77.8% of the respondents, sexual assistance should be financed by the State, and only a small number of respondents believe that it could fall under the budget for personal assistance. In general, 20 out of 27 respondents believe the State should enact positive measures on this field; sexual education, psychological counselling, sexual assistance and training for professionals involved with disabled people are the most popular options.

## 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. During the years, the *Committee* has elaborated its own specific proposal, which takes its distance from prostitution and sex working, in an attempt to find a framework compatible with Law 75/1958 on prostitution.

The *LoveGiver Committee* has been working since 2012 to promote this new professional figure in Italy. In 2014 it established a *National Observatory on Sexual Assistance* inside the organization, aimed at creating and maintaining a public debate on sexuality and disability. This goal is pursued through three main actions: research, control-aggregation and the creation of networks. Research is aimed at collecting scientific data on sexual assistance and giving scientific strength to the development of protocols. Aggregation and control mean a better dialogue between institutes and organizations which work with people with disability<sup>732</sup>. While the creation of networks is the last step, aimed at better communication between structures and the organization part of the *LoveGiver Observatory*. The network is also responsible for the public dissemination of information about disability and sexuality and promotes the organization of conferences, seminars or journal articles, multimedia content and much more.

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<sup>732</sup> They can become part of *LoveGiver* organization and subscribe and apply the protocols on sexuality as well as receive training on affectivity and sexuality for people with disability. At the same time this umbrella wants to avoid the fragmentation of small experiences and promote a unitary voice on sexual assistance on the territory.

According to the Committee, this new professional figure is an operator for well-being who will have to educate the user regarding affectivity, emotions, body experience and sexuality<sup>733</sup>. 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 disability in recognizing, experiencing and living eroticism and sexuality<sup>734</sup>.

In their view, this experience has a mainly educative purpose because it supports the person with disability in the exploration of sexuality and sensuality, learning from experience how to use pleasure and to promote her/his own psycho-physical well-being.

According to the Committee this is what mainly dissociates sexual assistance from sex working: «the growth experience proposed by the sexual assistant is different from the mechanical one offered by prostitutes and escorts<sup>735</sup>». Sexual assistants are described as figures characterized by a *vocation*: «we can affirm that the selected people show a form of vocation<sup>736</sup>», related to the «noble intention of assisting» people with physical, cognitive and sensory impairment who are described as «less fortunate»<sup>737</sup>.

On the word of the *Committee*, the work of sexual assistants is not designed to give a functional answer to the needs of the person with disability, on the contrary, it is structured as an experience of growth. At the same time, this professional figure can promote a better communication between caregivers and people with disability in a field such as sexuality, where self-expression is often denied and experienced with embarrassment and discomfort.

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<sup>733</sup> 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, p. 108-109;

<sup>734</sup> F. Quattrini, M. Fulcheri, *Affettività e sessualità nella disabilità*, cit., p. 108-109

<sup>735</sup> 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*, Trento, 2014, p. 55

<sup>736</sup> F. Quattrini, M. Ulivieri, *Cosa è (e cosa non è) l'assistenza sessuale*, cit., p. 58

<sup>737</sup> This kind of attitude is also confirmed in a study conducted with aspiring sexual assistants, from which emerges that they see sexual assistant as someone possessing “empathy”, “sensitivity” and a “vocation to help” others, see 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. 165

To sum up, the *Committee* pictures the sexual assistant as a professional who offers the experience of pleasure through culture, personal growth and psycho-physical well-being<sup>738</sup>.

The *Committee* believes that sexual assistance contains two of the main aspects of the experience of human relationships: respect and education. The first because it allows a person with difficulties to enter in touch with eroticism, intimacy and sexuality, allowing her/him to satisfy a primary need and to achieve social, and psychological-relational well-being. The second, because every human being needs to be accompanied and educated to respect her/himself and the others, learning how to recognize emotions and needs and learning from this experience.

Sexual assistance is based on a golden rule: the freedom of choosing to live and share one's sexual-erotic experience, no matter the difficulties related to life-experience<sup>739</sup>.

The *Committee* states that aspiring sexual assistants must undergo a specific 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 user vary from a minimum of 5 sessions to a maximum of 10 sessions, and are described as a «rehabilitative-educative training<sup>740</sup>».

The first encounters are dedicated to sharing information and knowledge on the theoretical aspect of affectivity, corporeity, and sexuality. This aspect will then be experienced on a practical level, through contact and massage techniques, through the experience of masturbation (which they call «pedagogy of autoerotic pleasure<sup>741</sup>»), and by promoting the education of orgasmic pleasure.

The work of sexual assistants can be divided into 3 different phases<sup>742</sup>:

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 relation of care;

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<sup>738</sup> F. Quattrini, M. Ulivieri, *Cosa è (e cosa non è) l'assistenza sessuale*, cit., p. 61

<sup>739</sup> F. Quattrini, M. Fulcheri, *Affettività e sessualità nella disabilità. La formazione degli operatori*, cit., p. 108-109

<sup>740</sup> F. Quattrini, *Assistenza sessuale il progetto "Lovegiver" per la formazione degli operatori*, in M. Ulivieri (ed.), *Loveability. L'assistenza sessuale per persone con disabilità*, Trento, 2014, p. 66

<sup>741</sup> F. Quattrini, M. Ulivieri, *Cosa è (e cosa non è) l'assistenza sessuale*, cit., p. 57

<sup>742</sup> F. Quattrini, *Assistenza sessuale il progetto "Lovegiver" per la formazione degli operatori*, cit., 77

2) Attention (*ascolto*): the assistant will observe and will enter into touch with the user, understanding her/his 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 practical side of the process of sexual and bodily education. Each and every experience will be aimed at helping the person in understanding and recognizing her/his personal concept of erotic-sexual well-being.

According to the *Committee*, sexual assistance in Italy needs to be easily distinguishable from prostitution. From this point of view the proposal is very distant from the experience of Nordic countries, which are precursors in this field (for further details, see Chapter V).

For this purpose, sexual assistants, according to the *Committee*, must not engage in coital sexual activity. For this reason, penetration and oral sex are forbidden<sup>743</sup>. We will discuss further the definition of prostitution according to our legal system.

In 2018 the *Committee* officially launched the first course inspired by the guidelines summed up above<sup>744</sup>, the discussion of this course and its legal implication will be part of the following paragraphs.

### 3. *The Italian context: the Merlin Law and Decision 141/2019 of the Italian Constitutional Court*

The very controversial relationship between sexual assistance and sex working has already been mentioned in the previous paragraphs. For this reason, after having analysed the proposal from the *LoveGiver Committee* on sexual assistance in Italy, it is important to dedicate space to the discussion of the legislative context in Italy on the matter of prostitution.

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<sup>743</sup> F. Quattrini, M. Ulivieri, *Cosa è (e cosa non è) l'assistenza sessuale*, cit., p. 59

<sup>744</sup> The network is also responsible of coordinating the activation of the courses for sexual assistants, and is now associated to a hotline that anyone can call to have information on sexuality and disability. See the website: [www.lovegiver.it](http://www.lovegiver.it)

In the following subparagraphs, we will briefly provide an excursus on criminal law on prostitution<sup>745</sup> from the Unification of Italy to the approval of the Merlin law in 1958.

We will then analyse the Merlin Law 75/1958, a legislation inspired by abolitionist principles. Its current applications, secondary effects and challenges will be examined. To conclude, the last part will analyse and examine Decision n. 141/2019 of the Italian Constitutional Court pertaining to the Merlin Law.

### 3.1. *Before the Merlin Law*

Before 1800, the history of prostitution in Italy was quite discontinuous.

Apparently, during the 1400s prostitution lived a status of independency from any law and regulation, without specific surveillance<sup>746</sup>.

During the 1500s most of the brothels were closed due to a high rate of sexually transmitted diseases. They were reopened in the 1600s and relegated to specific neighbourhoods, where it was legal to sell sexual services and where women, who were treated like immoral subjects to be kept outside of society, could carry out this job<sup>747</sup>.

In general, we can see that since the 1800s State regulation on prostitution has become highly invasive and precise, with pervasive control on opening times, buildings, position in the city, as well as control on women exercising prostitution, in a precise attempt to preserve the public decency and order. The social stigma regarding

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<sup>745</sup> The author prefers the terminology sex work for two main reasons: because it encompasses 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 there are people who self-determine in their choice.

However, the term prostitution will be used each time a law and a specific legal system uses this terminology, the case for Italy, for example. On the use of the word sex work see: F. Delacoste, P. Alexander, *Sex Work: Writings by Women in the Industry*, 1987

<sup>746</sup> De Rosa, *Sicurezza pubblica*, in *Digesto Italiano*, XVII, Torino, 1967, p. 361

«La prostituzione era pressoché abbandonata a se 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»

<sup>747</sup> M. Gibson, *Stato e prostituzione in Italia*, Torino, 1995, p. 163. The author also refers to the thesis of Lombroso, who considered prostitutes as delinquents see: C. Lombroso, G. Ferrero, *La donna delinquente, la prostituta, la donna normale*, Roma, 1893, p. 35

women<sup>748</sup> practising prostitution was very high, and the discretionary controls from the police (which often qualifies as abuse, rather than inspection) were very frequent: that is probably why besides some “authorized” prostitutes many were practising prostitution outside law<sup>749</sup>.

The need to legislate widely on prostitution was felt during the 1800s: administrative law on this topic started to proliferate<sup>750</sup>. In this era, the notion of the state brothel (*casa di tolleranza*<sup>751</sup>) was born.

One of the first administrative regulations was the *Regolamento Cavour* dated 15 February 1860<sup>752</sup>. According to this regulation, the State had a right, but also a duty, to control prostitution on the territory: prostitutes were provided with a special permit for their activity. That permit also became their only legal document for the purposes of identification.

In this permit there was also a Decalogue of prohibitions and other prescriptions, which concretely resulted in the social isolation of prostitutes<sup>753</sup>.

Prostitutes had to practice within government brothels and needed to undergo medical examinations - enforced by state medics and the police - every two weeks<sup>754</sup>.

The government brothels (*postriboli governativi*) were considered public operations and were located far from the main city roads, schools, churches and so on.

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<sup>748</sup> Here we talk about women, and not generic prostitutes, because 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 storico*, in C. Cipolla, E. Ruspini (eds.) *Prostituzioni visibili e invisibili*, Milano, 2012, pp. 37-50 and E. Ruspini, *Uomini per donne: la prostituzione maschile eterosessuale*, in C. Cipolla, E. Ruspini (eds.) *Prostituzioni visibili e invisibili*, Milano, 2012, pp. 169-188

<sup>749</sup> M. Gibson, *Prostitution and the State in Italy, 1860-1915, Prostitutes and Police: Surveillance*, Ohio, 2000, pp. 113-151

<sup>750</sup> For a punctual reconstruction of the historical profile of legislation around prostitution in Italy see I. Mereu, *Prostituzione (storia)*, in *Enciclopedia del diritto*, XXXVII, Milano, 1988

<sup>751</sup> G. Fusco, *Quando l'Italia tollerava*, Roma, 1965

<sup>752</sup> This regulation was based on a Governmental law on public security. It must be noticed that this regulation was never published in the Official bulletin, because, according to Crispi, some things must be known to the one who are interested to them, but it is not good to give them the visibility they don't deserve. See: Francesco Crispi alla Camera, *Atti parl. Camera*, XVI Legislatura, *Discussione* 14 aprile 1888, 1739.

<sup>753</sup> Prostitutes were banned from the possibility of going to the theatre, walking on the main city roads and square and they were forced to stay home after 8 in the evening from October to March and 10 o'clock in 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.

<sup>754</sup> M. Gibson, *Prostitution and the State in Italy*, cit., pp. 113-151

To open a brothel there was the need to obtain an authorization, which was temporary and subject to revocation. Owners had to pay an annual tax and a tax for the medical inspection of prostitutes<sup>755</sup>.

Even for that time, the regulation was considered excessively severe, in particular because of the measures against women and the high possibility of abuse from the police. The second administrative regulation was indeed based on the idea of reducing the possible field of abuse from the police<sup>756</sup> and at the same time 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 subscribe to a public register, to have a specific document or to undergo medical examinations by the public authorities<sup>757</sup>.

The last regulation before the Fascist era on this matter was the *Regolamento Nicotera*, which «imposed new bans for prostitutes such as going around the street without a precise reason», a list of predetermined prices for sexual services and a census<sup>758</sup>.

During Fascism some regulations intervened on this field<sup>759</sup> and some articles were dedicated to prostitution in the Law on public security (*Testo Unico di pubblica sicurezza, regio decreto 18 giugno 1931 n. 773*). Since then, the legislation on prostitution, specifically and only female prostitution, has been based on the principle of regulation (*regolamentarismo*)<sup>760</sup>: it was possible to sell sexual services inside specific spaces with specific permission. This permit was given by the Public security authority for 1 year (to be renewed).

Prostitutes still needed to undergo medical examinations, but the client did not have any specular duty, with the possibility of them infecting prostitutes<sup>761</sup>. If we look at

<sup>755</sup> A. Sorgato, *I reati in materia di prostituzione*, Milano, 2009, p. 5

<sup>756</sup> See A. Sorgato, *I reati in materia di prostituzione*, cit., p. 5. In particular note 16 at the already mentioned page.

<sup>757</sup> Medical examination was still compulsory but could be carried on by doctors entrusted by brothel owners, See A. Sorgato, *I reati in materia di prostituzione*, cit., p. 6

<sup>758</sup> A. Sorgato, *I reati in materia di prostituzione*, cit., p. 7

<sup>759</sup> R.D. 25 marzo 1923 n. 846, R.D.L. 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.

<sup>760</sup> While before it was most 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 the state recognition. See C.F. principi and the Circolare 20 febbraio 1925, prot. 439, prefettura di Como

<sup>761</sup> It was the client apparently to be protected by criminal law provisions, not the prostitute. See U. Pioletti, *Prostituzione*, in *Digesto delle discipline penali*, Torino, 1995, X, 274 ss.; G. La Cute,

criminal law, prostitution was not criminalized at such, but parallel conducts such as instigation, aiding and abetting prostitution and exploitation were punished under certain circumstances. Crimes related to prostitution find a place in Title IX (Conducts against public morality and decency) and in particular in Chapter II, under offences to decency and sexual honour. Aiding and abetting prostitution were offences punished at Article 531 (only for minors or people with mental impairment) and Art. 532 (if the person involved was a descendent, wife or sister) of the Criminal Code.

Furthermore, a broader offence of exploitation of prostitution was punished under Article 534 of the Criminal Code, where anyone who lives off the money earned by a woman who practised prostitution, was liable.

In general, it was observed that the legal apparatus around prostitution before the Merlin Law was, somehow, coherent<sup>762</sup>. Prostitution itself was irrelevant for criminal law, both for those selling sexual services and those buying sexual services. On the contrary, criminal provisions were present where there was a proper “victim” to protect or to condemn the lifestyle of those living on earnings coming from an immoral activity<sup>763</sup>.

At the same time, however, we must be aware that outside the legal framework a system of strong oppression and social stigmatization of people who practised prostitution was being perpetuated.

### 3.2. *The Merlin Law: 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 Lina Merlin, on the 6<sup>th</sup> of August 1948, presented her law proposal for closing State brothels. The reaction of public opinion and most of the Parliaments was not positive and was transversal to different political parties and social classes.

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*Prostituzione*, in *Enciclopedia Giuridica*, XXXVII, Milano, 1988, pp. 452 ss; T. Padovani, *Disciplina penale della prostituzione*, Pisa, 2015, pp. 107 ss

<sup>762</sup> A. Cadoppi, *Favoreggiamento della prostituzione e principi costituzionali*, in A. Cadoppi (ed), *Prostituzione e diritto penale*, 2014, Roma, p. 281

<sup>763</sup> F. Parisi, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutorio*, Torino, 2018, p. 100

## CHAPTER IV

According to some scholars, the reason behind this reaction was to be found in the common cultural root of the Italian political class, and in the fact that the topic is a crossroad of cultural and ideological values such as family, sexuality, public and private morals and the role of women in society<sup>764</sup>.

The Law was approved after a very complicated parliamentary *iter*, on the 20<sup>th</sup> February 1958, almost ten years later<sup>765</sup>

The aspects that the Merlin law wants to improve are in the approach towards voluntary prostitution<sup>766</sup>. The basic assumption of this legislation 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<sup>767</sup>.

First of all, State brothels were declared illegal (Art. 1) and the existing ones were forced to close (Art. 2). At Art. 3 substantial modifications were made to the Criminal Code, with regard Articles from 531 to 536 by extending the field of action of the provisions, punishing all the parallel conducts surrounding prostitution. In particular, the provisions punishing all those subjects 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 she/he is considered capable of making her own choices.

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<sup>764</sup> L. Azara, *I sensi e il pudore. L'Italia e la rivoluzione dei costume (1958-68)*, Roma, p. 10. On the sexual morality during fascism see B. P. F. Wanrooij, *Il casto talamo. Il dibattito sulla morale sessuale nel ventennio fascista*, in G. Turi (a cura di), *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 deviates our attentions by moving them on other issues such as corruption, identity, criminality, exploitation and many other topics. See as G. Pheterson, *The prostitution Prism*, Amsterdam, 1996.

<sup>765</sup> For a critical reconstruction of the Parliamentary discussion around merlin law see L. Azara, *L'uso «politico» del corpo femminile. La legge Merlin tra nostalgia, moralismo ed emancipazione*, Roma, 2017

<sup>766</sup> One of the first comment of the reform was made 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 ss

<sup>767</sup> See F. Parisi, *Prostituzione. Aporie e tabù di un nuovo diritto penale tutori*, 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 asset, in the whole, was confirmed by decision 141/2019 from the Constitutional Court, as we later discuss. To investigate further the notion of dignity in the offence of prostitution see A. Cadoppi, *Favoreggiamento della prostituzione e principi costituzionali*, in A. Cadoppi (ed.), *Prostituzione e diritto penale*, cit., p. 285

## SEXUAL ASSISTANCE IN ITALY: THE PROPOSAL AND ITS CONTEXT

All these “parallel conducts” are punished widely. According to the new asset all the subsequent conducts are to be punished:

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, owning or administering 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 his habitual residence, in order to practice prostitution there, or who interferes in order to facilitate his 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 facilitates or favours 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 exploitation of prostitution is formulated in a very synthetic and open way: the requirements set out in the previous version of Article 534 of the Criminal Code were repealed. We refer to the need of being economically sustained by a prostitute’s income. Now, the offence takes place when a person takes advantage of another person’s prostitution in any manner. (see further on)

As we have noticed, pimping is punished, but also conducts of simple friendship, solidarity, support and courtesy can be punished as aiding and abetting prostitution. (see further on)

The spectrum of punishable conducts is very wide, and at the same time the social disvalue, as well as the criminal gravity of them, are very different. Such a distinction is not provided by the law, these delicate evaluations entirely depend on the judges.

### 3.2.1. *The notion of prostitution according to the judges*

According to criminal law, prostitution can be defined as sexual intercourse, not with preferred partners, characterized for having a commercial nature with an exchange of money<sup>768</sup>, no matter the gender of the persons involved (it can imply both homosexual and heterosexual sexual relationships<sup>769</sup>). To comply with the definition of prostitution it is not necessary to carry out the activity in a continuative and regular way: one act of sexual intercourse is already sufficient if the exchange of money is the most relevant element of it<sup>770</sup>.

For many scholars<sup>771</sup> and most of the judges<sup>772</sup> the element of professionalism, namely the systematic practice and the main source of income, is not needed. On the matter of the material behaviour, what is relevant is not just the sexual intercourse, but also other acts (such as masturbation<sup>773</sup>) capable of giving sexual satisfaction following payment.

### 3.2.2. *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» can be punished. This article is divided into two different conducts, both having in common the prostitution of a third person.

The first punished conduct consists in the search, the persuasion and the engagement for oneself or for other people and for a consistent amount of time, of one or more

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<sup>768</sup> Cass. penale, sez III, 16 October 1979, in *Cassazione penale*, 1981, p. 895

<sup>769</sup> Cass. penale, sez III, 13 June 1977, in *Cassazione penale*, 1979, p. 1341

<sup>770</sup> Cass. penale, sez III, n. 33615, 25 June 2002, in *Cassazione penale*, 2003, p. 3170

<sup>771</sup> 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, *Il delitti di lenocinio e sfruttamento della prostituzione*, Roma, 1960, p. 32.

<sup>772</sup> Cass. penale, sez III, 1 August 1967, n. 734; Cass. penale, 18 June 1968, n. 712, in L. Delpino, *Diritto penale, I principali reati previsti in Leggi speciali*, 2003, Napoli, p. 256

<sup>773</sup> Cass., 22 gennaio 1966, n. 3012 in L. Delpino, *Diritto penale, I principali reati previsti in Leggi speciali*, Napoli, 2003, p. 255

people for prostitution<sup>774</sup>. According to many scholars, this offence can involve both people already inside the prostitution market and outside<sup>775</sup>. The offence takes place with the engagement, no matter whether the initiative started from the agent or the person who will be engaged<sup>776</sup>.

The second conduct, the one of 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 is comprehensive of positive actions and permissive and tolerant behaviours<sup>777</sup>. It can be defined as a bilateral offence: to take place it needs the recruitment or the facilitation of another person, who, with her/his consent, makes the offence possible (the agent only will be liable).

### 3.2.3. *The offence of Induction*

At Article 3 n.5 anyone is punished who encourages the prostitution of a woman (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 diffusion<sup>778</sup>. This article contains two different conducts.

The first one is the one of induction, consisting in a conscious conduct, realized without violence or blackmailing, aimed at inducing or reinforcing the intention of practising prostitution, or letting a person who wants to cease prostitution continue<sup>779</sup>.

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<sup>774</sup> 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*, cit., p. 256

<sup>775</sup> 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*, Lecce, p. 152; D. De Gennaro, *Prostituzione e lotta contro lo sfruttamento della prostituzione*, in *Archivio penale*, I, 1958, p. 216

<sup>776</sup> 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

<sup>777</sup> V. Manzini, *Trattato di diritto penale*, Torino, 1984, p. 527-528 e Cass. penale, sez. III, 24 marzo 1951, in *Rivista Penale*, 1951, p. 24

<sup>778</sup> For further investigation and the study of some case law on the issue see A. Sorgato, *I reati in materia di prostituzione*, cit., pp.125-159

<sup>779</sup> 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*, 1986, II, 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

The passive subject of the offence, a woman<sup>780</sup> over 18 years old, must not be practising prostitution at the moment of the fact - but it doesn't matter if she used to do it before<sup>781</sup>. According to some scholars, the offence takes place with the beginning of the act of prostitution<sup>782</sup>, while for the Court of Cassazione it takes place with the effective persuasion<sup>783</sup>.

The second conduct is pimping, which takes place when a person looks for clients on behalf of the prostitute<sup>784</sup>. The agent cannot be the prostitute him/herself. If the person gains monetary advantages from this activity, then there is a concurrence with the offence of exploitation.

All the acts related to pimping must be characterized by the advertisement of the place or the means of prostitution.

#### *3.2.4. 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 will be punished. Here again we have two different conducts: the one of aiding and abetting and the one of exploitation.

The first conduct (aiding and abetting prostitution) takes place with any activity capable of creating favourable conditions for practising prostitution<sup>785</sup>. It was stated

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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 abitudine 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»

<sup>780</sup> In spite of the text of the provision it is now, thanks to judges' interpretation, gender neutral

<sup>781</sup> Cass. pen., Sez. III, 17 May 1973, in *Giustizia penale*, 1974, II, 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, pp. 2110, Cass. Pen., sez. I, 21 November 1989, in *Cassazione penale*, 1991, p. 822

<sup>782</sup> F. Antolisei, *Manuale di diritto penale, Parte speciale*, Vol. I, Milano, 1999, p. 530, of a different opinion P. Santoro, *Prostituzione*, cit., p. 36

<sup>783</sup> Cass. pen., Sez III, 18 December 1972, n. 8463, Cass. pen., Sez. III, 10 September 1994, n. 36156, in L. Delpino, *Diritto penale*, cit., p. 260

<sup>784</sup> L. Pavoncello Sabatini, *Prostituzione (disposizioni penali in materia di)*, in *Enciclopedia Giuridica*, XXV, Roma, 1991, p. 6

<sup>785</sup> «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

that the action needs to ease the act of prostitution<sup>786</sup>, not the person who practises prostitution<sup>787</sup>.

At the same time, it must be pointed out that the action must not be a *condition sine qua non* of the act of prostitution: anything that can facilitate prostitution is already enough. The norm is very wide, and the cases emerging from the related case-law are very various<sup>788</sup>.

According to legal scholars, the relevant behaviours should be the ones with a relevant causal incidence for the event of prostitution, while all the marginal activities, whose absence would have not impeded the fact, are to be excluded<sup>789</sup>.

The second conduct is exploitation of prostitution, and it takes place when someone takes unjustified advantage from the prostitution of another person<sup>790</sup>. According to judges, one episode only is sufficient, while for scholars this should be qualified as a habitual offence (*reato abituario*). Any conduct with a proper justification of advantage<sup>791</sup>, if there is a proportion between the value and the price applied, must not fall under this offence.

### 3.3. *Challenges and current application of the Merlin Law*

Over the years, the punishment of the so-called *parallel conducts*, in particular the conduct of aiding and abetting prostitution, was widespread, but this did not have the expected outcome in terms of social impact.

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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 Constitution see: A. Cadoppi, *Favoreggiamento della prostituzione e principi costituzionali*, in *Scritti in onore di Alfonso Stile*, Napoli, 2014

<sup>786</sup> G. Vassalli, *I delitti previsti dalla legge 2 febbraio 1958, n. 75*, ora in *Scritti giuridici*, vol. II, Milano, 1997, p. 32

<sup>787</sup> G. Barletta, *Osservazioni in tema di favoreggiamento alla prostituzione*, in *Rivista Penale*, 1963, p. 85

<sup>788</sup> See A. Sorgato, *I reati in materia di prostituzione*, cit., pp. 125-135

<sup>789</sup> L. Pavoncello Sabatini, *Prostituzione*, cit., p. 7

<sup>790</sup> For the discussion of case law see A. Sorgato, *I reati in materia di prostituzione*, cit., pp. 293-299

<sup>791</sup> For example, there was no criminal relevance in the conduct of who, during the day, gave the use each time for about 10 minutes, of a room in his house, receiving money for this reason. See Cass., Cass. Pen., sez. III, 20 October 1982, in *Cassazione Penale*, 1984, p. 413

The Merlin law, in its original project, aimed at protecting people who practise prostitution, but in reality it resulted, on the contrary, in a significant growth of the social isolation of these people<sup>792</sup>.

In fact, if prostitution is not a relevant fact for criminal law there are many mechanisms of stigmatization outside the Criminal Code<sup>793</sup> which weigh over a sex worker's life. This circumstance should be understood in combination with the available data on the occult income of prostitution, which is about 3.6 billion euros<sup>794</sup>.

From this evidence it is possible to affirm that the premises of this law, inspired by the abolitionist principles, failed. Sex work is still a relevant phenomenon, which is getting subtler because of the use of technology<sup>795</sup>: the intentions of solidarity expressed in the Merlin law are widely unattended due to the social isolation of people working in this industry.

Whereas formally prostitution is a licit economic activity, on the concrete side of the legal system it is not: the legitimate spaces where prostitution can be practised are very small and no protection is recognized for those who perform this work, especially for the most vulnerable subjects, such as migrants<sup>796</sup>.

As scholars state: «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<sup>797</sup>».

According to Parisi<sup>798</sup>, there are 4 main legal causes that perpetuate the stigma surrounding sex workers:

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<sup>792</sup> F. Parisi, *Prostituzione. Aporie e tabù*, cit., p. 139

<sup>793</sup> See Parisi for a precise discussion on each of these points: F. Parisi, *Prostituzione. Aporie e tabù*, cit., pp. 146-179

<sup>794</sup> Istat, *L'economia non osservata nei conti nazionali. Anni 2014-2017*, Roma, 2017. Available at this link: <https://www.istat.it/it/files//2019/10/Economia-non-osservata-nei-conti-nazionali-2017.pdf>

<sup>795</sup> 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

<sup>796</sup> See F. Nicodemi, P. Bonetti (eds.), *La prostituzione straniera*, ASGI, Associazione per gli Studi Giuridici sull'Immigrazione, 2009

<sup>797</sup> 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»

<sup>798</sup> F. Parisi, *Prostituzione. Aporie e tabù*, cit., p. 147

The fact that there is no protection for sex workers who are not paid by clients<sup>799</sup>;  
 There are still administrative sanctions on solicitation<sup>800</sup>;  
 The application of measures of personal prevention such as the “foglio di via”<sup>801</sup>;  
 Major regulation on urban security based on the idea of contrasting street prostitution with monetary sanctions for clients and prostitutes<sup>802</sup>;  
 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 specific attention to the profile related to the respect of the principle of legal certainty. The latter might hardly be compatible with the offences as formulated by the Merlin Law, especially when it comes to the offence of exploitation and aiding and abetting prostitution.

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<sup>799</sup> This contract, in fact, is considered void for Italian Civil law because it is against boni mores (Article 1343 civil code). In case the client does not pay the prostitute cannot justice his/her right in Court. This is confirmed by decisions from the Corte di Cassazione, see for example: Cass. Penale, sez. II, n. 9348, 17 January 2001; Cass. Civile, sez. V, 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

<sup>800</sup> With the D.lgs. 30 December 1999, n. 507 solicitation was decriminalized. 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.

<sup>801</sup> “Foglio di via” is a personal prevention measure adopted by the local Chief of police, to be found 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 security and prevent he/she 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 subject of this measure is enlisted: (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;

For further information on the application of this measure on prostitutes see F. Parisi, *Prostituzione. Aporie e tabù*, cit., pp. 150-158;

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.

<sup>802</sup> These sanctions are expression of the so called “broken windows policy” with new powers for municipalities and majors to adopt measure, a mixture of administrative and criminal law, to contrast small expression of criminality socially perceived as dangerous. This kind of intervention were given to major firstly in d.l 23 maggio 2008, n. 93 (Decreto sicurezza) then in d.l. 20 febbraio 2017, n. 14 (Decreto Minniti). See Pelissero M., *La sicurezza urbana. Nuovi modelli di prevenzione?*, in *Diritto Penale Procedurale*, 7, 2017, pp. 845 ss; C.Ruga Riva, R. Conrelli, 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 [www.penalecontemporanei.it](http://www.penalecontemporanei.it), 2017, p. 28 ss; R. Cornelli, *Decreto sicurezza, un concetto pigliatutto poco mirato sui diritti*, in *Guida al diritto*, n. 13, 2017, p. 10 ss.; Forte C., *Il decreto Minniti: sicurezza integrata e “d.a.spo. urbano”*, in [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), 2017. But 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*, 2016, 3, pp. 775-804

These critiques also point at the fact that, even in an increasingly pluralistic and liberal State, little or no space is left for the right to self-determination of sex workers.

All these profiles were present in the ruling for referral to the Constitutional Court coming from Corte d'appello di Bari<sup>803</sup>, on which the Constitutional Court decided in June 2019 with Decision n. 141/2019.

### 3.4. *Decision n. 141/2019 of the Constitutional Court*

With Decision n. 141/2019<sup>804</sup> 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 originated in a criminal proceeding in front of the Corte di'Appello di Bari (*main proceeding*), the judge decided to formulate a ruling for referral to the Constitutional Court (*incidenter proceeding*).

The Corte d'appello of Bari raised the question of constitutional legitimacy<sup>805</sup> «in so far as the recruitment and aiding and abetting of prostitution voluntarily and consciously practised constitutes a criminal offence<sup>806</sup>» in relation to the above-mentioned constitutional parameters.

The Constitutional Court recognizes the relevance and the non-manifest (clear) unfoundedness of the question raised by the Court of Appeal, by accepting the argument of the Court on the point<sup>807</sup> and rejecting the exception of the State's attorney (*Avvocatura dello Stato*)<sup>808</sup>.

<sup>803</sup> Ordinanza Corte d'Appello di Bari, sez III, 6 February 2018.

<sup>804</sup> Constitutional Court, decision n. 141, 7 June 2019

<sup>805</sup> For comments 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*, 2018, 3, pp. 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*, 2018, 1, p. 16.

<sup>806</sup> The translation is done by the author, here the original sentence 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. »

<sup>807</sup> In particular see Points 1.1 and 1.2 of the decision

<sup>808</sup> 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 intervener's

The decision will be analysed by following the order of the observations made by the *a quo* judge and the arguments from the Constitutional Court on each Constitutional parameter involved.

### 3.4.1. *The 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 the escort, 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<sup>809</sup>». The *a quo* judge acknowledges that Law 75/1958 gave little space to the free choice of practising prostitution, but states that there is a need, given today's historical context, to give freedom a more positive and fuller connotation<sup>810</sup>.

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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 criticized, verifying whether the same arguments used to raise the question could be 'specularly' used to exclude certain specific cases from the scope of the precept.

In any event, the questions as to their substance are 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 exhausting itself in the sole protection of the freedom to determine the person in the sexual sphere, and that the various cases provided for by that law, and in particular by Article 3 thereof, are underlying legal goods which are not exactly. The national court did not consider, in particular, that the abovementioned Article 3, in incriminating the so-called parallel conduct to prostitution, intended to protect the 'objective dignity' of the person who is prostituted, finding in it his '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, excluding that the concept of "facilitation", in which the conduct of aiding and abetting prostitution is resolved, violates the principles of legality, determination and offensiveness, as well as that the incriminating disposition contrasts with the principle of secularity of the State.

<sup>809</sup> Point 1.2 of the decision, here 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»

<sup>810</sup> In this sense prostitution should be recognized «as a self-assertive mode of the human person, who perceives his own self in terms of the delivery of his own corporeity and genality (and of the pleasure connected to it) towards or against the giving of different utility». Here the passage in the original language: come modalità autoaffermativa della persona umana, che percepisce il proprio sé in termini

The Corte d'appello continues by stating that, if this freedom should be framed in a Article 2 of the Constitution, then any legislative interference hindering the exercise of this right should be removed. In this sense, the punishment of activities of third parties who put into contact potential clients and escorts, or allow for a better carrying out of their activity, would violate this right. Indeed, the conduct of recruitment will result in support for the escort, by facilitating the «free encounter on the sex market between supply and demand<sup>811</sup>».

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 a perishing one compared 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 a case in which only the negative profile of this freedom was highlighted. 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<sup>812</sup>».

However, it states that the act of voluntary prostitution cannot be considered as 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<sup>813</sup>», in open opposition to the view promoted by the *a quo* judge. For the constitutional judges, prostitution must be

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di erogazione della propria corporeità e genitalità (e del piacere ad essa connesso) verso o contro la dazione di diversa utilità»

<sup>811</sup> Point 1.2 of the decision, in italian: «libero incontro sul mercato del sesso tra domanda ed offerta»

<sup>812</sup> 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»

<sup>813</sup> 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 profitto: una “prestazione di servizio” inserita nel quadro di uno scambio sinallagmatico»

defined mainly as a «provision of paid service», to be enlisted in the catalogue of economic activities. This view is 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*<sup>814</sup>) and by the Corte di Cassazione in its judgments<sup>815</sup>. 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 the risk would be - in the words of the Court - that of qualifying as an inviolable right of the person, any entrepreneurial activity that requires the carrying out of a constitutional freedom.

The Court explicitly mentions that this consideration is not tackled 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<sup>816</sup>.»

#### 3.4.2. *The parameters: Article 41 of the Constitution*

The Corte d'appello argues that the provisions violate the freedom of economic initiative protected by Article 41 of the Constitution. The activity of prostitution should indeed be included in a range of protected economic activities, considering that this is lawfully considered a source of income subject to taxation<sup>817</sup>. These criminal offences constitute a limit preventing the economic activity in question from evolving, and as such it represents a violation of the freedom of economic initiative at Article 41. By punishing these conducts escorts are prevented from hiring personnel to help them with their professional activity, suffering from a stigmatization in their chosen activity of self-employment.

The Constitutional Court answers that the parameter is relevant, however it must be declared unfounded. It must be noticed that freedom of economic initiative finds its

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<sup>814</sup> 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 ss.

<sup>815</sup> Cass. civile, V sez., n. 22413, 4 November 2016; Cass. civile, V sez., n. 15596, 27 July 2016; Cass. civile, V sez., n. 10578, 13 May 2011; 1 October 2010, no. 20528). For the Corte of Ca according to which the income from prostitution can be subject to taxation.

<sup>816</sup> 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.»

<sup>817</sup> One of the latest decision on this point is Cass. Civile, sez. V, n. 15596, 27 July 2016 6

limitation in activities that contrast with social utility or that might damage security, freedom and human dignity. In this case prostitution is inscribed 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 his existential options. It can be not only economic factors, but also situations of unease at the affective level or in family and social relations, capable of weakening the natural reluctance towards a "choice of life" such as that of offering sexual services against pay<sup>818</sup>.»

The Court also notices that, even if we consider the very small percentage of people who chose freely to practise prostitution, it would be very hard to translate on the normative level the line of distinction between a free decision and coerced decision, and on the other hand, this would be even harder to verify on the procedural level, through an ex post verification.

The Court continues by affirming that some concerns are also reserved for the few who carry out this work freely and consciously because of the dangers they are exposed 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)<sup>819</sup>. »

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<sup>818</sup> 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.»

<sup>819</sup> 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

It continues by embracing an objective notion of human dignity, which must be given by the legislator according to the common social sentiment at a given historical moment. For this reason, prostitution, even the voluntary one, is considered a degrading activity that reduces the intimate sphere of the body to a good to be sold.

With an analogy with the law on drugs consumers and drug dealers, and by citing also comparative case-law<sup>820</sup>, 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 notices that, if the law does not prohibit prostitution, this doesn't mean that this can be qualified as an expression of a constitutional right. To support this statement the Court reminds 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)<sup>821</sup>. The circumstance in which the Courts and Tribunals of legitimacy consider the income from prostitution as taxable, is in line with the general provision of the tax system. Indeed, it is undisputed that incomings from facts, acts or activities which can be qualified as civilly, administratively or criminally illicit, if they are not subject to seizure or criminal confiscation (Art. 14, paragraph 4, Law 537/1999<sup>822</sup>) are subjected to taxation.

The Court finds no contradiction between the taxation of the activity of prostitution, on the one side, and the fact that the law, on the other side, 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 of 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<sup>823</sup>.

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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) »

<sup>820</sup> In particular, the Court cites the decision n. 641/2016, 21 November 2016, from 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 conduct of prostitutes from that on the conduct of third parties who facilitate - or exploit or instigate - the activity.

<sup>821</sup> The only legally relevant effect is the *solute retentio*, that is, the right of the person who prostitutes himself to withhold the sums received from the client (Art. 2035 of the Italian Civil Code), without, however, her being able to take legal action in the event of spontaneous non-payment. See the previous note on this matter.

<sup>822</sup> 4 December 1993, N° 537, bearing "Corrective interventions of public finance"

<sup>823</sup> The Constitutional Court specifies that the ECJ has qualified prostitution as a self-employed economic activity, but only to exclude that the exercise of that activity can be considered as conduct serious

### 3.4.3. *The 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 good protected by law (Art. 12, 25 co.2, 27 Constitution). For the Corte d'appello di Bari the thesis stating that the protected good is public morality, in a paternalistic way, must be declared outdated, especially if we consider sexual 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<sup>824</sup>. The Corte d'appello also mentions the case-law of the European Court of Human Rights, specifically *Tremblay v. France*<sup>825</sup>, in which it was held that prostitution should be considered incompatible with the rights and dignity of the person only if it is the subject of coercion.

Following these arguments, both the censored provisions would not cause offence to any legal good, considering that the conducts they refer to facilitate the act of self-determination of a person who consciously chose to practise prostitution<sup>826</sup>.

The *a quo* judge highlights that these auxiliary conducts are strictly connected to exploitation, which is the solely autonomous crime. This supports the idea that the conducts of recruiting and aiding and abetting prostitution lack intrinsic offensiveness. However, according to the Corte d'Appello, in order to be criminally relevant such conducts should have causal relevance with the concrete carrying out of the prostitution. Again, a conduct facilitating prostitution would be aimed ad

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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 conduct is carried out by one of its nationals.

<sup>824</sup> 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).

<sup>825</sup> *Tremblay v. France*, n. 37194/02, 16 May 2006

<sup>826</sup> 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 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"».

implementing the freedom of sexual self-determination of a person who chose this profession. On the contrary, when these conducts affect the will of the (potential) escort then these fall under the offence of induction. In the words of the *a quo* judge, the usual distinction *between aiding and abetting prostitution and aiding and abetting prostitutes*, usually used when deciding these cases, is pretentious.

The Constitutional Court dismisses all these arguments. First of all, it observes that the identification of punishable conducts is to be considered, for the constant case law of the Constitutional Court, as a matter of legislative discretion<sup>827</sup>.

These choices can be contested by the Constitutional Court only if they are unreasonable and arbitrary in a manifest way<sup>828</sup>. The principle of offensiveness «operates on two distinct levels<sup>829</sup>». The first one is for the legislator, who should reserve criminal law to facts which are offensive against legal goods deemed worthy of protection. The second one is for the common judge, who needs to evaluate the concrete damaging attitude of a particular behaviour (so-called "concrete" offensiveness).

The constitutional judges observe that the identification of the legal asset protected by Law n. 75/1958 changed in a significant way over the years: until 2004 it was public morality, then the dignity and freedom of determination of the person who prostitutes him/herself<sup>830</sup>, and finally the protection would be based on the dignity of the person in sexual activity which cannot be negotiated<sup>831</sup>.

The Court concludes by stating that the incriminations are in line with the principle of offensiveness as they want to protect the fundamental rights of vulnerable persons (both practising, or not, prostitution by choice). Nevertheless, the judges affirm that the incrimination of parallel conducts, far from being a constitutionally imposed choice, is a legitimate solution chosen by the Legislator in its discretionary powers.

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<sup>827</sup> Judgments No. 95 of 2019 and No. 394 of 2006

<sup>828</sup> 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).

<sup>829</sup> Judgments N. 225 of 2008, N. 265 of 2005, No. 519 and N. 263 of 2000

<sup>830</sup> Cass. Penale, Sez. III, n. 35776, 2 September 2004; It equally combines such individual interest to the protection of public morality and morality: Cass. Penale, Sez. III, n. 1716, 9 November 2004-21 January 2005

<sup>831</sup> Cass. Penale, Sez. III, n. 14593, 30 March 2018; Cass. Penale, Sez. III, n. 5768, 7 February 2018

It must be also pointed out that when the conduct does not concretely damage any relevant good then the judge would be able to exclude the configuration of the crime.

#### 3.4.4. *The 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 defined offence. This offence is, indeed, formulated in a very generic way: the normative formula *favors the prostitution of others* would be made even more generic with the double indetermination coming from the expression *in any way*. This would result in the fact that «the criminal sanction really does not seem to know limits to its operative space<sup>832</sup>». According to the Corte d'appello this configuration would lead to the paradoxical consequence of having to select criminally relevant conducts, not because of the conformity to a conduct described by law, but in relation to its concrete capacity of offending the protected interest. Again, the Corte d'appello rejects the attempt to overcome this problematic point through the distinction between aid to prostitution and aid to prostitutes, which would result in a violation of Article 3 of the Constitution.

According to the Constitutional Court, this last exception is unfounded. First of all, the Court reminds of its precedent ruling<sup>833</sup> where an identical question was similarly declared unfounded. According to the settled case-law of this 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 not exorbitant to 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

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<sup>832</sup> Here the original passage: «la sanzione penale pare davvero non conoscere limiti al suo spazio operativo»

<sup>833</sup> Decision 44/1964, confirmed and reiterated by Order 98/1964

foundation; and, correlatively, allows the addressee of the rule to have a sufficiently clear and immediate perception of the relative perceptive value<sup>834</sup>».

In the present case, the description of the incriminated facts is based on a concept, such as the one of aiding and abetting, of ample use in the ambit of the 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 conduct to be in favour of the activity of prostitution, and not in favour of the person who practises 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<sup>835</sup>».

Subsequently the censor around Article 3 is to be considered unfounded.

#### 3.4.5. *Some remarks and comments on the decision*

The approach of the Constitutional Court was certainly very cautious in discussing a topic which is highly divisive and challenging on a social level.

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<sup>836</sup>. In fact, this

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<sup>834</sup> The original passage, in Italian: «l'inclusione nella formula descrittiva dell'illecito di espressioni sommarie, di vocaboli polisensivi, 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 sufficientemente 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.

<sup>835</sup> 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.»

<sup>836</sup> 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

would have brought substantial consequences to the apparatus of the law, ultimately leading to a non-regulated liberalization of prostitution<sup>837</sup>.

All this being adequately considered, there are some critical profiles which need to be discussed, especially considering the relevance this matter assumes in a liberal and secular State such as Italy<sup>838</sup>. These points will be discussed using the same order as the parameters proposed by the *a quo* judge and analysed by the Constitutional Court. First, when analysing Article 2, the Constitutional Court states that practising prostitution cannot be considered as part of a fundamental right in the sphere of sexuality, because it is “simply” a particular form of economic activity. This argument might be weak if we consider work as part of the rights covered in Article 2 together with sexual rights. In this sense, Article 2 can be used to affirm that there is a fundamental right of self-determination recognized to everyone who wants to make a job out of their sexual sphere. By stating that, Article 2 should not be considered a suitable parameter because the censored disposition limits third part mediation and not prostitution itself, the Court neglects the substantial role and impact that these provisions have on the possibility of practising prostitution. 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<sup>839</sup> with a very strong position: «the choice of selling sex in the vast majority of the cases is rooted in factors which undermine and limit the self-determination of the individual» or «there are substantial worries even for persons who chose freely and consciously this job». These propositions, which are not supported by any data, result in a paternalistic approach of the state

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<sup>837</sup> 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.

<sup>838</sup> S. Bernardi, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit.

<sup>839</sup> 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. Di 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 Costituzionale*, 2019. On the contrary, other scholars appreciated the discussion on article 41, stating that proper attention was given to a profile often not 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*, in AIC

towards its consociates, with substantial and unreasonable limitation of the legitimate choice of a person<sup>840</sup>.

A liberal State needs to have a strong reason to limit the right of self-determination of individuals. This is particularly true in criminal law, where the intervention of the State is justified to contrast and prevent harm to other people and a duty of non-intervention in the case of self-harm<sup>841</sup>. For this reason, it was observed that on this point better arguments were expected from the Constitutional Court<sup>842</sup>.

Following the analysis of the Court we should assume that the main reason behind these criminal law provisions is the protection of vulnerable subjects. It was observed that the notion of vulnerable subject is quite new for Italian criminal law<sup>843</sup>, and the fact that the Court did not provide a definition of it, but simply related this condition to a multiplicity of factors that can hinder self-determination, might reveal a moralistic assumption, according to which prostitution can never be considered a work as any other<sup>844</sup>.

Moreover, the Court openly embraces, without further articulating this point, an objective notion of dignity in relation to Article 41 of the Constitution, that necessarily transcends from personal evaluation and self-determination, and is based on a predetermined evaluation from the legislator. The link between this notion of human

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<sup>840</sup> S. Bernardi, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit. Further comments on the decision: Cosimo 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*, 2019, 4, pp. 175-190; P. Pittaro, *Osservatorio di giurisprudenza penale. Rassegna di giurisprudenza*, in *Famiglia e diritto*, 2019, 1, pp. 62-66; A. Cadoppi, *Moralismo penale e prostituzione*, in *L'Indice penale*, 2019, 1, 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

<sup>841</sup> J. Feinberg, *The Moral Limits of the Criminal Law. Harm to Self*, vol. III, Oxford, 1986; On this point scholars wrote widely, ex multis see: A. Cadoppi (eds.), *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

<sup>842</sup> S. Bernardi, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit.

<sup>843</sup> Entered in article 600 cp and 601 cp, thanks to the influence of European law on human trafficking, Directive 2004/81/EC. On this see the article: 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

<sup>844</sup> S. Bernardi, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit.

dignity and the one affirmed in Decision n. 207/2018<sup>845</sup> on assisted suicide is immediate. Undeniably, the parameters involved are different: on the one side, indeed, we have Article 2 and Article 31 and on the other Art. 41. We must consider, however, whether it's possible to have two antithetical definition of dignity<sup>846</sup> living inside the constitutional system, one linked to self-determination and the other one connected to external parameters, which should be based on a social sensibility filtered by the legislator (more than 60 years ago). In the decision on assisted suicide the Constitutional Court affirms that the intention of the legislator is «to protect the subject from his/her harmful decision» (the one of committing suicide) and given the

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<sup>845</sup> This Order is widely commented by scholars, both because the topic is very sensitive, but also because it represents an exception in the Constitutional Panorama. In this decision, indeed, the Constitutional Court uses the power to manipulate in time the effects of its decisions, a prerogative which is not Given by the Constitution nor 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 its decision on the 25 September 2019, declared the constitutional illegitimacy of article 580 of the Criminal Code under certain circumstances. The decision is not public yet. For comments 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*; U. Adamo, *In tema di aiuto al suicidio la Corte intende favorire l'abbrivio di un dibattito parlamentare*, in *Diritti Comparati*; 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*; 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*; 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*; F. Dal Canto, *Il "caso Cappato" e l'ambigua concretezza del processo costituzional incidentale*, in *Forum di Quaderni Costituzionali*, 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 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

<sup>846</sup> Legal scholars pointed out at the fact that the notion of dignity, especially with regard to ethically sensible topics, is a sort of "empty vase" that assumes different connotation, depending on the context. On this observation, applied in the field of biolaw see: C. Casonato, *Introduzione al biodiritto*, Torino, 2012, pp. 47-81; G. Arruego, *El recurso al concepto de dignidad humana en la argumentación biojurídica*, in R. Chueca (ed.), *Dignidad Human y Derecho Fundamental*, Madrid, 2015, pp. 415-441

impossibility of intervening directly on the subject it «creates around him a "protective belt", inhibiting third parties from cooperating in any way with him/her»<sup>847</sup>.

This mechanism resembles the one enacted by the Merlin Law in relation to persons practising prostitution. In the first case, however, the Court recognized that exceptions must be made to the above-mentioned provision, appreciating that there are cases when the self-determination of the subject wins over the need for protection of vulnerability.

Of course, prostitution is a very different phenomenon because it involves the exchange of money and a big sphere is contaminated by very serious criminal phenomena, such as exploitation and human trafficking. For this reason, we must admit that the appreciation of free will is very hard and complex, but this does not invalidate the need to distinguish between human trafficking and prostitution as sex work.

However, the Constitutional Court, with its affirmation, excluded the possibility of recognizing any form of self-determination for this purpose. These statements are partially attenuated in the final part of the decision, where the Courts states that, in the end, this is not the one and only constitutionally compatible choice, leaving the responsibility to the legislator.

Some critical remarks need also to be made on the discussion of the Court of the parameters at 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<sup>848</sup>, and the solution of the Court was described as apodictic. The Court explicitly endorsed its precedent ruling n. 44/1964. However, one of the determining factors of that decision, has now changed: the Court failed to acknowledge it. 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. This statement was failed by the many different decisions from Tribunals and Courts that followed in the years. It is clear that the interpretative doubts around this provision, will find no help in this

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<sup>847</sup> Point 4 of the decision, here 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»

<sup>848</sup> A. De Lia, *Le figure di reclutamento e favoreggiamento della prostituzione al banco di prova della Consulta*, cit.

decision, considering both the profile of harm, as well as the boundaries between a legitimate conduct and a criminally relevant one<sup>849</sup>.

On the contrary, the fact that the Court explicitly mentioned the discretion of the judges on the evaluation of relevant conducts, might result in strongly fragmented decisions adopted with a case to case approach<sup>850</sup>.

To conclude, it must be mentioned that the fact that after having developed arguments in favour of the constitutional adequacy of the Merlin law, the Court recognizes that such a choice is not constitutionally necessary (and not the only one potentially acceptable) might reveal to contain two relevant aspects. On the one side this might disclose the existence of a different sensibility amongst the judges<sup>851</sup>, and on the other, it may show a willingness to demonstrate a certain openness to a possible future evaluation and legislative approach.

#### 4. *The Law proposals on sexual assistance in Italy*

After having analyzed the Merlin Law, its current application and the most recently issued decision from the Constitutional Court on the topic, we can move on to the analysis of the potential legislative approach to 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.

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 were born 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

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<sup>849</sup> A. De Lia, *Le figure di reclutamento e favoreggiamento della prostituzione al banco di prova della Consulta*, cit.

<sup>850</sup> Agree on this point: A. De Lia, *Le figure di reclutamento e favoreggiamento della prostituzione al banco di prova della Consulta*, cit.; S. Bernardi, *Sulla legittimità costituzionale dei delitti di reclutamento e favoreggiamento della prostituzione*, cit.

<sup>851</sup> A. di Martino, *È sfruttamento economico e non ad autodeterminazione sessuale: la consulta salva la legge Merlin*, in *Diritticomparati.it*, 2019

drafted, to understand and speculate on the aspect sexual assistance might assume in our country on a legislative level.

#### 4.1. *The three law proposals and the opening memorandum*

All three law proposals were drafted during the XVII legislature, while nothing similar was proposed during the current legislation at this time. The first one, Disegno di legge n. 1442, presented in the Senate on the 9<sup>th</sup> 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*)<sup>852</sup>. This proposal is called the “Law on assisted sexuality for people with disability<sup>853</sup>”.

In the memorandum that opens the text, sexuality is seen as part of a broader project of personal development, and sexual rights are framed as human rights whose violation is considered a denial of equality, non-discrimination, dignity and right to health.

The constitutional anchor is Decision n. 561/1987, where sexuality is considered as part of the set of fundamental and undeniable rights, protected by the Constitution. From this assumption the Senators point out the fact that many people with disability, for different reasons, cannot make informed and free choices around their sexual well-being or health. Some people with disability cannot autonomously entertain interpersonal relationships because of a condition of physical impairment or because «their appearance doesn't fit in the dominant esthetical model and what is considered attractive<sup>854</sup>», others cannot even practice masturbation.

They also notice that the difficulty in living a sexual and intimate sphere results in a further loss of autonomy for people with psycho-social impairments.

In the opening memorandum it is stated clearly that this situation is made even more serious by the predominating stereotypes around disabled people's sexuality in our

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<sup>852</sup> The initiative was presented by senators: Lo Giudice, Cirinnà, D'adda, Guerra, Ichino, Mancanoni, Maran, Mastrangeli, Mattesini, Pezzopane, Puppato, Ricchiuti, Sonogo, Spilabotte, Valentini, Bencini and Romani.

<sup>853</sup> XVII Legislatura, Disegno di legge n. 1442, Disposizioni in materia di sessualità assistita per persone con disabilità, 9 April 2014

<sup>854</sup> Here the original quotation: «Molte persone in condizione di disabilità non possono autonomamente intrattenere relazioni interpersonali complete sotto il profilo psicoaffettivo, emotivo e sessuale poiché impedito da una condizione di ridotta autosufficienza a livello di mobilità e motilità o a causa di un aspetto fisico lontano dai modelli estetici dominanti e ritenuti attraenti» The proposal can be found at this link: <http://www.senato.it/service/PDF/PDFServer/BGT/00769165.pdf>

culture, and it is acknowledged that the law cannot replace the need to overcome prejudices and cultural barriers. However, the law can help in promoting, through the tool of sexual assistance, the sexual dimension of people with disability.

According to the promoters of the law, this text represents a form of prevention of the limitation of the fundamental right to health, deriving from the impossibility for many people with disability to reach a condition of psycho-physical, emotional and sexual well-being. For this reason, the law aims to create a specific professional figure of a sexual assistant, a professional who needs to follow psychological, medical and sexology training. This figure will support people with psychosocial or physical impairments in living an erotic, sensual or sexual experience and in learning how to better address internal energy to avoid rage and aggressive feelings. The regulation of this professional figure, already existing in Denmark, Germany, The Netherlands, and Switzerland is defined as a “goal of civility<sup>855</sup>”.

This proposal with its memorandum is the most extensive one: the other two, presented inside the Chamber of Deputies, are largely inspired by it, with very few amendments. The second proposal is “*Proposta di legge n. 2841*” presented on the 23<sup>rd</sup> January 2015, written by the deputy Argentin, an activist for disability rights from the Democratic Party (*Partito Democratico*), and other deputies<sup>856</sup>, and is named “Law on assisted sexuality for people with disability<sup>857</sup>”. The third proposal is “*Proposta di legge n. 4143*”, titled “Creation of the professional figure of the educator to sexual well-being for persons with disability<sup>858</sup>” and was presented by the deputy Savino, from Forza Italia. In this memorandum, the goal of dismantling stereotypes on the asexuality of people with disability is declared. In this sense education and assistance to live 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 will help the persons with disability to be *protagonists* of their life and aware of their sexual, emotional and relational potential. This educator will

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<sup>855</sup> See: Disegno di legge n. 1442, p. 3

<sup>856</sup> The deputies were; Albin, 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.

<sup>857</sup> XVII Legislatura, Proposta di legge n. 4143, Disposizioni in materia di sessualità assistita per le persone disabili, 23 January 2015

<sup>858</sup> XVII Legislatura, *Proposta di legge n. 4143*, Istituzione della figura dell’educatore al benessere sessuale per le persone disabili, 11 November 2016

help the user through sexual education and will raise her/his awareness of her/his self and increase the capability of taking care of her/his body.

In this memorandum the topic of the relationship between sexual assistance and sex working is explicitly mentioned. They affirm that prostitution differs widely from sexual assistance because the latter is offered by people who are trained experts, who enlisted in a register and are periodically supervised. Moreover, sexual assistance, unlike prostitution, is a specific therapy aimed at realizing the right to psycho-physical well-being and giving people with disability higher responsibility with regard their relational life.

#### 4.2. *The text of the Law Proposals in detail*

In this part we will analyse and later discuss the law proposal in detail.

As has already been mentioned, the first proposal presented in the Senate is the most comprehensive text, while the two others are to be considered versions with little variation or simplifications of the original proposal.

The structure of the law proposal is very simple, and the text is quite short. It is composed of a single article divided into 5 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 with disability (Paragraph 2) is not defined<sup>859</sup>. 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 disability with reduced mobility and motility<sup>860</sup>.

As stated in paragraph 1, this figure will be disciplined by Regional intervention, 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 declared that the Regions and the Provinces of Bolzano and Trento must prepare a list

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<sup>859</sup> «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.»

<sup>860</sup> «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. »

## CHAPTER IV

of people who are trained to provide sexual assistance in their territories. 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 ASL (Local Health Authority); e) must be accredited according to the procedure at §4<sup>861</sup>.

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 of choice about publication of professional contacts; d) adopt an ethical code for sexual assistants and for the users, using content elaborated and actuated in Italy or other countries by organizations and institutions specifically trained in this area; e) define the typology 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<sup>862</sup>.

Paragraph 5 regulates the aspects concerning labour law. It is stated that sexual assistance cannot be treated as employment, nor can it be carried out through procurement contracts. The work must be characterized by the full autonomy of the

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<sup>861</sup> «Costituiscono elementi necessari per l'inserimento nell'elenco di cui al comma 2 le seguenti caratteristiche: *a)* il raggiungimento della maggiore età; *b)* l'aver 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. »

<sup>862</sup> «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.»

person who practises it. It can be regulated as self-employment in a Cooperative company<sup>863</sup>.

*Proposta di legge n. 2841* replicates precisely the text of the previous proposal.

As regards the *Proposta di legge n. 4143*, this is composed of three articles. The major difference between this text and the one already analysed, is that at Article 1 a definition of this new professional figure is provided. In Paragraph 1 the *educator to sexual well-being* is defined as a professional operator supporting people with disability 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<sup>864</sup>.

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 in 6 months. At Paragraph 2 it is 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 disability.

At Article 3, Paragraph 1, three requisites to be part of the above-mentioned list are established: a) be over 18 years old; b) possess a certification of psycho-physical eligibility provided by the local ASL (Local Health Authority); e) be accredited according to §2<sup>865</sup>. In Article 3, Paragraph 2, it is established that the Regions and the Province of Trento and Bolzano must: a) define the typology and the 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 periodicity of the updating of the register;

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<sup>863</sup> «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.»

<sup>864</sup> «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.»

<sup>865</sup> «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. »

d) regulate the ways in which the psycho-physical eligibility of the operators should be periodically assessed<sup>866</sup>.

#### 4.3. *The delegation to the Minister of Health and to the Regions, the register and the role of the ASL*

We have already shown that the Law proposals are all very concise and short.

What is evident is that the proposals are also very vague and give a predominant role to the Minister of Health as well as to the Regions and Province of Trento and Bolzano to be carried out outside of 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<sup>867</sup>, which should be coordinated by a decree from the Ministry. In such a delicate and unexplored legislative field, the idea of reducing to the minimum the intervention by formal Statute is probably a risk. The delegation to the Minister of Health itself is not defined in any manner. On the contrary, each Region and the Provinces of Bolzano and Trento are asked to legislate widely on very specific topics. On this point there are some considerations to be made. Firstly, the fact that 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 discontinuous service, with substantial differences in the Italian territory. Secondly, some Regions, where the local organizations have been working for years on creating such services (for example Emilia Romagna), may have the support of these local entities to develop a proper legislation, while others may be totally unsupported in having to legislate in detail on such a delicate topic.

In particular, the fact that Regions must legislate on the training course, on the ethical code to be adopted, on the type of disability which makes the person eligible or not for

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<sup>866</sup> «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 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»

<sup>867</sup> 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, 1007-1062

the service, and on the monitoring of the psychophysical well-being of the sexual assistance, is particularly problematic. All these concerns are connected to the unknown content of the Guidelines from the Minister of Health, and the risk of substantial differences at the territorial level, with the risk of a violation of the principle of equality (Art. 3 of the Constitution).

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<sup>868</sup>.

Another point pertains to the need for the sexual assistant to receive a certification of eligibility from the Local Health Authority (ASL). This is one of the few requirements to be a sexual assistant provided by law, however, again, it is not clear what kind of eligibility the law is referring to. Of course, the need to have mentally-balanced persons doing the work of caregivers can be recognized, but no specific criteria are established or mentioned. To this end, a scientific protocol, similar to the one elaborated by the *LoveGiver Committee* for the selection of aspiring sexual assistants (see Paragraph 5), might be suitable. On the contrary, the certificate on physical eligibility doesn't appear to be immediately reasonable and risks excluding from this profession disabled people themselves who want to be trained as sexual assistants<sup>869</sup>.

#### 4.4. *An ethical code: possible features*

The possibility of adopting an ethical code to be subscribed by all sexual assistants is considered positively.

As has already been observed, what raises doubts and questions is that this code is to be adopted on a Regional level, which may imply a high level of territorial differentiation. It is interesting however that, according to the law, Regions are incited to legislate on the matter by integrating the work and the experience of national and international organizations working on sexual assistance.

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<sup>868</sup> This 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*, in *L'indice penale*, 2018, p. 412

<sup>869</sup> See the interesting article from 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.

The *LoveGiver Committee* has not yet published their complete ethical guideline to be followed by sexual assistants, however they explicitly agree on the need for such a document for both parties involved and they set out some basic possible features<sup>870</sup>.

According to the *LoveGiver Committee*, a possible ethical code should be based on four main pilasters: distinction between prostitution and sexual assistance; relation with the assisted person; non-excitatory involvement of the professional; respect between professionals.

As regards the difference between prostitution and sexual assistance nothing in the proposal of law stresses or marks this point, which however cannot be ignored in a legal system where the approach toward prostitution is an abolitionist one, especially given the last decision from the Constitutional Court on the matter. In the view of the main promoter of sexual assistance in Italy, this difference is mainly a qualitative one: as we have already mentioned, they contrast sexual assistance to “simple” sex working by stating that in sexual assistance there is a surplus of care and attention to the emotional side as well as medical and sexology knowledge. The ultimate goal of the sexual assistant indeed is to educate the user to pleasure and the recognition of pleasure<sup>871</sup>.

For this purpose, the Committee supports the idea of specific provisions in the hypothetical ethical code/guidelines regarding the limitation of the sexual practice that a user and a sexual assistant can experience during this educational path. As has already been mentioned, sexual practices that imply coitus as well as any penetrative and oral experience, and in general anything requiring a body-to-body experience should be excluded.

Another factor that should be considered from the ethical point of view, according to the *Committee*, is the one related to the possibility, for the person with disability, to fall in love with her assistant. The vulnerability which some people with disability, specifically the ones with psycho-social and intellectual impairment, can experience, might bring them to experiment a certain confusion between the experience of pleasure and love. To avoid this, it has been suggested to limit the number of encounters

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<sup>870</sup> F. Quattrini, *Assistenza sessuale il progetto “Lovegiver” per la formazione degli operatori*, cit., p. 70

<sup>871</sup> F. Quattrini, *Assistenza sessuale il progetto “Lovegiver” per la formazione degli operatori*, cit., p. 62

between the sexual assistant and the user. 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 experiencing in the emotional and sexual sphere<sup>872</sup>.

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 excitement, which is why in the selection process there is a specific test to identify the possible *devotism*<sup>873</sup> of the aspiring sexual assistant (see further on). The possibility that the sexual assistant relate to the assisted person as a sexual object must be avoided. Of course, from both sides there is always the possibility of a deeper involvement: in case the two persons fall in love they are encouraged to enter into a different kind of relationship, but the professional relationship should end accordingly. Moreover, the *Committee* pushes attention to the need to elaborate rules about fair behaviour between sexual assistants, who must respect each other as professionals to grant a working community based on mutual growth.

From the possible legal framework proposed in Italy, the fact that this professional figure must be remunerated is something uncontroversial. Nothing, however, is proposed to define the characteristics, the minimum wage and the limits of this remuneration.

Of course, as an autonomous worker the sexual assistant should be capable of offering his/her service for the price he/she deems the most appropriate. However, we should notice that, if this assistance should be framed as an instrument of actuation of fundamental rights, then there is a certain need to ensure prices in the liberal market are fairly determined to protect both parties.

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<sup>872</sup> 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 about 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

<sup>873</sup> Sexual attraction to disability (minor, such as missing fingers, or severe, such as blindness, limb amputation or quadriplegia) is known as devotism, and subjects who are specifically interested in and sexually aroused by people with disabilities call themselves devotees. Devotism is classified as a paraphilia. See R. J. Aguilera, *Disability and delight: staring back at the Devotee community*, in *Sexuality Disability*, 2000; 18, pp. 255–261 and E. Limoncin, R. Carta, G. L. Gravina, E. Carosa, G. Ciocca, S. Di Sante, E. A. Jannini, *The sexual attraction toward disabilities: a preliminary internet-based study*, in *International journal of impotence research*, 26, 2, 2014, p. 51

Of course, another point to develop is whether or not this service should be financed by the State (this aspect will emerge in Chapter V from the comparative analysis and in some proposals for Italy).

In addition, this 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 matured in the field of medical consent through Law 219/2017<sup>874</sup> can be useful. In this sense, it could be said that there is a need for the autonomy of the person with disabilities and the professional competence of the sexual assistance to meet (as stated in Co. 2 Art.1 Law 219/2017<sup>875</sup>).

To make this encounter happen we urge the building of relationships based on trust. For this reason, just as informed consent in the medical field must be given by paper<sup>876</sup> (Paragraph 4), the intervention plan elaborated by the assistant after the communication and assessment phase might be written and signed by the assisted person. After all, this is also what happens in countries such as Denmark with people living in institutions (as discussed in Chapter III).

In general, many principles could be derived from the Deontology code for social workers<sup>877</sup>.

#### 4.5. *Further observations on these proposals*

If in general these law proposals are to be considered a good expression of interest from institutional politics in the topic, there are many weak points on these texts as formulated during the last legislature.

Apart from some specific remarks which were already brought forward in Paragraphs 4.4 and 4.3, there are two main issues to be faced. The first one regards the theoretical

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<sup>874</sup> On Law n. 219/2017 see *Biolaw journal- Rivista di Biodiritto*, n. 1, 2018, pp. 1-104, with a specific Focus dedicated to Law on informed consent

<sup>875</sup> 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*, n. 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*, n. 1, 2018, pp. 25-27.

<sup>876</sup> Or it might be registered via video, or with any other means for communication, according to the need of each one, always in the perspective of maximum accessibility and reasonable accommodation.

<sup>877</sup> 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: Di F. G. Reamer, *Social Work Values and Ethics*, New York, 2013.

matrix, while the other one concerns the coordination between this kind of legislative measure and the law on prostitution.

To begin with, we must notice how the proposals, specifically the one elaborated by Senator Lo Giudice, reveal both in the opening memorandum and the articles the idea of the therapeutic nature of the service of sexual assistance. For example, in the opening memorandum, after having framed the issue of sexuality inside the decision of the Constitutional court n. 571/1987 as a fundamental right according to Article 2, and after having faced issues specifically arising for people with disability from stereotypes and prejudices around their sexuality, it states that this impossibility of reaching a sexual, emotional and psychic-physical well-being is a violation of the right to health.

Of course, if we define health as a comprehensive state of physical and emotional well-being, as affirmed by the WHO<sup>878</sup>, we can agree on the previous statement. However, the fact that there is no further mention of social barriers and inequalities perpetuated by this status quo might bring forth some critics around the conception of disability underlying the law.

Indeed, the general concern of this law is that it could implement a medical view of disability, where sexuality is another disability issue to be treated medically. This idea is further reinforced by the fact that the competence for the guidelines is given to the Ministry of Health.

Moreover, between the list of specific issues the Region must legislate on, there is the criterion regarding the type and severity of the impairment which makes the person eligible for the service. This is a very arbitrary criterion to set: the legislator is asked to find a reasonable benchmark capable of 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, both between people with disability in the same Region and between people with disability who live in different Regions. If this is physiologic in Regionalism however, when it comes to social rights, for example in

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<sup>878</sup> The World Health Organization defined health as Health is 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. Callahn, *The "WHO" definition of health*, in *The Hastings Centre Studies*, 1, 3, 1973, pp. 77-87

the field of health, there is the possibility of establishing a minimum standard of protection that must be ensured to everyone<sup>879</sup>.

According to the law proposal, this criterion should be based on two indexes: the type of impairment and the severity. Both features are to be assessed using medical criteria and it is unavoidable to reconnect this approach to a medicalization of disabled people's sexuality, putting the person in the role of object of state intervention again, not subject.

The fact that not every person with disability is entitled to choose in freedom whether or not she/he needs this kind of service, as an expression of self-determination might not be in line with a proper constitutional framework for this kind of measure, which should be mainly based on Articles 2 and 3. On the contrary, the predetermination of a subcategory of disabled people who, because of their presumed difficulties in the sphere of sexuality, are eligible for this service is highly stigmatizing for these people. Of course, the need to assess a criterion of eligibility for this service is recognized, specifically in a situation where abuses, and the possibility of trying to elude the laws on prostitution, are a concrete danger. For this purpose, a provision, open to every kind of disability, requiring an assessment to be based on Article 4 of Law 104/1992 might be a suitable option (see Chapter V for further details).

The coordination between this hypothetical law and the Merlin Law is a problematic point that might easily expose these provisions to a declaration of unconstitutionality. The fact that the proposals do not address the issue directly, defining with more precision the distinction and lines between this figure and the sex worker is critical<sup>880</sup>. An intervention of coordination would have been preferable: a modification or a new disposition inside the Merlin Law for example, would have been functional<sup>881</sup>.

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<sup>879</sup> On Regionalism, in general see: E. Balboni, *L'attuazione del regionalismo differenziato: la differenziazione non implica di per sé disegualianza*, 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 the profiles related to right to health: G. France, *Federalismo, regionalism e standard sanitari nazionali*, Milano, 2011. In Chapter V we will discuss how a minimum standard of protection was never established for personal assistance (LivEAS)

<sup>880</sup> 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

<sup>881</sup> 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.

Clearly the latter is not to be considered the only legislative technique possible: a solution like the one suggested in the law proposal is not *per se* to be excluded, although due to its brevity and lack of definitions is very risky.

On this point it must be observed that the definition on a legal level of the main features of the training course, for example the specific professional competences needed to carry out this profession, would have helped in this sense.

##### 5. *The first course for sexual assistants outside of a legal framework: nature and implications*

To recapitulate, we can affirm that the advocacy movement around sexual assistance has been active for more than six years now, the public attention is growing, the public seminars, TV programs and discussions are multiplying. Nonetheless, on a political level the debate is still stuck in 2014, with the law proposals detailed in Paragraph 4, which never reached Parliamentary discussion. The political situation in Italy is currently not fruitful and it is probably not ready for the discussion of such a sensitive topic.

It is probably because of these considerations that the *Committee* decided to detach its route from the legislative itinerary, finding new and alternative ways to give concrete life to the *LoveGiver* project. For this reason, they decided to launch the first courses for aspiring sexual assistants, regardless of the law provisions on prostitution.

##### 5.1. *The LoveGiver Committee and the course for sexual assistants*

The Committee decided to discuss the elements of a possible training course already 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 disability.

According to the *Committee*, the training is not just about sexual education, on the contrary its main focus is on the promotion of the satisfaction of the erotic-sexual well-

being of the user. The idea behind these different courses is to train different professional figures around sexuality-related issues for people with disability. For example, a medic or a psychologist trained in sexuality might be able to provide counselling and advice to a person, and if necessary to guide him/her to the service offered by sexual assistants.

The tools and functions of these professional figures are very different but can be considered in a continuum and are all aimed at granting the sexual-erotic well-being of the person with disability. These trainings are definitely all aimed at creating a collective consciousness on sexuality and disability and designed to grant a functional and educative support for all those people who have difficulties in recognizing, expressing and having experiences of eroticism and sexual pleasure.<sup>882</sup>

The launch of the first course started in 2014 and was promoted under the scientific direction and support of Quattrini and Fulcheri<sup>883</sup>. The organization of the course was broken down into many different steps, namely: a call for participants, the selection of the aspiring sexual assistants, the training course itself, the internship, and a follow up. Currently 16 people have been trained to carry out the profession of sexual assistant in Italy<sup>884</sup>.

## 5.2. *The call for participants and the selection of aspiring sexual assistants*

Between June and July 2014, the *LoveGiver Committee* launched the call for candidates for the first training course for sexual assistants in Italy.

They wrote a press release, which was spread only through social networks and a few newspapers, and soon received more than 70 applications. Quattrini and Fulcheri elaborated a protocol for the selection, widely inspired by the experience of northern

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<sup>882</sup> F. Quattrini, *Assistenza sessuale il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 62

<sup>883</sup> F. Quattrini, M. Fulcheri, *Affettività e sessualità nella disabilità. La formazione degli operatori*, cit., p. 108-109

<sup>884</sup> From this article journal and interview <https://www.fanpage.it/attualita/anna-la-prima-assistente-sessuale-per-disabili-in-italia-insegno-lintimita-e-leros/>

countries, revisited for the Italian context and in line with the figure of the Italian sexual assistant (as described in the previous paragraphs)<sup>885</sup>.

They decided that the first part of the selection was to be based on the identification of the real motives of the candidate, a sort of pre-selection of people before moving on to the proper interview process. In the press release, candidates were asked to send their application by sending their Curriculum Vitae, a passport photo and a cover letter. It was specified that the interview would have taken place in the Italian Scientific Sexology Institute, based in Rome. The choice of place was intentional: they thought that, due to the travelling, with effort in terms of time and money implied, only people with a high-motivation profile would accept to take part in the interview. Already from this first phase, indeed, some candidates showed some personality features which were considered incompatible with the figure of sexual assistant imagined by the *Committee*<sup>886</sup>, and enabled the pre-selection to be successful.

The following phase was regulated by an experimental scientific protocol based on multiple psychological evaluations. This was composed of a clinic interview and three questionnaires. The first one was the *Sexual Disability Questionnaire*, a tool designed ad hoc by Quattrini and Dell'Oste<sup>887</sup>. The Sexual Disability Questionnaire is a tool with 136 items divided into 6 different areas. Most of the items are organized into Yes-No answers and a five-level Likert scale, but there are also a few open questions<sup>888</sup>.

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<sup>885</sup> F. Quattrini, M. Fulcheri, *Affettività e sessualità nella disabilità. La formazione degli operatori, cit. familiari e opportunità relazionali* p. 108-109 and F. Quattrini, *Assistenza sessuale il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 62

<sup>886</sup> In the book Quattrini report in particular two email exchange happened between him and two aspiring candidates for the training course. In the email of the first candidate "Anna" the refusal to provide a passport photograph and a cover letter, as well as a very sharp communication, showed a certain rigidity incompatible with the empathic and open figure who the sexual assistant was imagined to be. The second person, called Antonella, showed a firm refusal to send her CV, which united to the information related to her work- she is the owner of a sex shop- provide a set of ambivalent motivations. F. Quattrini, *Assistenza sessuale il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 62

<sup>887</sup> F. Quattrini, M. Fulcheri, *Affettività e sessualità nella disabilità. La formazione degli operatori*, cit., p. 108-109

<sup>888</sup> The areas are divided as follows:

Area A: Anamnesis. Composed by 24 items is useful to trace a complete framework of the amnesthetic-social and cultural characteristics of the candidate. One of the item (n. 24) highlights the possible disability of the person who is responding.

Area B: Living experience related to sexuality (item 25-41);

Area C: Relationship with the topic of sexuality and disability (item 42-71);

Area D: Sexuality, disability and empathy (item 72-89) with a sub-section related to the direct experienced with people with disability (items 80-95);

Area E: Burnout. This group of items want to evaluate the risk and the possible pathologic result of the stress which may invest caregivers;

Then the *Balanced Emotional Empathy Scale* from Mehrabian<sup>889</sup>, a self-report questionnaire, composed of 30 statements with answers in a 7-level Likert scale, was used.

This scale measures the emotional component of empathy, defined as the experience of other people's feelings associated with interpersonal positivity. According to the Committee, both these elements are fundamental for sexual assistants, who must be able to live emotions related to other people but also who, using cognitive mediation, want by doing so to activate a positive and prepositive experience of feelings.

Another instrument used was the *Scale to measure emotional fragility* by Caprara<sup>890</sup>, composed of 30 items in a 7-level Likert scale. This tool is aimed at evaluating the role that emotions and affectivity play in the complex personality balance of the candidate. Finally, the *Indicators of Aggressive Conduct* by Caprara<sup>891</sup> were used to measure the tendency of each individual to react from impulse or in a provocative and polemical manner. The Committee believes these aspects are really important, as the sexual assistant might be in a situation where she/he is subject to aggressive behaviour and has to be able to not respond in an impulsive way. They also report, without providing further information, that half of the aspiring sexual assistants were tested using the *MMPI-2 test*<sup>892</sup> in order to evaluate possible personality disorders.

These tests were followed by a clinical interview, lasting approximately an hour, during which each candidate had to answer some questions around her/his/their motivations, formulated by a psych-sexologist<sup>893</sup>. Quattrini also created another

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Area F: Problem Solving. This area is aimed at investigating the capability of creating and adopting strategies. Some items are aimed at identifying possible stereotypes that the candidate might have (item 117-136), and others are specifically on sexual assistance.

F. Quattrini, M. Fulcheri, *Affettività e sessualità nella disabilità. La formazione degli operatori*, cit., p. 107

<sup>889</sup> A. Mehrabian, *Balanced Emotional Empaty Scale: Manuale*, adattamento italiano a cura di A. M. Meneghini, R. Sartori e L. Cunico, Firenze, 2012

<sup>890</sup> G. V Caprara., M. Perugini, C. Barbaranelli, C. Pastorelli, *Scala per la Misurazione della Fragilità Emotiva: Manuale*, Firenze, 2011

<sup>891</sup> G. V Caprara., M. Perugini, C. Barbaranelli, C. Pastorelli, *Indicatori della condotta aggressiva*, Firenze, 2011

<sup>892</sup> The Minnesota Multiphasic Personality Inventory (MMPI) is a standardized psychometric test of personality and psychopathology that was developed in 1940s to assess mental health problems in psychiatric and medical setting. It soon became quite common also as a standard personality instrument: psychologists use various versions of the MMPI for treatment plans; differential diagnosis, in forensic psychology. See S. R. Hathaway, J. C. McKinley, *A multiphasic personality schedule*, in *Journal of Psychology*, 10, 1940, pp. 249–254.

<sup>893</sup> These questions approximately were: 1) how did you receive the information about this training course 2) what is for you sexual assistance 3) what does a sexual assistance do on a professional level

specific tool to be used during the interviews, aimed at investigating the potential devotism<sup>894</sup> of the aspiring candidate<sup>895</sup>. At the end of the interview the candidate was given more information about the course and space for questions was left.

### 5.3. *The training course and the internship*

The course imagined by *LoveGiver* consists in 200 hours of training, lasting 12 months, with monthly encounters. Weekends are organized into a three-day immersive experience, where there will be theoretical and practical lessons. Two sexual assistants from northern Europe will be invited to present the experience of their countries and to share theory and techniques related to sexual assistance. In general, the training will provide a specific theoretical focus on disability by studying different forms of impairments both from a medical-functional side and a psychological-relational side. Specific theoretical attention will be given to assertive communication, active listening, the development of emotions and empathy and the education to the body and sexuality. The practical side will investigate the candidate's emotional-expressive characteristics, sexual identity, the body and the sexed body. An internship of 50/100 hours will be incorporated in the educational offer. This internship will take place in an organization or social enterprise which is part of the network created by the LoveGiver Committee. In this way the aspiring sexual assistant will have the chance

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4) who are the people you've told (o you would tell) about your interest in this profession 5) how would you feel about entering in touch with the sexuality of a person with disability whose sexual orientation is different than yours 6) what do you expect from the course. See F. Quattrini, *Assistenza sessuale il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 66.

<sup>894</sup> R. J. Aguilera, *Disability and delight: staring back at the Devotee community*, in *Sexuality Disability*, 18, 2000, pp. 255–261. Sexual attraction to disability (minor, such as missing fingers, or severe, such as blindness, limb amputation or quadriplegia) is known as *devotism*, and subjects who are specifically interested in and sexually aroused by people with disabilities call themselves devotees. This is still it is classified as a paraphilia.

<sup>895</sup> This test is composed by 4 simple mental exercises. The candidate is asked to imagine a woman or a man (according to sexual orientation) completely naked and identify three body parts related to positive feeling, then three parts which are not of the candidate's interest (negative value) and then the candidate is asked to associate 3 adjectives to the chosen part. The same exercise is then done imagining a person of the opposite sex. The third and fourth exercise are exactly the same, but the candidate is asked to imagine a person with disability and communicate which kind of impairment she/he is imagining. See F. Quattrini, *Assistenza sessuale il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 67

to enter into contact for the first time with this experience and be, at the same time, monitored in this approach through specific supervision modules<sup>896</sup>.

#### 5.4. *The follow up phase*

Supervision is a big part of the training course, considering that this implies a huge responsibility, both for the trainers and the trainees. For this reason, guidelines to monitor and ensure the well-being and safety of the trainees were elaborated. 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 program. As regards 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 the period of 1 year. After this period this support is not mandatory, but highly recommended<sup>897</sup>.

#### 5.5. *Possible relevant profiles for criminal law*

We have already mentioned that a first training course was carried out in Italy, and the second one is about to start.

On the one side, the activation of such a training course can be seen in a positive manner because it represents a form of taking into account the concrete needs of some persons with disability and starting to discuss the isolation that some people can face in the field of sexuality. This might be a concrete help also for families and operators, who widely view sexual assistance favourably, and would suggest that people with

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<sup>896</sup> F. Quattrini, *Assistenza sessuale il progetto "Lovegiver" per la formazione degli operatori*, cit., p. 62

<sup>897</sup> 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, cit., p. 70

disability around them use this service<sup>898</sup>. Some, however, argued that the organization of this course represents a form of civil disobedience<sup>899</sup>.

In any case, the organization of such a service outside of any legal framework implies many risks.

First of all, the risk of abuse on both sides, which inherently exists in such an intimate sphere, is exasperated by the total absence of legal provisions. 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 economical resources. On the latter depends also the possibility of entering into contact with a competent association, and the circumstance of being willing or unwilling to challenge the law. All these situations generate a fracture with Article 3 of the Constitution.

Apart from these profiles, it must be discussed whether or not this training course could assume, in any manner, a criminal relevance according to Law 75/1958 on prostitution. As we already discussed in Paragraph 3, the notion of prostitution according to Law 1958 is very wide. Any sexual activity in exchange for money can be related to the notion appreciated by criminal law. We should consider that the perimeter is so wide that, according to undiscussed case law, erotic video chats must be considered as part of the area sanctioned by criminal law. Physical contact is not a constitutive element of prostitution according to Law 75/1958<sup>900</sup>.

In this sense, it is probably true that the only way for sexual assistance not to fall under the criminal law definition of prostitution in Italy is for it to be given without any form

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<sup>898</sup> According to the already mentioned study by Dolfini, the 66% of operators are in favor of legalization of sexual assistance and 61% of families and friends are as well. The 94% of operators and family members/friend would suggest using such service to a person with disability if it were legal. D. Dolfini, *Il diritto alla sessualità e la disabilità*, pp. 59-60

<sup>899</sup> For a discussion on this point from a juridical point of view, in particular, for the reason why it is still not the case 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*, in *L'indice penale*, 2018, p. 413

<sup>900</sup> See Cass. Pen., Sez III, 22 April 2004, n. 2546, in *Diritto e giustizia*, 2004, 25, p. 24, with comment by Natalini A., *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 ss.; Cass. pen., sez. III, n. 17394 27 April 2015, in *Cassazione penale*, 2015, pp. 3239-3244 with comment F. Lombardi, *Prostituzione "a distanza": tra analogia ed esigenze sistematico-evolutive*

of monetary compensation<sup>901</sup>, which however seems quite incompatible with the idea of the sexual assistant as a trained professional<sup>902</sup>.

For this reason, the possibility of inscribing the actions of the LoveGiver Committee, namely the promotion, organization and activation of a training course for sexual assistants in the conducts of recruiting, and aiding and abetting prostitution, as well as exploitation of prostitution, sanctioned by the Merlin Law, is not to be immediately excluded. This is particularly valid after Decision 141/2019 of the Constitutional Court.

The organization of this course, for example, might be interpreted as the activity of an association aimed at recruiting prostitutes. The promotion of this course can be seen as the promotion of a prostitution business, and the act of creating contacts between persons with disability and aspiring sexual assistants, as aiding and abetting prostitution.

It has been observed, however, that some possible arguments against the liability of the association might be the following: I) there is no recruitment because people are recruited not for carrying 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 aiding or abetting prostitution because the support to this activity is merely theoretical<sup>903</sup>.

If the lines traced above are already very thin, it must be noticed that any further activity of the association, such as hiring a secretary to manage the organization and putting into contact persons with disabilities and (already trained) sexual assistants, fall outside of the previous arguments.

We already know, for example, that people with disability have been involved in the training of sexual assistants, so this contacts bridge has somehow already been built.

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<sup>901</sup> 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*, in *L'indice penale*, 2018, p. 392, pp. 398-399

<sup>902</sup> Having trained professional as sexual assistant diminish 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*, in *PLoS One*, 9,6, 2014, pp. e98413.

<sup>903</sup> 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. 392

## SEXUAL ASSISTANCE IN ITALY: THE PROPOSAL AND ITS CONTEXT

Of course, what is to be considered, as reminded by the Constitutional Court in Decision 141/2019, is the possibility for the ordinary judge to value the concrete damage to the relevant juridical good in question.

In this case, the judge might value the aim of the association, its goal and its methods as well as the training provided, to conclude that there is no concrete offence to any valuable good, 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.



## CHAPTER V

### SEXUAL ASSISTANCE: A COMPARATIVE PERSPECTIVE

The object of inquiry of this last chapter will be the tool of sexual assistance on a comparative level. In the previous chapter, we analysed the public debate and the proposal around sexual assistance in Italy, attempting to coordinate the factual situation with the criminal law provisions on prostitution.

In this chapter we will move the analysis to the European level, by analysing the situations and legislations in seven different countries.

We will be able to observe how we can divide the approach towards sexual assistance into two different models that are strictly connected to the regulation of prostitution and sex work in general. It must be recognised that the regulation of prostitution is a very complex topic that, for the purpose of this work, will not be deeply analysed in its social, legal and criminal policy implications. The following paragraphs will provide a brief insight into the legal framework of sex work in some elected countries. Within this panorama the regulation proposed in Italy would represent a sort of “third model”, unique in Europe and at an international level.

In the last paragraph the constitutional sustainability of this model will be analysed. To conclude, some remarks will be elaborated, together with alternative proposals.

#### *1. Sexual assistance in a comparative perspective: two main models in Europe*

When looking at the situation of sexual assistance in Europe it is possible mainly to make two remarkable observations.

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 on the trade of sexual services<sup>904</sup>.

On the first point, in the upcoming paragraphs we will have the opportunity to notice how, even in countries where sexual assistance is a well-established service, with

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<sup>904</sup> For an overview of politics, policy and approach towards prostitution and sex working 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

associations working on the topic since the early 90s, there is no specific regulation on the topic. From the legal point of view, sexual assistance is assimilated to the broader notion of sex working. For this reason, we can say that, in this field, if we tried to build models based on the observation of the sources of law, we would fail.

The classic distinction between models based on intervention and abstentionist models<sup>905</sup> is not adequate to describe the legal status of sexual assistance. From this point of view, we should acknowledge that in Europe all the 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 a non-binding document, in the form first of Guidelines and now of a Handbook, tries to set out good-practice in the field of sexuality for people with intellectual impairments living in State houses.

If we want to elaborate models of approach, then we need to adopt another point of view and look at the factual regulations and conditions regarding sexual assistance.

From this perspective we are capable of finding that the presence of a well-established service of sexual assistance is strictly linked to the decriminalization of prostitution and parallel conduct related to it, at different levels.

On the contrary, in countries where the approach towards prostitution is a prohibitionist/abolitionist one, sexual assistance is struggling to be recognized both on a social and a legal level. 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, often having difficulties falling outside the criminally sanctioned umbrella.

The proposed models will be divided as follows:

- The *negative incorporation* model: in this model there are no specific provisions around sexual assistance, on the contrary there is a social and public debate around the creation of this professional figure. At the same time, the approach towards

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<sup>905</sup> See the description provided by C. Casonato, *Introduzione al biodiritto*, cit., 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 analyzing whether they regulate a specific field. According to Casonato the choice to set up a legislation has these positive consequences: legitimacy, political responsibility and democratic accountability. This intervention then might be a “heavy” one or a light one, it can be substantial or procedural, depending on the choice of the single legal system. The abstentionist model implies a *laissez faire* approach that exposes all the subjects and does not grant them any kind of protection.

sex working is an abolitionist or prohibitionist one, that criminalizes parallel conduct and often the person who purchases 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 can find countries such as Spain, France and Sweden. Italy belongs to this model as well.

- 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 working in general. Indeed, in these countries, there is a regulationist approach towards prostitution, and sexual assistance is usually a service that has been existing for more than 20 years. In this model we can find countries such as Germany, the Netherlands, Switzerland and Denmark.

## 2. *The negative incorporation model: sexual assistance as part of a criminally relevant phenomenon*

In this paragraph the *negative incorporation* model in Europe will be theorized.

The common characteristics of the countries belonging to this model (Sweden, France, Spain, and Italy) are the following:

- In all these countries the law provisions around prostitution criminalize parallel conducts 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. On the contrary, 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 working. The topic is struggling to reach Parliamentary debate, and institutional politics in general.
- In all these countries, sexual assistance has been raised as an issue to be addressed by social actors. In particular in France, Spain and Italy associations and NGOs are advocating for and are offering this service, even outside of and, arguably against, the legal framework. As we already mentioned in Chapter III, 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, after having been asked to do so by the Ministry of Health. In Sweden, on the contrary, 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.

### 2.1. France

The topic of sex working is widely debated in French public opinion and has been subject to modifications and Parliamentary discussions during the years<sup>906</sup>.

In 1964, France adopted an abolitionist approach. This happened with the so-called Marthe Richard law *tendant à la fermeture des maisons de tolerance et au renforcement de la lutte contre le proxénétisme*, which closed State brothels<sup>907</sup>.

This legislative choice was reinforced during the '60s, 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 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 highly 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 closed off to the possibility of enacting any form of sexual assistance compatible with the existent legal framework against prostitution.

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<sup>906</sup> 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

<sup>907</sup> S. P. Conner, *The Paradoxes and contradiction 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

### 2.1.1. *The regulation of prostitution in France*

As mentioned above, France is a country with a neo-abolitionist approach towards prostitution, which recently came closer to a prohibitionist model, where the purchase of sexual services is considered an offence.

The recent 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 new Law will be dealt with after having delineated the already existing measures against prostitution.

Just like Italy and many other countries in Europe, the legislative measures adopted by France follow two different goals: on the one hand they are aimed at preventing prostitution and protecting prostitutes, and, on the other hand, criminal law is used to punish any act promoting prostitution<sup>908</sup>.

As far as the first kind of actions are 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 furnish assistance to people who are put in danger by prostitution, by providing housing and social and medical support<sup>909</sup>.

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<sup>908</sup> S. M. Maffesoli, *Le traitement juridique de la prostitution*, in *Sociétés*, 1, 99, 2008, pp. 33-46

<sup>909</sup> Here is the text, in the original language, of the above-mentioned 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-

## CHAPTER V

If we analyse the side of the repression and punishment of parallel conducts we can observe that the majority of these measures find their place 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 formulate the offence of procuring and related conducts. Procuring can be separated into procuring by supporting or procuring by constriction (even if they are punished in the same way with a 7-year maximum sentence and a fine of up to 150,000 euros)<sup>910</sup>. 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 such a person pressure to engage in prostitution or to continue doing so<sup>911</sup>.

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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 bénéficiaire de cette aide est accordé par 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'Etat.

Les conditions d'application du présent article sont déterminées par le décret mentionné à l'avant-dernier alinéa du présent II.»

<sup>910</sup> R. Parizot, *La prostituzione in Francia*, A. Cadoppi (ed.), *Prostituzione e diritto penale*, Roma, 2014, p. 134,

<sup>911</sup> Here is the original text in French, as modified by Loi n°2003-239 du 18 mars 2003 - art. 50: «Le proxénétisme est le fait, par quiconque, de quelque manière que ce soit : 1° D'aider, d'assister ou de protéger la prostitution d'autrui ; 2° 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 ; 3° 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»

Article 225-6 provides a list of conducts 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<sup>912</sup>.

Article 225-7 provides a list of aggravating circumstances if procurement involves vulnerable subjects<sup>913</sup>.

Article 225-10 punished he/she 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

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<sup>912</sup>Here is the original text in French, as modified by Loi n°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 : 1° 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 ; 2° De faciliter à un proxénète la justification de ressources fictives ; 3° 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 ; 4° 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.»

<sup>913</sup> The original text of the article, as modified by Loi n°2011-525 du 17 mai 2011 - art. 150 is this: «Le proxénétisme est puni de dix ans d'emprisonnement et de 1 500 000 euros d'amende lorsqu'il est commis : 1° A l'égard d'un mineur ; 2° 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 connue de son auteur ; 3° A l'égard de plusieurs personnes ; 4° 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 ; 5° 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 ; 6° 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 ; 7° Par une personne porteuse d'une arme ; 8° Avec l'emploi de la contrainte, de violences ou de manœuvres dolosives ; 9° Par plusieurs personnes agissant en qualité d'auteur ou de complice, sans qu'elles constituent une bande organisée ; 10° 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. »

not open to the public, in the knowledge that they will there 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<sup>914</sup>.

In 2003, with Law n. 2003-239 (*Loi pour la sécurité intérieure*)<sup>915</sup> 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*)<sup>916</sup>.

This offence is now punished at article 225-4-1 and it provides that: «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.» The punishment is seven years' imprisonment and a fine of €150,000.

After many years of debate, both inside and outside the Parliament<sup>917</sup>, a reform on prostitution was approved in 2016. The aim of the reform, actuated with the approval

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<sup>914</sup> The text of the article, as modified by Loi n°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 :

1° De détenir, gérer, exploiter, diriger, faire fonctionner, financer ou contribuer à financer un établissement de prostitution ;

2° 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 ;

3° 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 ;

4° 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 premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables aux infractions prévues par les 1° et 2° du présent article»

<sup>915</sup> Loi n° 2003-239 du 18 mars 2003 pour la sécurité intérieure

<sup>916</sup> For a general comment on this offence and its effect see R. Paritot, *La prostituzione in Francia*, cit., pp. 136-139.

<sup>917</sup> 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

of Law n. 2016-444 on the 13th April 2016<sup>918</sup> is to «reinforce the fight against the system of prostitution and support people who exercise prostitution».

The reform acts on two different levels: on one side it establishes measures to educate, assist and support people who want to quit prostitution, on the other side it strengthens the criminal law provisions.

As regards the measure in support of people who want to exit prostitution, the law elaborates a specific Prostitution exit program 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), financial aid to help with social and professional integration (AFIS), possibility of accessing housing and employment, health care, professional support and more<sup>919</sup>.

If we look at the repressive side, the actions implemented are aimed at creating a criminal law response against those who buy sexual services (clients), while at the same time protecting the people who prostitute from abuse and stigmatization.

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<sup>918</sup> The text, in French, is available here: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032396046&categorieLien=id>.

For a first comment on the law from a French scholar see R. Parizot, *La prostitution, infraction sans texte*, in *Tevue de science criminelle et de droit penal compare*, 2, 2016, p. 373 ss.

<sup>919</sup> 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 program 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 program 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 program 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 program, 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 program out of prostitution are accredited.

The defence of vulnerable subjects is pursued by eliminating the offence of soliciting at article 225-10-1<sup>920</sup> of the Criminal Code (*Recolage passif*<sup>921</sup>), which, however, was not frequently applied by Courts<sup>922</sup>.

To foster the protection of 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.

But the main innovative point of this law is the punishment of the client, with the creation of new offence in the Criminal Code. 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<sup>923</sup>. For the ones who are punished under the above-mentioned 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 the legislator, 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.

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<sup>920</sup> See R. Paritzot, *La prostituzione in Francia*, cit., 142- 143

<sup>921</sup> 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 inserted with Law n.239/2009 (*Loi pour la sécurité intérieure*), also known as Law Sarkozy II. Some comments might be found in: J. Vernier, *La Loi pour la sécurité intérieure: punir les victimes du proxénétisme pour mieux les protéger?*, in M.E. Handman, J. Mossuz-Lavau (eds.), *La prostitution à Paris, Editions La Martinière, Paris, 2005, 121-152*; and J. Vernier, *La pénalisation des prostituées selon la LSI*, in *Plein droit*, 2, 2005, pp. 42-44.

<sup>922</sup> This fact is reported by F. Parisi, *Prostituzione. Aporie e tabù di un nuovo diritto tutorio*, cit., p. 73. It must be considered, however, that many people have been arrested and kept in custody on the base 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, online: [https:// www.ldh-france.org/Rapport-Un-harcèlement/](https://www.ldh-france.org/Rapport-Un-harcèlement/) (In French)

<sup>923</sup> 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 considered 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<sup>924</sup>.

This reform was also the object of a recent decision from the *Conseil Constitutionnelle*, decision n° 2018-761<sup>925</sup>. The application for a priority preliminary ruling (*question prioritaire*<sup>926</sup>) on the issue of constitutionality was raised by the *Conseil d'État*

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<sup>924</sup>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, pp. 725 ss; G. Duché, M.-H. Franjou, H. De Ruy, *La lutte contre le système prostitutionnel, une politique publique française*, in *Forum. Champ social*, 2018, p. 43-54; C. Dumesnil, *Choralyné. 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*, 2018, 15; 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; L. Mathieu, *Des monstres ordinaires. La construction du problème public des clients de la prostitution*, in *Champ pénal*, 2015, p. 12; A. F. Dequiré, *Prostitution*, in *Le sociographe*, 3, 2017, pp. 7-9; R. Parizot, *La prostitution, infraction sans texte*, in *Revue de Science Criminelle et de Droit Pénal Comparé*, 2016, pp. 373; P. Morvan, *Quand le « cave » devient délinquant : la pénalisation des clients de prostitué(e)s*, in *La semaine juridique - édition générale*, 2016, pp. 487

<sup>925</sup>Comments from 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. In 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, p. 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. Ponselle, *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 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

<sup>926</sup>The *Question prioritaire* in France is the priority preliminary ruling procedure that can be established in front of the Conseil Constitutionnelle to verify the compatibility of a certain law to the French Constitution. This institute came into life in the French constitutional justice system after the constitutional reform of 2008, coming into effect in 2010. This was the result of years of adjustment from the Conseil Constitutionnelle 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 1793 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 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*

(Decision no. 423892 of 12 November 2018<sup>927</sup>) on behalf of many associations and sex workers trade unions<sup>928</sup>. 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 regards 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, for what concerns 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.

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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 the 10 December 2009 (Loi organique n. 2009-1523). Some French literature on the *Question prioritaire*: C. Maugué, 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’incostitutionnalité*, in *Melanges en l’honneur de Bruno Gernevois. Le dialogue des juges*, Paris, 2009, p. 997; G. Tusseau, *La fin d’une exception française*, in *Pouvoirs*, 2011, 137, pp. 5; In Italian: C. Severino, *La Question prioritaire de constitutionnalité. Quadro normative 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*, Napoli, 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

<sup>927</sup>The decision from the Conseil d’Etat is Available in French at this link: <http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=214728&fonds=DCE&item=1>

<sup>928</sup> The recurrent ones were: Médecins du monde, Syndicat du travail sexuel, Aides, Fédération parapluie rouge, Les amis du bus des femmes, Cabiria, Griselidis, Paloma and Acceptess-t associations. They all acted in behalf of Thierry S., Giovanna R., Marie S., Christine D. and Marianne C.

On the alleged violation of personal freedom, the judges state that these offences are aimed at safeguarding human beings against human trafficking and sexual exploitation. Moreover, the choice of the legislator 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, the legislator inhibits 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 observes that the penalties are not to be considered disproportionate to 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* observes that the legislator has the liberty 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<sup>929</sup>.

### 2.1.2. *The debate on sexual assistance in France*

The legal discourse around sexual assistance should be based on Law of 11 February 2005 “*Loi pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées*”<sup>930</sup> 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 disability, and their right to participate in all the areas of social life. The demand for access to sexual life and the

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<sup>929</sup> The Full text of the decision is available in French from the website of the Conseil Constitutionnel at: [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/decisions/2018761qpc/2018761qpc.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2018761qpc/2018761qpc.pdf)

<sup>930</sup> 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

request for sexual assistance could be rooted inside this framework and are 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».

The debate on sexual assistance in France started in the early 2000s with the publication of an interview in *Le Monde* at Renè-Claude Lachal<sup>931</sup>.

With this interview, the topic of the sexuality of people with disability entered into the public discourse, tackling pervasive stereotypes and beginning to raise awareness regarding their needs<sup>932</sup>. 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”<sup>933</sup>. This event represented the apex of years of lobbying between many associations and NGOs working with disability in the French territory<sup>934</sup>. In the following years, the issue tried to reach the institutional political debate by entering into the Parliamentary discussion, with very little success. This was mainly linked to the strong opposition coming from politicians supporting an abolitionist view of prostitution, inherently considered in conflict with any discourse around sexual assistance<sup>935</sup>. 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*

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<sup>931</sup> Claude Lachal, is a tetraplegic person, who was director of CRNS. In this interview at *Le monde*, published on the 23<sup>rd</sup> 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 body*. The interview can be found online in Le monde archive at this link: [https://www.lemonde.fr/archives/article/2002/10/23/la-sexualite-des-handicapes-sort-difficilement-de-la-clandestinite\\_4250818\\_1819218.html](https://www.lemonde.fr/archives/article/2002/10/23/la-sexualite-des-handicapes-sort-difficilement-de-la-clandestinite_4250818_1819218.html)

<sup>932</sup> 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

<sup>933</sup> The conference, which took place on the 27 and 28 of April 2007, resulted in a publication known as “white book” of *Handicaps and sexualité*, edited by one the main actors and 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

<sup>934</sup> The conference was organized by Handicap International, AFM, APF and CHA. For further observation see M. Nuss, P. Dreyer, *Handicaps et sexualités: le livre blanc*, cit., pp. 2-3

<sup>935</sup> P. Bresseur, P. Detuncq, *L'assistance sexuelle: qu'est-ce-à-dire? Quels enjeux?*, in *VST, Vie sociale et traitements*, 2014, P. 53-54

*la Santé* in 2012<sup>936</sup>. The consultative organism was approached by Mrs Roselyne Bachelot, who was Minister of Solidarity and Social Cohesion, on three questions<sup>937</sup>. The Comité observes that sexuality remains, despite a change in morals, the realm of intimacy, a realm from which no-one should be excluded. The person with disability, just like everyone else, «needs a satisfying relational life and, in particular, to be recognized in all aspects of his or her identity<sup>938</sup>». After having observed this, the *Comité* starts by raising some specific issues around sexuality and disability, by firmly considering that there are profound differences between people with physical and psycho-social impairments «In terms of awareness, autonomy and responsibility». Some of the issues treated were: the recognition of sexual identity from parents, the infantilization of people with disability and their need for intimacy. The *Comité* recognizes that an important role to contrast this situation must be given to associations and institutions.

On the specific issue of sexual assistance, the *Comité* firstly points out the need to make a clear distinction between sexual assistance and support. In this sense the Comité states 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.<sup>939</sup>». On this point it further specifies that «the fact remains that questions

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<sup>936</sup>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<sup>th</sup> September 2012 Available in French here: [https://www.ccne-ethique.fr/sites/default/files/publications/avis\\_ndeg118.pdf](https://www.ccne-ethique.fr/sites/default/files/publications/avis_ndeg118.pdf)

<sup>937</sup> The three questions that gave life to the document issued by the Comité were articulated as follow: «- 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 on the author. See 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*, cit., p. 1

<sup>938</sup> Here 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, *Vie affective et sexuelle des personnes handicapées*, cit., p. 4

<sup>939</sup> 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

arise about the fine line between prostitution and those who are accompanying them<sup>940</sup>».

According to the Comité, the recognition of a professionalized and remunerated figure of sexual assistant would require an adjustment of the legislation prohibiting the procuring of prostitution. In any case the CCNE considers it impossible to make sexual assistance like any other professional situation, because of the principle of non-commercial use of the human body.

Even though the CCNE recognized the existence of sexual rights, it also specified that this doesn't mean that the State must necessarily compensate for the situation of people with disability in the sexual sphere: not all freedom corresponds to a duty to be assumed by the community<sup>941</sup>. 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.

For what concerns the de facto situation we must report, however, that the association APPAS (guided by Marcel Nuss) has been very active, with the promotion of training courses, and by putting into contact sexual assistants with potential users<sup>942</sup>.

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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 done by the author, see: 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*, cit., p. 10

<sup>940</sup> 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*, cit., p. 10

<sup>941</sup> 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, *Vie affective et sexuelle des personnes handicapées*, cit., p. 8

<sup>942</sup> 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) 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

The association has given itself a set of rules: a Statute, some rules for operators - including an ethical code - and rules for users. Their position about sexual assistance is that it is a form of prostitution with a therapeutic aim<sup>943</sup>. They state that as prostitution is not illegal in France, then sexual assistance is not an infraction of the law<sup>944</sup>.

According to them, APPAS cannot be persecuted for procuring because the association does not receive any pecuniary advantage from creating a contact between assistants and users<sup>945</sup>. It is not APPAS that provides the salary for sexual assistants and there is no relationship of subordination between the professionals and the association<sup>946</sup>.

## 2.2. Spain

The regulation of prostitution in Spain can be divided into different phases. In general, we can affirm that the approach adopted is, on a national level, moderately abolitionist<sup>947</sup>. However, in recent years, when it comes to street prostitution, some Municipalities have adopted a more severe approach, closer to the prohibitionist one<sup>948</sup>.

On the 30<sup>th</sup> August 2018, the first sex workers' trade union (*Organizacion de trabajadoras sexuales*, OTRA), was legally created. The Statute of this trade union was challenged: the *Audencia Nacional* issued its decision on it on the 19<sup>th</sup> November 2018. The tribunal affirmed that the Statute was to be considered void because «it comprehends activities that, for their nature, cannot be object of a valid contract just

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créé à cet effet) ; • Proposer sa médiation en cas d'éventuel litige.». This Statute can be consulted in APPAS website, see: <https://www.appas-asso.fr/index.php/reglement/>

<sup>943</sup> Consult their Statute on: <https://www.appas-asso.fr/index.php/reglement/>

<sup>944</sup> 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;

<sup>945</sup> 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

<sup>946</sup> This is what they affirm in their Statute: <https://www.appas-asso.fr/index.php/reglement/>

<sup>947</sup> J. L. Guereña, *La prostitución en la España contemporánea*, 2003.

<sup>948</sup> 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

like prostitution (...) which would imply the recognition of the activity of procuring as a legitimate one<sup>949</sup>».

However, in a very recent decision, the *Tribunal superior de justicia de Madrid* recognized a working relationship between a prostitute and a nightclub. This happened even though she was not being paid directly by the owners of the club since 2007. In this decision the tribunal gave importance to the fact that she was subject to specific rules and working hours and she was given instruction by the club owners.

If prostitution in Spain lives in this grey area, sexual assistance is a topic which is widely debated and addressed by local initiatives and associations outside the legal framework, not yet having reached institutional politics.

### 2.2.1. *The regulation of prostitution in Spain*

In general, we can say that 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 voluntarily and free way.

However, if a person works as 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<sup>950</sup>.

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<sup>949</sup> Audiencia Nacional, Sentencia 174/2018, de 19 de noviembre de 2018. Available at this link: <http://www.poderjudicial.es/search/openDocument/454dea8be780ba89>

Here 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](https://www.laboral-social.com/sites/laboral-social.com/files/NSJ059150_0.pdf)

<sup>950</sup> However according to jurisprudence from the Tribunal Social it must be made 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, the further exchanges between the client and this person is not in any manner controlled by third parties. This was considered as a legitimate form of work. See for example: Sentencia Social N° 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 Leon, Sala de lo Social, Sección 1, Rec 318/2016 de 09 de Junio de 2016, Sentencia Social N° 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 N° 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 comments from 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

The criminal provisions are all aimed at protecting self-determination and free decision from anyone who wants to limit these possibilities for economic reasons, while there is no criminalization of intermediation and similar conducts<sup>951</sup>.

Before the intervention of *Decreto Ley 3 marzo 1956* and the reform of the Criminal Code in 1961 and 1963, widely inspired by international law<sup>952</sup>, the main approach towards prostitution in Spain was regulationist.

After this, the legislative approach became an abolitionist one, 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<sup>953</sup>. The Criminal Code of 1995, on the contrary, abandoned the abolitionist approach by eliminating the number of parallel conducts punishable under Spanish criminal law<sup>954</sup>.

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<sup>951</sup> 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

<sup>952</sup> 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».

<sup>953</sup> 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 dieran o tomaran 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 serial 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. Graddido Guzman, *La prostitucion: estudio juridico y criminologico*, Madrid, 1992, p. 64

<sup>954</sup> The 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*, 1995, pp. 83-97

With an Organic Law<sup>955</sup> (*Ley organica n. 11/1999*), after a few years, the notions of intimidation and vulnerability became elements capable of hindering the consent of the person carrying out prostitution<sup>956</sup>.

The latest modification was given by *Ley Organica 11/2003* 29 September, which determined the punishment of the conduct of earning profit from the exploitation of prostitution, even with the consent of the person involved<sup>957</sup>.

At the moment, the relevant criminal provisions are Article 187 of the Spanish Criminal Code, that at §1, punishes anyone who determines 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<sup>958</sup>.»

The punishment is imprisonment from two to five years, and a fine.

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<sup>955</sup> The notion of Organic Law is discipline by the Spanish Constitution (Constitución Española) from 1978. Organic laws are law that, due to their particularly relevant object of regulation, are aggravated from the procedural point of view, to ensure a higher level of protection on these field. According to article 81, the following areas must be discipline by organic law: fundamental rights and freedoms, Statutes of Autonomy (for autonomous communities in Spain) and election law. The procedure for the approval of an Organic Law requires that this must be passed by an absolute majority of members of the Congress. Similarly for any amendments or derogation to this kind of law. This institute was introduced in the Spanish system as a reception from the French model, 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

<sup>956</sup> On this point it has been observed that this law equiparate the use of violence with the situation of taking advantage from a situation of vulnerability of the victim and this circumstance are actually very different. E. Orts Berenguer, C. Suárez Mira, *Los delitos contra la libertad e indemnidad sexuales*, Valencia, 200, p. 259

<sup>957</sup> 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

<sup>958</sup> Here 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 concorra 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 concorra alguna de las siguientes circunstancias:
- 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 dedicare 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»

The same punishment is prescribed for anyone who, even with the person's consent, profits from exploitation of prostitution. It 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 conducts related to the prostitution of minors, people with disability and vulnerable subjects<sup>959</sup>.

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<sup>959</sup> 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.

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.»

### 2.2.2. *The debate on sexual assistance in Spain*

The public debate on sexual assistance in Spain is very vivid, and it started with the city of Barcelona, and some specific projects around disability and sexuality<sup>960</sup>.

In particular, activists from the Forum for Independent Living (*Foro de Vida Independiente y Diversidad-FVID*)<sup>961</sup> and also the Crip-transfeminist Alliance (*Alianza tullido-transfeministas*) are elaborating a discourse around crip pride<sup>962</sup>, touching issues such as 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.

This discourse articulates on a horizontal level, with many associations and NGOs working on this topic and operating in this context, however the issue has never managed to reach political institutions at any levels.

In spite of this, theoretical and practical proposals around sexual assistance are flourishing all around Spain, with a multitude of different approaches. This plurality of associations and models elaborated 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 on the territory, and an archipelago of other horizontal initiatives. *Tandem Team*<sup>963</sup> and *Sex Asistent*<sup>964</sup>,

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<sup>960</sup> For example, the documentary “Yes, we fuck!” a documentary film 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 couple, sexual assistance, prostitution and so on.

See: [https://www.huffingtonpost.es/2015/04/18/discapacidad-sexo-documental\\_n\\_7092272.html](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.

<sup>961</sup> See the website: <http://forovidaindependiente.org>

<sup>962</sup> 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; P. Guzmán, R. L. Platero, *The critical intersections of disability and non-normative sexualities in Spain*, in *Annual Review Critical Psychology, Gender and Sexuality*, 11, 2014, pp. 357-387

<sup>963</sup> See the website of the association Tandem Team, where it is possible to find information on their services: <https://www.tandemteambcn.com>

<sup>964</sup> See the website of the association *Sex Asistent*, where it is possible to find information on their services: <https://sexasistenteu.wixsite.com/home>

for example, promote a model, defined as an “erotic connection model”, which is probably the one with the biggest social and mediatic incidence<sup>965</sup>.

According to this proposal, sexual assistance is the answer for people with disability’s sexual needs, given that without it many of them wouldn’t be able to experience sexuality, at all.

According to both these NGOs, sexual assistance is a service provided by people with a vocation and given for free, providing intimacy and connection. What is weak about this model is the risk of relegating people with disability to the role of undesirable subjects, condemning them to social exclusion and more stigmatization<sup>966</sup>.

Other associations and movements, more linked to the philosophy of independent living, such as *asistenciasexual.org*<sup>967</sup> are promoting a different form of sexual assistance, called the “auto-erotic”<sup>968</sup> model. This model and its definition of sexual assistance was dealt with in Chapter IV, however to this regard it is important to recall that, according to its promoters, sexual assistance here is a form of personal assistance, and the explication 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<sup>969</sup>.

### 2.3. Sweden

Sweden is the first country in Europe that adopted a prohibitionist model in the regulation of prostitution, with the criminalization of the purchase of sexual services. The law, which passed in 1998, was surrounded by a debate dominated by a radical

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<sup>965</sup> 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

<sup>966</sup> 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. 19

<sup>967</sup> See the website: <https://asistenciasexual.org>

<sup>968</sup> . 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. 19

<sup>969</sup> 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?*, en *Red CDPD*, 201

feminist perspective, according to which prostitution was a form of male dominance oppressing women<sup>970</sup>. If Swedes in general tend to see a “strong State” with a paternalistic approach with favour, the legislation and the debate around prostitution was (and still is) characterized by being strongly anti-liberal<sup>971</sup>.

The liberal side of the discussion around prostitution was totally absent, and no consideration was given to the possibility of prostitution as a free choice of some women and in general, of a person. This approach has strongly impregnated public opinion and public discourse<sup>972</sup>: the social disapproval around prostitution consistently influences the debate around sexuality and disability.

Indeed, compared to the other countries, here we can see that the social debate and horizontal public initiatives struggle to emerge.

### 2.3.1. *The regulation of prostitution in Sweden*

In Sweden, prostitution itself has never been a criminal offence.

It was, however, subject to regulation for reason of public health and hygiene during the XIX and XX centuries. Parallel conducts, such as procuring, have been criminalized since the Criminal Code of 1864<sup>973</sup>.

In 1977, the Commission of public inquiry on sexual offence was created to study, amongst other issues, prostitution.

In 1993 another Commission was set up with the specific task of investigating, without prejudices, the possibility of criminalizing prostitution<sup>974</sup>. This commission, unlikely

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<sup>970</sup> One of the feminist jurist and thinker who broadly inspired the regulation of prostitution in Sweden is Catharine MacKinnon. She is a very prolific scholar, for a first approach to her view on prostitution see: C. A. MacKinnon, *Prostitution And Civil Rights*, in *Michigan Journal of Gender & Law*, 1, 1993, pp. 13-31

<sup>971</sup> For more about this Sunstein, Cass R., and Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, in *The University of Chicago Law Review*, 70, 4, 2003, pp. 1159–1202, in particular with a gender perspective: M. L. Eduards, *The Swedish gender model: Productivity, pragmatism and paternalism*, in *West European Politics*, 14, 3, 1991, pp. 166-181

<sup>972</sup> A. Gould, *The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden*, in *Journal of Social Politics*, 30, 3, 2001, pp. 437–456

<sup>973</sup> The Criminal Code of 1864 also comprehended 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*, London, 2017, p. 169

<sup>974</sup> M. Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: the Swedish Prostitution Law*, in *Michigan Journal of International Law*, 33, 1, 2011 p. 133-146; J. Levy, *Criminalising the Purchase of Sex: Lessons from Sweden*, London, 2014

to have been the first one, already had this very strong assumption guiding its work: «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<sup>975</sup>».

The report of this Commission was published in 1995: its main outcome was the elaboration 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 way, prostitution became central to the feminist discourse of that period, 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. It was then that 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 formulated in the special Statute.

It was transferred into the Criminal Code, chapter 11, section 6, dealing with sexual offences, with the amendment 2005:90<sup>976</sup>. It should also be mentioned that the maximum penalty was originally of 6 months' imprisonment and was raised to 1 year's imprisonment (in 2011 with the reform 2011:57<sup>977</sup> -in Sweden the maximum is 10 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».

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<sup>975</sup> The translation of this part of the document, Dir. 1993:31, is made by C. Wong, *Prohibition in Swedish Law of the Purchase of Sexual Service*, in A. Cadoppi, *Prostituzione e diritto penale*, cit., p. 180

<sup>976</sup> An English version of the Swedish Criminal Code translated by the Government is available at this link: <https://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf>

<sup>977</sup> C. Wong, *Prohibition in Swedish Law of the Purchase of Sexual Service*, in A. Cadoppi, *Prostituzione e diritto penale*, cit. p. 186

As can be easily noticed, in spite of the debate that brought to this law provision, the offence is formulated in a gender-neutral way. This is actually considered a crime against the State, and not against the person, which is why people who carry out prostitution are called in trial as witnesses, not as plaintiffs<sup>978</sup>.

The main incriminated conduct 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<sup>979</sup>.

Attempts are punishable as well. In the second part of the article it is specified that the conduct is punished also when the payment is given/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<sup>980</sup>. In this case, the person who is actually involved in the *liaison*, will be considered the perpetrator, while the other one will be considered as an instigator or an accomplice.

The above-mentioned 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.

At Article 12 it is stated 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

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<sup>978</sup> C. Wong, *Prohibition in Swedish Law of the Purchase of Sexual Service*, in A. Cadoppi, *Prostituzione e diritto penale*, 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*, 2006, Bristol, pp. 73-74

<sup>979</sup> C. Wong, *Prohibition in Swedish Law of the Purchase of Sexual Service*, in A. Cadoppi, *Prostituzione e diritto penale*, cit., p. 184

<sup>980</sup> C. Wong, *Prohibition in Swedish Law of the Purchase of Sexual Service*, in A. Cadoppi, *Prostituzione e diritto penale*, cit. p. 186

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.

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. »

### 2.3.2. *The debate on sexual assistance in Sweden*

Just like the other Countries analysed so far, 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 vivid. 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<sup>981</sup>.

In general, the possibility of introducing sexual assistance and sexual facilitation, is framed inside the legal framework provided by law-LSS, the Swedish law on support and service for people with functional impairment (*Lagen om stöd och service till vissa funktionshindrade 1993:*) approved in 1993<sup>982</sup>.

Concretely, however, the debate around the possibility of including in personal assistance aspects related to sexuality was stopped by this consideration: «As personal assistance services are indirectly funded by the state, and the purchase of sexual

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<sup>981</sup> V. Kulick, J. Rydstromm, *Loneliness and its opposite*, cit., pp. 70

<sup>982</sup> For some explanatory journal articles and comments on Sweden's LSS and Social Integration: T. Boren; M. Grnlund; 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*; 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*, Volume 16, 2014, pp. 3-18

favours is prohibited, sexual facilitation within personal assistance is interpreted as purchase of sexual services<sup>983</sup>»

The practical situation is that sexual facilitation is managed (or better, unmanaged) in a non-homogenous way, depending on the single individuals.

Studies showed 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<sup>984</sup>.

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, which resulted in a book titled "A secret known by many" (*Hemligheter kända av manga*<sup>985</sup>).

The project aimed at challenging judgmental attitudes surrounding the topic, and its mission was to create a mentorship program for service users, and a handbook with methods. The adopted perspective was the one of an effort for horizontal and collective policy-making<sup>986</sup>.

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<sup>987</sup>.

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 3 months to solve questions related to ethical dilemmas in the field of social services, through issuing official statements<sup>988</sup>.

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<sup>983</sup> J. Bahner, *Legal Rights or Simply Wishes? The Struggle for Sexual Recognition of People with Physical Disabilities Using Personal Assistance in Sweden*, in *Sexuality and Disability*, 2012, p. 339

<sup>984</sup>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, p. 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

<sup>985</sup> Available, unfortunately in swedes only, at this link: <http://enhemlighet.se/wp-content/uploads/2012/03/Hemligheter-k%C3%A4nda-av-m%C3%A5nga.pdf>

<sup>986</sup> In affirming this Bahner refers to the work of Colebatch, who discuss the different approaches in policy-making. See, H. K. Colebatch, *Policy*, Buckingham, 2009

<sup>987</sup> 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

<sup>988</sup> To know more see: <https://www.socialstyrelsen.se/en/regulations-and-guidelines/national-guidelines/>

The questions that were addressed by the Committee are the following:

1. Is the personal assistant allowed to facilitate the purchase of sexual favours?
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. This being considered, an assistant (who is, among other things, a public 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<sup>989</sup>».

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<sup>990</sup>).

As regards the second question, the Committee first observed that in the disability service law there is no mention of sexual needs.

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.

The Committee affirmed that helping a service user with masturbation would not fall under the criminal provision against the purchase of sexual favours, however ethical dilemmas persist. The Committee 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

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<sup>989</sup> 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*, in *Disability & Society*, 30, 5, 2015, pp. 798

<sup>990</sup> 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>.

voluntariness to help must be emphasized, discussed and assessed from case to case<sup>991</sup>». (Socialstyrelsen 2012a<sup>992</sup>)

However, the Committee, after having highlighted the difficulties in dealing with sexual facilitation, did not offer concrete insights or suggestions.

What they affirmed is that, in this uncertain panorama, a distinction could be made. They all agree 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 executing 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 voluntarily agreement, «also the execution of a sexual act can be included in personnel's duties».

#### 2.4. *Pros and cons of the negative incorporation model*

We should observe that 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 above-mentioned model, as sketched, has its own weak and strong points. Among the positive remarks we should mention that all the countries belonging to this abstract model maintain a certain level of coherence in their legal system. They coherently widely define prostitution 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,

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<sup>991</sup> 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*, in *Disability & Society*, 30, 5, 2015, p. 800

<sup>992</sup> Socialstyrelsen, “Kan Personlig Assistent Hjälpa Person Med Funktionsnedsättning Att Onanera? [Can a Personal Assistant Help a Person with a Disability to Masturbate?], Stockholm, 2012. Available online in Swedish: [http://www.socialstyrelsen.se/etikisocialtjansten/skapersonligas\\_sistenthjulpapper](http://www.socialstyrelsen.se/etikisocialtjansten/skapersonligas_sistenthjulpapper)

associations and NGOs started providing this service. This implies the existence of an extra-legal or contra-legal dimension of sexual assistance, where abuses and discrimination might flourish.

3. *The positive assimilation model: sexual assistance in the regulatory umbrella of sex working*

In the following paragraphs the positive assimilation model in Europe will be theorized.

The common characteristics of the countries belonging to this model (Germany, the Netherlands, Switzerland and Denmark) are the following:

- In all these countries the law provision around prostitution changed between the 90s and the early 2000s. They all adopted a 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 parallel conducts, 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 inside the legislative umbrella of sex working.

Sexual assistance has been practiced since the early 90s or 2000s, promoted by local associations. The theoretical framework and theories behind sexual assistance may vary a lot, however sexual assistance does not violate any criminal law provision, and for its regulation can be assimilated by law to sex working.

### 3.1. *Germany and the Netherlands*

In Germany and the Netherlands there is a regulationist approach towards prostitution. In both countries, the main legal provisions were approved at the beginning of the XXI century, as a result of the evolution of social customs and morality.

The legislations 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 working 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, with particular attention to clients with disabilities, or by specifically trained sexual assistants.

In fact, some local organizations provide specific training courses and offer some services, explicitly shaped for people with disability needs, however their work is always legally framed within the sex working umbrella.

#### 3.1.1. *The regulation of prostitution in Germany*

Since 2002, with the Law *Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten- Prostitutionengesetz*, Germany has adopted a regulationist approach towards prostitution<sup>993</sup>.

Prostitution is seen as a legitimate activity, but to be such, it needs to follow a specific set of rules concerning public order, public health, hygiene and the protection of minors.

Moreover, local authorities can circumscribe city zones where prostitution is allowed or forbidden<sup>994</sup>.

The law 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 legitimate.

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<sup>993</sup> For an historical excursus of prostitution before 2002 see: I. Hunecke, *Germany*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 107-111

<sup>994</sup> M. Helfer, *La prostituzione nell'ordinamento austriaco e in quello tedesco*, in A. Cadoppi, *Prostituzione e diritto penale*, cit., p. 99

This implies that sex workers are protected against possible noncompliance from clients, with the possibility of taking them to Court. Moreover, the law provides the possibility of concluding proper employment contracts, as well as the possibility of entering the social security system, receiving healthcare insurance, and unemployment insurance<sup>995</sup>.

The regulation to be followed is on an administrative level, and its implementation depends on local municipalities<sup>996</sup>. If the administrative provisions for carrying out prostitution are not respected, then the first violation implies responsibility under §120 Ordnungswidrigkeiten gesetz (OWiG), while the second time the punishment is disciplined by criminal law (§184e StGB, Unlawful prostitution) implying the possibility of imprisonment (not exceeding 6 months) or a fine.

If, on the one side, this law intervened on the administrative regulation of prostitution, on the other side it also changed the criminal provisions around prostitution.

What are now left are the following provisions: first of all, §180a of the German Criminal Code, punishing the exploitation of prostitutes. This provision is aimed at avoiding inhuman conditions for sex workers and it wishes to contrast any situation which stands against sex worker's liberty and economic independence.

The offence comprises three different conducts. Number (1) punishes whosoever «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 her work. The latter comprehends also economic dependence, which takes place when a person's freedom to choose is compromised for economic reasons, for example, her/his work is not being paid, or he/she has many debts. Number (2) punishes: «1. Whosoever 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

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<sup>995</sup> M. Helfer, *La prostituzione nell'ordinamento austriaco e in quello tedesco*, in A. Cadoppi, *Prostituzione e diritto penale*, p. 100 and I. Hunecke, Hunecke, *Germany*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 107-122

<sup>996</sup> See I. Hunecke, Hunecke, *Germany*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 111-113

## CHAPTER V

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 her/his personal and economic 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, 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 n.1 is applicable when the economic condition of the victim is lessened by more than 50% and the perpetrator is enriched by taking advantage of the sex worker. At number 2 the conduct of someone acting for his/her 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 conduct 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 economic liberty of the sex worker, the relationship between the victim and the perpetrator must be enduring and continuative, and the conduct must be of proper exploitation, not just living off another person's work.

These criminal law provisions might appear to be in contrast with Law 2002 on prostitution and its basic assumption on the legitimacy of prostitution. What we should notice is that, from the point of view of the law in action (how these provisions are applied), the apparatus remains coherent. 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 oriented at protecting sex workers' self-determination, rather than an abstract notion of public morality.

That is why any conduct promoting prostitution without violence, threat, or substantial abuse is not punished<sup>997</sup>.

However, the whole asset of the regulation on prostitution was exacerbated by a recent reform. The Bundesrat intervened recently in 2016 with two different laws: Law 21 of October 2016 (*Gesetz zur Regulierung der Prostitutionsgewerbes sowie zum Schutz von in der Prostitution tätigen Personene*) about voluntary prostitution, and Law 11 of October 2016 against forced prostitution<sup>998</sup>.

As regards 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<sup>999</sup>.

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 conducts, 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<sup>1000</sup>, in particular with its article 18 co. 4 at §232 co. 6, the client of a forced prostitute is

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<sup>997</sup> M. Helfer, *La prostituzione nell'ordinamento austriaco e in quello tedesco*, in A Cadoppi, *Prostituzione e diritto penale*, cit., p. 109

<sup>998</sup> For a better understanding of this reform see the report made 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 Prostitutes*, Berlin, 2007 available in English at the following link: [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](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)

<sup>999</sup> 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 to register and advise which was suspected to be against the Constitution. Here it was also affirmed that the requisite on condoms would constitute an inadmissible interference with the intimate personal sphere.

<sup>1000</sup> 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>

punished. It is observed how, concretely, it will be very difficult to apply this norm, given that the assessments to be carried out are many and complicated. One of the most controversial ones, is, for example, the one aimed at ensuring that the clients were aware that the person had been forced into prostitution<sup>1001</sup>.

### 3.1.2. *The regulation of prostitution in the Netherlands*

The model in the Netherlands is known for its social pragmatism<sup>1002</sup>. 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<sup>1003</sup>.

From 1980, this law was almost unapplied, because of a change in social attitudes and customs: prostitution between consenting adults started to be considered as an expression of self-determination, also by second wave feminists.

At the same time, due to migrations, the demography of sex workers in the country started to change with increasingly high levels of human trafficking.

It was from here that the idea that a reform was needed started: political forces were united in saying there was a need to increase the fight against human trafficking, to punish prosecutors and to protect victims<sup>1004</sup>.

The legislator decided to decriminalize prostitution in order to contrast criminality, by putting it inside the framework of the Dutch administrative welfare regulatory system. This was carried out bringing the *Act Lifting the Ban on Brothels*<sup>1005</sup> into Parliament, which came in force on the 1<sup>st</sup> 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:

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<sup>1001</sup> F. Parisi, *Prostituzione. Apoie e tabù di un nuovo diritto penale tutorio*, cit., p. 60-63

<sup>1002</sup> S. Altink, I. van Liempt, M. Wijers, *The Netherlands*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 62-77;

<sup>1003</sup> S. Altink, I. van Liempt, M. Wijers, *The Netherlands, Assessing Prostitution Policies in Europe*, pp. 67

<sup>1004</sup> S. Altink, I. van Liempt, M. Wijers, *The Netherlands, Assessing Prostitution Policies in Europe*, pp. 69

<sup>1005</sup> For a comment 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., p. 160-174

- Regularize voluntary prostitution, with a system of licenses and authorizations based at the municipal level;
- Protecting minors;
- Fighting against forced prostitution;
- Improving working conditions of sex workers;
- Separating criminality from sex working;
- Diminishing illegal prostitution<sup>1006</sup>.

The reform mainly decriminalized prostitution, but at the same time made it subject to administrative law and labour law, respecting the right of self-determination and autonomy of sex workers<sup>1007</sup>.

Nonetheless, in this legal system, sex working is still considered a somewhat peculiar form of work, capable of affecting physical and mental integrity<sup>1008</sup>.

For this reason, the legislator gave local authorities the power to regulate prostitution. Since the 2000s, City councils adopted laws regulating prostitution in their municipalities<sup>1009</sup>.

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, wanted 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 under-aged prostitutes and a system of licenses for sex businesses (such as brothels).

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<sup>1006</sup> C. Post, J. G. Brouwer, M.I Vols, *Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?*, in *European Journal of Criminal Policy Res*, 25, 2019, p. 113-114

<sup>1007</sup> H. Wagenaar, S. A. Helga Amesberger, *Final Report of the International Comparative Study of Prostitution Policy: Austria and the Netherlands*, Hague, 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*, Ashgate, 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.

<sup>1008</sup> Kamerstukken II 1997/98, 25,437, 5; Kamerstukken II 1998/99, 25,437, 189b

<sup>1009</sup> Peculiar, 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

This Bill was however strongly criticized and was struck down by the Senate. The Senate proposed an amended version in 2014, which however was never discussed and approved<sup>1010</sup>.

### 3.1.3. *Sexual assistance in Germany and the Netherlands*

Both Germany and the Netherlands are to be considered as 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 - early in the 90s and moved to Germany in the same years, starting to offer services of erotic/sensual contact to people with disabilities.

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<sup>1011</sup>»

In Germany, Nina de Vries and the Institute for the Self-determination of the Handicapped association (*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 disability.

The association currently works both in the field of sexual assistance and on sexual counselling, by periodically proposing training courses for new operators and offering several services. All these initiatives, all in compliance with the guidelines of the association, are rooted in the philosophy of independent living and aimed at the empowerment of users<sup>1012</sup>. Even if the ISSB clearly marks the differences between its

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<sup>1010</sup> C. Post, J. G. Brouwer, M.I Vols, *Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?*, cit., p. 114

<sup>1011</sup> This definition is and extract from a lecture Nina de Vries gave in September 2006 in Australia. The entire transcription in German can be found here: <https://web.archive.org/web/20160913235235/http://www.integra.at/files/Sexualbegleitung.pdf>

<sup>1012</sup> See their website: <http://www.isbbtrebel.de>

service and sex working, from a legal point of view, sexual accompaniment is disciplined by the law on prostitution.

Specifically, the *Prostitute Protection Act* 2017 frames sexual accompaniment 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- they should be considered obliged to undergo registration and an assessment meeting, provided by law.

As regards the Netherlands, one of the first organizations involved in the field of sexuality and disability was founded in 1997 by people with disabilities themselves. This organization is formed of 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 working, rather as a form of social work with a specific attention to the sphere of sexuality.

Another organization, *FleksZorg*, offers services more related to the sex work industry. In the Netherlands people with disability who are supported financially can freely decide to spend their budget in sexuality related services.

It was estimated that this sum of money covers approximately 10-15 visits per year<sup>1013</sup>.

### 3.2. *Switzerland*

Switzerland has a regulationist approach towards sex working, which however is very light and brief on a federal level, and it very much depends on the approach of each canton and municipality<sup>1014</sup>.

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<sup>1013</sup> L. Couldrick, *Disability sexual health services in the Netherlands*, SH&DA meeting, 12 October 2009, available online at: <http://shada.org.uk/sites/default/files/Netherlands.pdf>

<sup>1014</sup> This asset is line with the general system in Switzerland. This country indeed is known for its peculiar form of federalism, which was introduced earlier 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 the Federal Constitution from 1848 that the powers of the Confederation and cantons are laid down. The main principle in this field is the principle of subsidiarity according to 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, some examples, according to the federal Constitution are the fields of defense, customs and monetary matter, 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 task that are not expressly allocated to the Confederation are of responsibility of cantons, while in some areas the competence is shared. The smallest political entity in Switzerland is the communes or

The public discourse on sexual assistance dates from the 2000s. During these years two main associations in German-Switzerland and French-speaking Switzerland started projects on sexual assistance, by 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 working and - as such - it is subject to general provisions on prostitution.

### 3.2.1. *The regulation on prostitution in Switzerland*

Currently, Switzerland has adopted a regulationist approach towards prostitution, with different implementations at a regional or cantonal level. Today, 8 cantons out of 25 have a specific regulation on prostitution.

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)<sup>1015</sup>.

From 1925 to 1942, the activity of prostitution was criminalized on a national basis, with the prohibition of opening brothels and practising prostitution in the public sphere. With the new Penal Code from 1942, prostitution *per se* ceased to be an illicit activity, while the conducts of procurement, active solicitation and homosexual prostitution, were included among criminal offences<sup>1016</sup>.

It was from 1992 that these provisions too, expressions of an enduring repressive legal framework on prostitution, were repealed.

Nevertheless, some cantons still adopt a legislation against active soliciting<sup>1017</sup>.

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municipality (2300 circa), some of them (cities and larger town) have their own Parliament. Municipalities are responsible for task given by Cantons and 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

<sup>1015</sup> M. Chimienti, G. Bugnon, *Switzerland*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 136-151

<sup>1016</sup> M. Chimienti, G. Bugnon, *Switzerland*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 136

<sup>1017</sup> JAAC (Jurisprudence des autorités administratives de la Confédération) (2014) Exercices de la prostitution: Aspects contractuels, nécessité d'harmoniser les règles, mesures envisageables et compétence de réglementation

As can be deduced from the remaining criminal law provisions (that will be analysed later), 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 from 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 mores<sup>1018</sup> (atf 11 II 195). The remaining legal provisions around prostitution are mainly three: Article 195 cps, Article 199 cps and Article 182 Cps<sup>1019</sup>.

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 conduct interfering with the self-determination of a sex worker by forcing her/him, or limiting her/his freedom in choosing modalities, timing and location of her/his work. As regards Article 195cps, it is titled *Exploitation of sexual acts/ encouraging prostitution* and, according to it, 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 or her will, is liable to a custodial sentence not exceeding ten years or to a monetary penalty<sup>1020</sup>».

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 explication of her/his activity.

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<sup>1018</sup> See the decision: ATFF 11// 297ss, JT 1986/ 449 ss

<sup>1019</sup> En english version of the Swiss Criminal Code is available at <https://www.admin.ch/opc/en/classified-compilation/19370083/201907010000/311.0.pdf>

<sup>1020</sup> Here the text in French, one of the official language 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; »

## CHAPTER V

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<sup>1021</sup>», irrelevant of the heterosexual or homosexual character of the sexual act in question.

In general, we can observe that the punished conducts 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 her/him to start again after having quit it.

This offence can take place in many ways: simply through suggestions or also by pressuring the person. In any case the conduct must be within a certain scale of intensity: simple incitation is not sufficient as - according to the judges - the conduct 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<sup>1022</sup>.

In particular, the three punished conducts around encouragement are:

I) Encouragement of a minor: this conduct involves simply encouraging the minor, and it 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 conduct implies a state of need or awe, 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 economic 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 conduct is strongly built on the personal motive of the agent<sup>1023</sup>.

The other three conducts, pertaining to exploitation, involve and protect people who are already in the sex work industry.

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<sup>1021</sup> See the decision: DTF 129 IV 75

<sup>1022</sup> D. Item, *La prostituzione nell'ordinamento svizzero*, in A Cadoppi, *Prostituzione e diritto penale*, cit., p. 118

<sup>1023</sup> D. Item, *La prostituzione nell'ordinamento svizzero*, in A Cadoppi, *Prostituzione e diritto penale*, cit., p. 116

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 of the scope of the provisions.

The conduct of imposing a location, a duration, a schedule or any other circumstance regarding the activity is punished<sup>1024</sup>.

According to the judges, this conduct implies the same intensity that is required in the case of general coercion, punished at Article 181 cps. This conduct 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 conduct is that of 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.

Article 199 cps<sup>1025</sup> 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 oriented at protecting the economic freedom of the person involved in prostitution, and it 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<sup>1026</sup>.

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.

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<sup>1024</sup> D. Item, *La prostituzione nell'ordinamento svizzero*, in A Cadoppi, *Prostituzione e diritto penale*, cit., p. 118

<sup>1025</sup> Here the text in French, one of the official language 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. »

<sup>1026</sup> M. Chimienti, G. Bugnon, *Switzerland*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 140-141

### 3.2.2. *Sexual assistance in Switzerland*

Thanks to the experience of the Netherlands, Denmark and Germany (1980-1990) sexual assistance reached Switzerland in the early 2000s<sup>1027</sup>.

The first promoter of this initiative was Switzerland's largest disability association, *Pro Infirmis*<sup>1028</sup>, in the German speaking territory.

In 2003 they launched the first Swiss training course on sexual assistance, registering the interest of more than 300 people. The project was actually carried out in 2004 by the association *FaBS Fachstelle für Behinderung und Sexualität*, under the responsibility of Rd. 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 18 days and 6 months. It was aimed at men and women from all professional backgrounds, preferably from professions related to the body, (e. g. body therapists<sup>1029</sup>).

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, and the main person in charge died in 2011.

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*<sup>1030</sup> (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.

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<sup>1027</sup> 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?*, Geneve, 2013, p. 20. Available at this link: [https://www.unige.ch/formcont/files/9715/1326/9622/CAS\\_sexologieclinique\\_memoire\\_assistance\\_sexuelle\\_Aregger.pdf](https://www.unige.ch/formcont/files/9715/1326/9622/CAS_sexologieclinique_memoire_assistance_sexuelle_Aregger.pdf)

<sup>1028</sup> See the website of the association here: <https://www.proinfirmis.ch/it.html>

<sup>1029</sup> 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?*, Geneve, 2013, p. 15

<sup>1030</sup> See the website of the association: <https://sehp.ch/association/>

Both these associations have recruited and trained sex workers<sup>1031</sup>, 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<sup>1032</sup>.

From a legal point of view, sexual assistance does not find any legal 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 the federal law, cantonal law, and municipalities regulations on sex working.

At the same time, the activities of the associations, such as recruiting people and organizing training courses on sexual-related services, are to be considered legal, and subject to the above-mentioned 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<sup>1033</sup>.

Sexual assistants in Switzerland practice massages, provide caresses, engage in sensual games, teach masturbation to avoid injuries, and some of them practice penetrative and oral sex. They also support couples with physical disabilities. Apparently, services for homosexual people are only available in German-speaking Switzerland<sup>1034</sup>.

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 understand the nature of the service. Later they acquire a legal document,

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<sup>1031</sup> C. Agthe Diserens, *La formation en assistance sexuelle : toute innovation implique des risques !*, in *Reliance*, XXIX, 3, 2008, pp. 46-52; S. Kessler, 2008, «*Mais qui sont-ils ? La sélection des candidats qui se destinent à l'assistance sexuelle* », in *Reliance*, XXIX, 3, 2008, pp. 53-57.

<sup>1032</sup> Most of them come from the middle class, they are between 27 and 65 years old. About half of them are men. See C. Agthe Diserens, *La formation en assistance sexuelle : toute innovation implique des risques !*, in *Reliance*, XXIX, 3, 2008, pp. 48

<sup>1033</sup> G. Garofalo Geymonat, P. G Maciotti, *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 were - or had been - sex workers.

<sup>1034</sup> 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?*, Geneve, 2013, p. 17

registering that receiving sexual assistance is a desire and a request of the beneficiary<sup>1035</sup>.

The costs of sexual assistance, which are not covered or reimbursed under health insurance, may vary from between 115 euros in French-speaking Switzerland and 200 euros in German-speaking Switzerland per session, each lasting approximately one hour and a half<sup>1036</sup>.

If the legal framework is very clear (sexual assistance is a form of sex working regulated by the related law and subject to the rules of the free market) the idea of sexual assistants regarding their roles, are many and inhomogeneous.

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<sup>1037</sup>. For others, sexual assistance is a form of therapy within a medicalized framework<sup>1038</sup>, and as such should be covered - according to them - by health insurance.

For others, on the contrary, it would be very dangerous to talk about a therapeutic aim.

### 3.3. Denmark

Denmark is the only Nordic country which did not adopt an abolitionist approach towards prostitution.

The decriminalization of the activity of prostitution took place in 1999, while the Criminal code still criminalizes some parallel conducts.

Moreover, in recent years, the law punishing human trafficking has become more severe to conform to international standards on the topic.

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<sup>1035</sup> 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?*, Geneve, 2013, p. 76

<sup>1036</sup> 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?*, Geneve, 2013, p. 80.

<sup>1037</sup> 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 his rhythm, this ideal being the opposite of a caricatural representation of prostitution, which would be characterized by requirements of temporal and financial 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

<sup>1038</sup> The medicalization of sexual assistance would thus be part of the more general movement to medicalize social assistance: P. Aiach, *Les voies de la médicalisation*, in P. Aiach et D. Delanoë (eds.), *L'Ère de la médicalisation, Ecce homo sanitas*, Paris, 1998, pp. 15-36

As regards sexual assistance, Denmark has developed guidelines for social operators and disability workers on the matter of sexuality and disability (Chapter III), specifically for people living in state institutions.

In general, sexual assistance is considered a form of sex working, and as such it follows the rules on prostitution.

### 3.3.1. *The regulation on prostitution in Denmark*

In Denmark the regime for prostitution is regulationist. Before the 1999 decriminalization, the legal understanding of prostitution was very discontinuous.

From the middle of the XIX 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. This was an expression of the functionalist approach adopted in this field, according to which, in the incapability of putting an end to prostitution, public policies were responsible for controlling it and contrasting its adverse effects.

It was with a law from 1895 that compulsory registration of women practicing prostitution was eliminated<sup>1039</sup>.

The Criminal Code of 1930 punished *Vagrancy* at §199. Vagrancy was defined, from 1967, as gaming, fornication or being supported by fornication. Anyone involved in these activities, and not looking for other occupation, was punishable with imprisonment for up to one year.

While Sweden in 1999 was emanating a law to punish anyone purchasing sexual services, a law to decriminalize the trading of sexual service was being approved in Denmark<sup>1040</sup>.

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 parallel conducts which are relevant for criminal law.

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<sup>1039</sup> J. Bjonness, M. Spanger, *Denmark*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 152-169

<sup>1040</sup> 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

## CHAPTER V

Prostitution, however, is not considered a profession by law for the purposes of membership of a trade union<sup>1041</sup>. Nonetheless, it is legal to have an income from sex working, as long as the person is registered and pays taxes.

The purchase of sexual services is legal when the person selling is over 18 years old. Currently the Danish Criminal Code<sup>1042</sup> punishes the conduct of pimping.

The latter is defined as the conduct of a person who professionally, or for profit, encourages, promotes, or facilitates the practice of prostitution by another person. The relevant articles are §228 and §229 of the Criminal Code.

The first one states as follows: «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 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.

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<sup>1041</sup> J. Bjonness, M. Spanger, *Denmark*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 160

<sup>1042</sup> The English version of the Danish Criminal Code is available here [https://www.legislationline.org/download/action/download/id/6372/file/Denmark\\_Criminal\\_Code\\_am\\_2005\\_en.pdf](https://www.legislationline.org/download/action/download/id/6372/file/Denmark_Criminal_Code_am_2005_en.pdf)

With an amendment of 2002, the offence of human trafficking was introduced into the Criminal Code system, directly deriving from the *UN Palermo Protocol*<sup>1043</sup> and Art. 2 of EU policies against human trafficking<sup>1044</sup>. The article, §262a, states as follows:

« (1) Any person who recruits, transports, transfers, houses or subsequently receives a person, using or following the use of 1) unlawful coercion pursuant to Section 260 of this Act; 2) deprivation of liberty pursuant to Section 261 of this Act; 3) threats pursuant to Section 266 of this Act; 4) unlawful induction, corroboration or exploitation of a delusion; or 5) other unseemly conduct; for the purpose of exploitation of the individual through sexual immorality, forced labour, slavery or slavery-like conditions, or removal of organs, shall be guilty of trading in human beings and liable to imprisonment for any term not exceeding eight years.

(2) The same penalty shall apply to any person who, for the purpose of exploitation of the individual through sexual immorality, forced labour, slavery or slavery-like conditions, or removal of organs, 1) recruits, transports, transfers, houses or subsequently receives a person under the age of 18 years, or 2) renders a payment or other favour to obtain consent to the exploitation from an individual who has guardianship over the victim, and any person who receives such payment or other favour.»

It should be noticed that the judges have often applied this article together with §228, for the cases of human trafficking related to sexual exploitation<sup>1045</sup>.

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<sup>1043</sup> The Palermo Protocols are a set of UN Treaties to combat international organized crime. In particular the one in question is the one 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 in force on the 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, pp. 931; J. G. Raymond, *The new UN trafficking protocol*, in *Women's studies international forum*, 25, 5, 2002, pp. 491-502

<sup>1044</sup> 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, 775-790

<sup>1045</sup> J. Bjonness, M. Spanger, *Denmark*, in S. O. Jahnsen, H. Wagenaar (eds.), *Assessing Prostitution Policies in Europe*, London, 2017, pp. 164

### 3.3.2. *Sexual assistance in Denmark*

Sexual assistance in Denmark is approached as a very vast phenomenon, that involves different practices and professionals.

In this case we must truly acknowledge that 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 with disability<sup>1046</sup> »

The services provided are various: counselling, education, assistance during intercourse with a partner, assistance with masturbation, and it takes into consideration 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 institutionalized people. 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 above-mentioned regulation.

The *Danish Association for Sexuality Advisors*<sup>1047</sup>, founded in 1998, is responsible for the training of the professional figures of the sexual advisor in Denmark and consists of approximately 200 trained members. The association, which believes that “Everyone has the right to have a sexual life – regardless of disability”, 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 disability, 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 address the person who may need it to a sex worker.

For this reason, the Ethic committee of the association issued, in 2013, a paper called *Attitude paper on prostitution*<sup>1048</sup>. The Ethical Committee states that since prostitution

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<sup>1046</sup> D. Kulick, J. Rydstrom, *Loneliness and its opposite*, cit.

<sup>1047</sup> Here the English version of the website of this organization can be found: <https://www.seksualvejlederforeningen.dk/in-english/>

<sup>1048</sup> The text is only available in Danes at this link: <https://www.seksualvejlederforeningen.dk/etik/>

is legal in Denmark, people with disability should not be denied help with contacting a sex worker. However, sexual advisors are suggested to consider the following issues when they are asked to help their assisted client in contacting a sex worker:

in this field it is better to follow a principle of “minimum intervention”, as this should be considered as the last resort when everything else has somehow failed the need of the assisted person.

Pay attention to the issue of human trafficking. The sexual advisor should investigate the situation and the condition of the sex worker he/she is referring to.

#### 3.4. *Pros and cons of the negative assimilation model*

In this model, the demand for protection in the sexual sphere for people with disabilities finds its own way.

Nevertheless, we should observe how, even in this model, the dimension of sexuality and disability, addressed through the services of sexual assistance, does not emerge *per se* in the eyes of law.

For the legal system, the latter completely overlaps with sex working: from this comes both positive and negative stances.

On the positive side, sexual assistance finds recognition and a (non-specific) regulation inside the legal system. This implies more protection and guarantees for sexual assistants, people with disability 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. Here some controversial issues still remain unsolved, such as the economic dimension of this service and the assessment of consent.

Moreover, this implies a non-formalization of existent good practices, which would help in the creation of a common definition of the terms of this service and in the creation of a minimum common standard for it.

4. *The “Italian way”: sketching the affirmative specification model*

We saw already that it is possible to theorize the existence of two main approaches to sexual assistance in Europe, if we look - not at the sources of law - but at the factual dimension of it and the intersection with sex working.

At this moment, Italy can be qualified as one of the countries belonging to the negative incorporation model.

It is our duty to understand what place the proposals formulated both by associations and at a Parliamentary level should occupy in this frame. In doing so, it becomes evident that what is suggested is a sort of “third-way” to sexual assistance, compared with the existent 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 on 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, taking the distance from the already existing solutions in Europe and at a broader international level.

If the elaboration of a form of regulation is to be seen positively, there are some critical evidential points that should be raised and addressed.

Some of these have already been analysed when discussing the law proposals, however in the following paragraph, a deeper analysis from a constitutional point of view will follow, with a focus on the constitutional sustainability of this model.

To conclude, a proposal for an alternative framework will be formulated, by using some of the suggestions that emerged from the comparative legal analysis.

4.1. *The constitutional sustainability of a third model as delineated by the already existent proposals*

In the last paragraph of Chapter 2 of this work, we sketched a possible constitutional basis for positive measures in the field of sexuality and disability.

First, what emerged is that the Constitutional Court endorsed a social model of disability, according to which disability is to be considered a social issue to be addressed collectively, by society<sup>1049</sup>.

The spheres of sexuality, as one of the essential ways of self-expression<sup>1050</sup>, must be encompassed in a broader constitutional project, aimed at granting the self-development of each individual, both with positive and negative rights<sup>1051</sup>.

From this 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 sexual agency for the disabled person.

The second one is Article 32, which should be used to give more strength to the instances of self-determination. Article 32 must be interpreted in the sense that «socialization (can be seen) as an essential element for health, as such can have a therapeutic function just like medical treatments and rehabilitation<sup>1052</sup>». The use of this parameter, however, needs to be strictly linked with Article 2 and Article 3, as the emphasis must not be put on the strictly medical aspect of it, but on the holistic and comprehensive notion of well-being of the person, otherwise there would be a concrete risk of reaffirmation of a medical model of disability.

To conclude, the last parameter is Article 3, and we have already mentioned that in the field of disability law the notion of equality must be understood as an anti-subordination principle.

In the specific case of sexual assistance, this framework must be coordinated with the legal provisions around prostitution contained in the Merlin Law. As we noticed from

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<sup>1049</sup> 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 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»

<sup>1050</sup> Being defined by Constitutional Court as one of the essential way in which the human person can express himself/herself. See decision n. 215/1987

<sup>1051</sup> From which, however, the dimension of the choice of selling sex must be excluded according to decision n. 141/2019 from the Italian Constitutional Court (see Chapter IV)

<sup>1052</sup> Here the original passage of the decision n. 251/2008 from 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»

the previous paragraphs, this bond cannot be ignored, and - on the contrary - must be addressed in the evaluation of any proposal, especially from a constitutional point of view.

A legislation on sexual assistance in our legal system would constitute an exception to the Merlin Law, that must be said. Such a regulation would create a legal space where the organization of trade of services related to sex for people with disability would not be criminally relevant. On the contrary, following the existing proposals, this service would be promoted by the State, and organized by the Regions.

Such an exception to the general criminalization related to the trade of sexual services would need to be reasonable and justified, especially from the Constitutional point of view. The arguments which could be used for this purpose 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 disability should be excluded from the application of criminal law.

The first argument relies on the fact that sexual assistance, according to its promoter, differently from “common” prostitution, has a therapeutic aim. In fact, it is provided by specifically trained professionals, whose aim is to grant to a person with disability an educative sensual or erotic experience. This is clearly the position, for example, of the *LoveGiver Committee* also adopted by the law proposals from Senator Lo Giudice (see Chapter IV).

The second argument relies on the fact that, given social discrimination and stigma, people with disability do not easily cultivate a fulfilling sexual life, and as such they need professionals to live this specific aspect of life. The use of sexual assistants would be, indeed, the only way for people with disability to explore the aspect of sexuality. As sexuality is a relevant field for self-determination and this is the only way for people with disability to be granted access to the sphere, then an exception to general provisions must be granted by law.

Both arguments basically rely on a view of disability which is now obsolete: they consider the condition of disability as a pejorative attribute and relegate the sexuality of people with disability either to a sphere of medicalization, or something that can be satisfied only through the auxiliary work of a trained person.

The model of disability this model represents does not comply with the assumption of the social model of disability currently embraced by our constitutional system and, at an international level, by the CRPD.

This view risks being patronizing and pathologizing the sexual sphere of people with disability, in an open violation of every constitutional parameter we mentioned before. Under this model there is no space for self-determination in the sexual sphere, but only 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<sup>1053</sup>.

This is not in line with the views of Articles 2 and 32 of the Constitution in the disability field, where the accent is always on social factors, barriers, accessibility and self-determination.

It is also hard to imagine how this legal exception could be compatible with a proper interpretation of Article 3 of the Constitution. This consideration is even reinforced by the fact that the negative view of prostitution adopted by our legal system was recently confirmed by the Constitutional Court.

In the end, it appears that a similar proposal would perpetuate and strengthen the social stigma regarding people with disability, specifically in the field of sexuality.

If, at the core of the constitutional scheme for the person with disability, we can find sociality, accessibility and active participation, then we can say that this third model does not comply with any of them.

#### 4.2. *What space is left for a third way: the affirmative specification model*

What we would like to suggest is a different framework for sexual assistance, drawing upon the definition given by the Spanish thinkers and activists Arnau and Centeno, and the Danish philosophy and experience.

The possibility we would like to explore is to frame sexual assistance in the already existent regulation for personal assistance (law 104/1992) rather than creating a whole new professional figure by law.

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<sup>1053</sup> C. Colapietro, *Diritti dei disabili e costituzione*, cit., p. 81

Just like Centeno mentioned<sup>1054</sup>, Sexual assistance might be seen, not as a therapeutic relationship or as an erotic/sensual experience, but as a tool - an instrument - to live sexuality within the philosophy of independent living<sup>1055</sup>.

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, by guiding her/him or helping with the use of sex toys, for example. Sexual assistants should not be involved in sexual intercourse with the user, simply because that would be outside his/her competence. As Arnau and Centeno care to explain, sexual assistance should grant a person with disability access to his/her own body<sup>1056</sup>.

In this sense, the experience of 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 disability have sexual intercourse with partner 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 his/her assisted person.

Early on, when Law 104/1992 was approved, some scholars soon complained about the lack of any mention of the field of sexuality and the sexual needs of people with disability<sup>1057</sup>.

The Law could be now modified in order to encompass the field of sexuality in its objectives. 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 already existing structure of the articles some references to sexuality.

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<sup>1054</sup> This view is also supported and being implemented currently by the Spanish association [asistenciasexual.org](http://asistenciasexual.org)

<sup>1055</sup> This philosophy is also promoted by international institution on a macro-regional level. See the document: Council of Europe, *The right of people with disabilities to live independently and be included in the community* 14 October 2012. Available here: <https://rm.coe.int/the-right-of-people-with-disabilities-to-live-independently-and-be-inc/16806da8a9>

<sup>1056</sup> A. Centeno, *Asistencia sexual para personas con diversidad funcional*, in *Derechos Humanos Ya*, 2014; S. Arnau Ripolles, *La asistencia sexual a debate*, *Forum on Sexual Assistance*, in *Dilemata*, 6, 15, 2014, pp. 7-14

<sup>1057</sup> On this point see V. Vadalà, *La tutela delle disabilità*, Milano, 2009, p. 195

In this way, 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<sup>1058</sup>).

According to this Law, as emended by l. 104/1998, Regions are competent for the organization of personal assistance. Regions must grant people with disability independent living, and the Law explicitly recognizes the possibility of self-managing personal assistance, in a direct form<sup>1059</sup>.

In this way sexual assistance should be subject to the same regime as personal assistance in general, 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 should count on the possibility for Regions to implement their policy for independent living (from a financial and organizational point of view) with the multiplication of programs available and funding for them<sup>1060</sup>.

It must be noticed, however, that the introduction of this service does not mean immediately and directly a surplus in regional expenses for disability related service. The budget can indeed remain unaltered and, in coherence with the way personal assistance is currently structured, it would be the person with disability who decides in which field he/she/they want to invest their budget and plan their assistance.

Similarly, sexual assistants or personal assistants in the field of sexuality will not be obliged to undergo any specific training to practice this profession by law. Participation in a specific training course might be encouraged by giving funding to associations and NGOs of people with disability organizing training course, but the participation should not be mandatory. It will be the person with disability who, just like with a personal assistant, will choose the right person for her/him/them, and if

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<sup>1058</sup> Here 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.»

<sup>1059</sup> Technically, this form of assistance is called by law “indirect”. In spite of the confusing name it works by giving to the interested person the possibility of managing her assistance alone, on her own. With a sum of money provided by the Region, given upon specific request, he/she can hire a personal assistant. The work and the budget for this person must be reported to Regions.

<sup>1060</sup> Tuscany can be considered the most virtuos Region in Italy for the implementation of the philosophy of Independent Living, see the book: A. Lauria, B. Benesperi, P. Costa, F. Valli, *Progetto ADA: Un modello di intervento per l'autonomia domestica delle persone disabili*, Milano, 2017

possible provide the specific training needed for the task the assistant is expected to fulfil.

On this point we need to consider that some people with disability, especially the ones with psycho-social and cognitive impairment, might not be able to guide the work of a sexual assistant precisely and fully express their need and consent in a precise manner. That is why, coherently with independent living and in the effort towards self-determination, we should consider the need to support the work of the sexual assistant with a figure resembling the Danish sexual advisor<sup>1061</sup>. Some people in fact could benefit from professional guidance and counselling in their path towards the expression of sexuality.

This person, with a specific knowledge on sexuality and a stereotypes-free and competent approach towards disability, would be able to reveal and address the need of the user. At the same time, he/she would ensure the person in question fully understands the terms of the assistance required.

Nevertheless, training regarding sexuality and disability should be offered and promoted, at different levels, in order to spread a positive attitude towards the expression of sexuality of people with disability and encourage them to recognize and express their needs in this field. Training should be aimed at medical professionals, social workers, families, and anyone working in institutions and services for people with disability.

The figure of the sexual advisor, for example, could be part of the already existing system created by “Consultori familiari”<sup>1062</sup>, as part of a public national service, managed by Regions, aimed at self-determination and informed choices in the field of sexuality and reproduction (specifically targeted at people with disability).

In general, as we have already mentioned, it is also important to offer programs of inclusive sexual education in schools, in particular for classes with students with disability.

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<sup>1061</sup> D. Kulick, J. Rydström. *Loneliness and its opposite*, cit.

<sup>1062</sup> As we already mentioned in Chapter II, this health-related services were created by Law 405/1975 with the aim of protecting informed choice in reproductive issues. Inside these structures work many different professionals, such as: social assistants, educators, gynecologists, obstetricians, nurses, psychologist and pedagogists. See: R. E. Maroz, *Sessualità e consultori familiari*, Roma, 1980; E. Protetti, M. T. Protetti, *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

## SEXUAL ASSISTANCE: A COMPARATIVE PERSPECTIVE

The law can be a propulsive actor of social change<sup>1063</sup>, affecting social attitudes and perception, but to do so, this issue must be addressed in a comprehensive way. That is why sexual assistance without further interventions would be an ineffective measure to implement.

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<sup>1063</sup> L. Gianformaggio, *Eguaglianza donne e diritto*, A. Facchi, C. Fralli, T. Pitch (eds.), Bologna, 2005, p. 5



## CONCLUSIVE REMARKS

The conclusions of a complex and multi-level study are inevitably complex and containing many layers themselves. For this reason, they will be articulated in small paragraphs.

To give innovative input to the final reflections it is appropriate to look back and try to summarise the cardinal points we've been establishing during our journey.

The first paragraphs will aim at summarizing what emerged from each Chapter.

We will continue by pinpointing some reflections that emerged as a *fil rouge* of the study, in particular the topics of: 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 conclusive considerations will be articulated upon the idea of a constellation of tools to foster the sexual agency of people with disabilities and on the role of the law in supporting positive social change.

### ***Italian law and international law: from the medical model to the social model and the missing discourse on sexuality***

During Chapter one we analysed the main theories, models and approaches towards disability. The intermediate model with some elements from the feminist disability theory and the crip theory was the one that enabled us to address the issue of the incorporation of impairment and raise points on gender and sexuality. One of the main goals of this chapter was to understand what kind of relationship the law has with this theoretical elaboration on disability. To answer this question, we analysed the international legal framework and the domestic legal framework related to disability. We did it by looking at legislation and case-law. As regards the domestic level, a specific focus was kept on the constitutional level: by doing this, evidence emerged on the fact that Italy is progressively adopting a social model of disability.

A very virtuous example of this progress is the law on inclusive education, which, in spite of the ongoing economic crisis, 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 its students to grant effective and quality education for everyone<sup>1064</sup>. It is by chance that one of the most significant decisions from the Constitutional Court is in the field of education, Decision n. 215/1987 is representative of the entire judicial philosophy of the Italian Constitutional Court on disability. Here it is clearly stated that the law must address social barriers to overcome social marginalization of people with disabilities and grant their full development as human beings<sup>1065</sup>.

We found that social inclusion is the core of the constitutional jurisprudence on disability.

When looking at the international level we can see that this shift is happening slowly and with consistent inhomogeneity at different levels. In a leading role the United Nations can be found, which fully embraced the social model with the elaboration of the 2006 Convention on the rights of persons with disabilities. This striking document is currently the leading light for the protection of disability rights at an international level and is influencing both the policy from the European Union and the Council of Europe. The European Union signed the Convention in 2007, however in a decision the Court of Justice clarified that its provisions do not have direct effect in European Union law<sup>1066</sup>. On the whole, the EU approach towards disability can be defined as erratic, indeed where the disability strategy adopts a definition of disability inspired by the social model, the Court of Justice, in its fundamental task of interpretation of the European law, struggles to affirm and apply a definition untied from medical criteria<sup>1067</sup>. 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 emerges from this first part of the analysis is that the law is being progressively contaminated by social elaboration and theories around disability. Slowly, the law is changing its architecture in order to embrace an understanding of disability which is

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<sup>1064</sup> 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 (a cura di), *Tra amministrazione e scuola. Snodi e crocevia del diritto scolastico italiano*, Editoriale scientifica, 2014, pp. 1- 40

<sup>1065</sup> Point 5 of the decision

<sup>1066</sup>Case C-363/12, *Z. v A Government Department*

<sup>1067</sup>Case *Daouidi v Bootes Plus SL*, C-395/15

capable of granting equality and access to every field of life for people with disabilities. 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 reflections carried out by these scholars are still unacknowledged by law, in particular as far as the fields of sex, sexuality, and intimacy are concerned. In the law these issues have not been addressed or have been addressed very little: this is also shown by the scarcity of legal literature on the topic.

### ***Sexuality, law, disability: social barriers and the place of the law***

Starting from this observation, Chapter two investigates the unexplored intersection between law, disability, and sexuality.

The first need was to understand the status of sexuality in the law. This field indeed presents itself as a peculiar object of inquiry, still underinvestigated and crossed by unresolved social conflicts and tension. In the reconstruction of the general relationship between law and sexuality it emerged how complex this issue is, but it was possible to detect some growing trends.

Where the law has, for a long time, been a way to control and regulate sexuality, especially through criminal law (e.g. the one criminalizing buggery or sodomy), during the revolution of the 60s and 70s social movements strongly asked the law to withdraw from the field related to sex, sexuality and the body, believing that this alone would grant individual self-determination. The final stage of this historical trajectory, however, reached the awareness that to foster self-determination there is a need for recognition and promotion by the law: for this purpose, instruments such as social rights and positive measures are the most appropriate ones.

From these findings we moved on to the analysis of international and domestic law and identified a trend on both levels, pointing at an increasing interest on the part of the law for 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.

The jurisprudence from the ECHR reveals that 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 fields such as the right to engage in consensual sex, the recognition of bodily integrity and gender identity. From these we can deduce that, in the European Convention of Human rights system, sexuality is a matter of dignity, self-determination and right to identity. However, the concrete outcome of the case discussed in front of the Court often depends on an assessment of the social sensibility towards a certain topic.

A similar trend can be detected looking at the Italian national level. From a legislative point of view the legal and social change started during the 1968 revolution with the approval of ground-breaking laws 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, without a doubt, sexuality to the right to personality. An approach that was then confirmed by Law n. 164/1982 (on the recognition of gender identity) and its evolutions. Looking at case-law, in those years the Court of Cassation started recognizing the right for compensation for damage in the sexual sphere and at the same time it affirmed the prevalence of consent on public order in decisions related to the sexual sphere.

At a first glance however, this detected trend does not involve issues related to the sexuality of people with disabilities, an area which appears to be segregated in a niche corner. The sexuality of people with disability, indeed, is surrounded by many stereotypes and misconceptions that become barriers. The main domain associated with this field are denial, censorship and stigma that significantly contribute to the desexualisation of people with disability. Even disabled people themselves, due to this stigma, initially underestimated the importance of this field in their struggle for equality. In recent years many disabled scholars started to address sexuality as a social issue, challenging the idea that this belongs to a private and individual dimension and trying to address it as a matter of collective and social relevance. It is in this view that law enters into the discourse and must be interrogated with regard to its attitude

towards disabled people's sexuality. To do this we looked, in coherence with the level of analysis developed earlier, at the international and national level.

As regards the international level, the analysis mainly took into consideration the CRPD, showing how sexuality is configured as a highly divisive topic. In the process of drafting, discussion and approval of 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 purposes. The final result is less audacious than the past Standard Rules: it was argued that sexuality was incorporated in a "discursive silence" and reduced to the issues of sterilization and marriage.

The use of silence as a form of regulation can be also found at the national level. We should underline, however, that this silence was preceded by a form of regulation which was *de facto* repressive. It was Article 519(2)(3) of the Criminal Code of Italy, a strict liability offence, incriminating for sexual violence anyone having sexual intercourse with a person "sick of the mind" (*malate di mente*) or in "condition of physical or mental inferiority" (*condizioni di inferiorità fisica o psichica*) person. This provision, despite having as its object the protection of the vulnerable person, constituted a deprivation of sexual self-determination for people with disability, who were considered by law incapable of actuating any form of consensual sexual expression. The offence was reformed and cancelled with 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.

We have previously highlighted that the attempt of disability scholars in the field of sexuality is to overcome the view of this matter as something private. This perspective has also influenced the law, generating the common argument according to which the law should not interfere in sexuality issues because of their private nature. 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) reveals itself to be inadequate to represent 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. It was indeed fundamental to challenge and overcome repressive State regulation in this field. However, given the evolution in sexuality, customs and law, this strict category seems

to be empty nowadays and the separation between them is more blurred due to the welfare State and social rights. Moreover, this consideration was enriched with the reflection of feminist scholars who have been capable of showing how the private has been used to perpetuate situations of discrimination and power imbalances. They ultimately revealed that to secure privacy and affirm self-determination in this realm, State intervention is needed. 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 over-ruling of the infamous *Bowers v. Hardwick* decision, it was also the argument that gave legitimacy to state-enforced homophobic policy such as the ‘*Don’t ask, don’t tell*’ in the US Army.

With specific regard to the field of disability and sexuality, this argument is particularly fallacious: in the disability realm people already experience very thin lines of separation between private and public. The common sense on the common notions about what is private and what is public might not be valid for a person with disabilities who needs high level support 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 disability living in group homes.

These reflections were then followed by the attempt to elaborate a constitutional framework for disability and sexuality, starting from the analysis of the constitutional jurisprudence on sexuality related issues. From this we deduced that sexuality is framed, first of all, within the right to develop one’s personality (Art.2), 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 explicate one’s sexuality. Limits must be found however in the notion of human dignity that does not cover the possibility of making sexuality a source of legitimate income, as emerged from Decision n. 141/2019. What emerged is the idea of the existence of a multifaceted notion of sexuality-related rights. Those are not new rights to be recognized, but a set of different constitutionally relevant situations, capable of calling into action (and asking for the application of) already well-established fundamental rights.

On the basis of these findings we were able to elaborate a possible constitutional guide for measures in the field of sexuality and disability. The leading principles are the ones expressed in Articles 2, 3 and Article 32, understood as well-being. According to this set of principles the sexuality of the disabled person can be an area of intervention to grant the removal of social barriers and obstacles that inhibit the person from socialisation and self-development in this field.

***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***

This part of the study (Chapter III) unwrapped and analysed certain specific and legally relevant issues arising in the field of sexuality and disability, after having traced a general theoretical framework in the previous chapter. What emerged is mainly the need to overcome stereotypes that regard people with disability as vulnerable in the sexual sphere without giving up on the need for protection. The topics analysed were forced sterilization and the construction of criminal offences to protect people with disability from sexual abuse.

The issue of sterilization has roots in the rise of the early eugenics movement in the US but also in other European countries. Still nowadays, 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 perspective, it is possible to identify a common thread in the case-law of different systems related to sterilization: the argument of the best-interest, declined in different degrees depending on the particular case and the historical moment. The leading case for the US for a long time was the *Buck v. Bell* case, where the sterilization of a young “feebleminded” woman was authorized for the best interest of society, simply because “three generations of imbeciles are enough”. The legal arguments over the years became subtler and the best interest of society started to be replaced by arguments such as the best interest of the subject or the best interest of the possible children born from parents with intellectual disability, who are presumed to be 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 ECHR on the wider topic of sterilization (a specific question regarding the sterilization of people with disability has not reached court yet).

From an Italian point of view, forced sterilization is considered a criminal offence, punished 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 disjointed 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 (with legal guardians, e.g.) must be started. A good example of the application of these constitutional principles at jurisprudential level is represented by a decision from the *Tribunale di Catanzaro* (on the 18.11.2013) that decided against the request of the doctor and guardian of a pregnant woman with intellectual disability for the authorization of an interruption of pregnancy and sterilization. Here the judge proceeded with a concrete and deep assessment of the capacity of the woman to understand the implications of her pregnancy, her will and the broader context of her life and concluded that the request was “aberrant” and against the interests of this person. Sterilization, in spite of being linked to the field of reproduction, constitutes a way to regulate and deny sexual agency to people with disability. People with intellectual disabilities are the ones mostly affected by this: the social stigma that depicts them as incapable of acting as agents of their own life expands also into the intimate and sexual sphere. This is reinforced by the fact that social workers and carers who work with people with intellectual impairments approach the topic as a taboo and do not provide any support on this part to the people they assist. If it is true that people with intellectual disability, and in particular young people, are more vulnerable to sexual abuse than the rest of the population, it must be taken into account that this derives from many factors such as the lack of information, opportunities of socialisation, and spaces for experimenting rather than on 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 nowadays in some countries the law legitimizes and exacerbates the deprivation of sexual agency to people with intellectual disability, in the attempt at protecting them without addressing the causes behind their vulnerability. We mentioned the examples of some common law jurisdictions (such as Scotland and England) and the debate in Ireland for the reform of the Sexual Offence Act. In this case for example the new offence is an improvement compared to the previous one, however Ireland missed the occasion to implement a disability neutral paradigm, as suggested by influential Irish scholars.

A disability-neutral offence, on the contrary, is implemented in Italy where, on the basis of the already-mentioned Article 609-bis, judges proceed to a case by case assessment of the capability of consenting to the sexual act, an evaluation that is not influenced by the impairment of the person. This approach, for example, is consistent with Article 23 of the CRPD.

A very positive example of the elaboration of policy for the self-determination of people with intellectual disability 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 they are involved with. The Danish policy according to which the only way to contrast abuse is to create an affirmative culture of sexuality for people with disabilities should probably represent the tip of the scale when balancing the need for protection and the self-determination of people with disabilities in the sexual sphere. The elimination of unlawful medical practices such as sterilization and the repeal of the criminal offence denying the sexual agency of people with disability is not enough, as we argued earlier. In this view, tools such as programs of sexual education, 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, is auspicious. Sexual assistance should be framed amongst these proposals and it is, nowadays, one of the most discussed tools of intervention in this field.

### *Sexual assistance in Italy: a proposal and its limits in context*

Chapter IV aimed at entering into the issue of sexual assistance and in particular its configuration in Italy with regard to the scheme promoted by the main social actor on the topic, the law proposals formulated in the previous years and the general legal framework.

It is not possible to provide a unitary definition of sexual assistance. Broadly we can say that sexual assistance is a particular form of sexual facilitation, something that implies assistance with 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 variegated in the international panorama. One of the issues that emerged as deeply unsolved are the similarities and differences between sexual assistance and sex working.

This tension also emerges in Italy in the proposal of the LoveGiver Committee which defines a sexual assistant as an operator for well-being with the task of educating to affectivity, emotions, body experience and sexuality. They frame this professional figure in a vocational narrative, using the philosophy of “pedagogy of eroticism” where the person with disability has to be instructed to recognize and experience erotic and sexual connections. The aspiring sexual assistant must respect specific requirements to have access to a specific training course.

This figure however should find her/his space within the broader Italian legal context characterized for having adopted since 1958 an abolitionist approach towards prostitution. The Merlin Law indeed 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 the so-called “parallel conducts” does not criminalize sex workers directly, however it discourages the act of practising prostitution and generates in fact a strong social stigma and isolation towards this category of people. The system of the Merlin Law, with particular regard to the offence of recruiting and aiding and abetting prostitution, was recently under the scrutiny of the Constitutional Court. The Constitutional Court declared the constitutionality of it (in particular the compatibility with Art. 2, 41, 13, 25(1) and 27) with the Decision

141/2019. The Constitutional Court adopted a view according to which prostitution can never be a “choice of life” and, even if it were, this universe attracts vulnerable subjects that the State must protect in the name of an objective notion of human dignity.

The three law proposals on sexual assistance, elaborated during the previous legislature, do not provide any explicit coordination between the Merlin Law and the professional figure of the sexual assistant they wish to introduce. 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) who 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 an ethical code of conduct is set out, however, again, there is no concrete structure for this document. From the opening memorandum of the report preceding the proposals we can understand that this new professional figure is inscribed in a mostly medical view of disability, where her/his functions are of a therapeutic nature. For all these reasons it was observed that the proposal hardly finds its space in the constitutional asset of disability as elaborated by the Constitutional Court.

While the law proposals, with all the critical points we analysed in detail, were never discussed (nor proposed again), the LoveGiver Committee did not stop its activity. The association indeed organized the first training course for sexual assistants in Italy and is now about to start the second one. What is happening is that the situation is evolving outside the legal space, opening up to possible situations of inequality (for example from region to region, or depending on personal economic resources), discrimination and abuse. The organization of the training course moreover, especially after Decision 141/2019 from the Constitutional Court, might have profiles relevant for criminal law. It is hard to draw a clear boundary between the activity of a sexual assistant (who, according to the committee, cannot be involved in “coital” practice) and someone practising prostitution, given the wide jurisprudential definition of prostitution. The promotion, organization and activation of a training course for sexual assistants might be inscribed in the conducts of recruiting, and aiding and abetting prostitution, as well as exploitation of prostitution, sanctioned by the Merlin Law.

Also, further activities of the association such as hiring a secretary to manage the organization and putting in contact persons with disability and already trained sexual assistants, might also be relevant for the Merlin Law. It was, however, recognized that it would probably be reasonable for a judge to value the concrete damage of the juridical good in question as non-relevant (an assessment that, according to Constitutional Court, a judge can always make).

***Sexual assistance and sex working: the existing Positive Incorporation Model and Negative Incorporation Model and the hypothesis for an Affirmative Specification Model***

After having discussed sexual assistance in Italy, the last chapter aimed at investigating the same issue at a comparative legal level, through the use of models of analysis. The first approach was to distinguish different models by taking into account the sources of law, something which was not possible. All countries in Europe are united by the lack of a specific legislation on sexual assistance. The only partial exception to this is provided by Denmark, with its guidelines on sexualities adopted in 1989 and recently modified in 2016, which however are just a policy document, strictly non-binding and concerning people with disabilities living in public group homes only.

For this reason, the classification must be set out referring to different elements. It was observed that an analysis through models could be carried out by crossing-referencing the data on sexual assistance with the regulation of sex work. We observed that there is a strong factual link between the regulation of sex work and the presence/absence of praxis related to sexual assistance for people with disabilities. If we look at the countries that developed experience on sexual assistance since the nineties, those are the countries that adopted a regulationist model on prostitution. On the contrary, in countries where sexual assistance is currently being discussed on a social level and nothing more, the system adopted is an abolitionist model on prostitution. This led to the formulation of the hypothesis on the direct link between criminal provisions around prostitution and the absence/presence of sexual assistance in a country. In particular it was noticed that sexual assistance is a well-established service in countries where prostitution and parallel conducts are more widely decriminalized. On the contrary,

countries with abolitionist or neo-abolitionist legislation around prostitution are struggling both on a social and legal level at recognizing sexual assistance.

By this observation we could envisage the existence of two different models in Europe: The first one which we call the “*negative incorporation model*”. This model sees a public debate (more or less vibrant) 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 difficulties in falling outside the conducts which are criminally sanctioned. 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 and activities organized by associations are various. For example, the association *TandemTeam*, is offering sexual assistance for free. 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 was substantially inhibited from reaching a significant level, due to high social stigma around this discourse. Here the Swedish National Board of Health and Welfare (*Socialstyrelsen*) and its social committee answered some questions around sexual facilitation with written advice, 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 where nowadays, even if unsuccessfully, a law proposal on sexual assistance was formulated within the Parliament.

The second one can be called the “*positive incorporation model*”. This model incorporates sexual assistance in the broader notion of sex work from a legal point of view, but a plurality of practices is present in the factual dimension. The latter provides

many theoretical frameworks and theories around sexual assistance, which however is never criminally relevant and, on the contrary, can be regulated and protected by laws on sex working. 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 constitutes a partial exception to this statement. Countries that can be framed in 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 in around the 2000s. As we mentioned before, Denmark constitutes a partial exception within this model: this country indeed adopted a soft-law tool regulating sexual facilitation for people living in state-owned group homes, which however is not completely connected to sexual assistance. The latter in general fall within the umbrella of sex work.

We mentioned before that Italy is currently part of the first model, the negative incorporation one. If we consider however the proposals currently elaborated in our country then Italy would create a third model: a model in which sexual assistance is regulated by an autonomous law of the State, and a model where sexual assistance is admitted alongside an abolitionist approach towards prostitution. The proposal, however, would probably be incompatible with the Constitution, and in particular with the framework drawn up by the constitutional case-law on disability and the recent decision on the Merlin Law. The view that the proposal transmits 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 conducts that would hardly pass the non-discrimination scrutiny.

A possible third path, consistent with the given constitutional system and compatible with the existent legislative corpus, was formulated by taking into account some suggestions arising from the comparative legal analysis.

This was called the “*affirmative specification model*”. It was suggested indeed that 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 need to be created as a new professionality, but could be part of Law 104/1992, and be regulated by the same rules and principles there set. Adjustments should be made in order 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. For the rest, 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 realized through "direct" assistance with programs managed and financed by the Regions. Another suggestion formulated, specifically oriented towards people with intellectual impairment, was the one related to the creation of the figure of the sexual advisor. This person, with specific knowledge on sexuality and an aware approach towards disability, could work inside *Consultori familiari*, in order to address the specific needs and questions coming from people with disabilities and encourage their self-determination in the sphere of sexuality.

After having set out in summary the path followed by the analysis and its main findings, chapter by chapter, a few remarks, crosscutting the study, will be explored. There are mainly three recurrent issues that need to be highlighted, the first one regards the sources of law and the models, the second one the constitutional parameters and the third one is on the balance between protection from abuse and promotion of self-determination in the field of disability and sexuality.

***Knots on our fil rouge (1): balancing protection and self-determination in the field of disability and sexuality law***

What emerged is that the law needs to start addressing the field of disability and sexuality, to intervene where discrimination and obstacles hinder the self-development of people with disability. This reflection however is inevitably linked to another one: if it is true that people with disability are denied their sexuality, it also must be acknowledged that they are particularly vulnerable to abuse in this field. In the past, the law attempted to protect people with disabilities from sexual abuse with criminal

offences that in the end were harmful and contributed to perpetuating the stigma around the expression of sexuality of people with disabilities. This was not, as an example, a successful operation. What we should probably take into account when thinking about this balance is what clearly emerges from the Danish experience: 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 of it.

To ensure that both protection and promotion of the expression of sexuality are actuated we need specific measures to address the social barriers against people with disabilities in the sexual sphere, but not specific laws to protect them from abuses. What must be addressed is the guarantee of equal access to justice for people with disability<sup>1068</sup>. More than the formulation of specific norms for the protection of people with disabilities, that revealed themselves to be inadequate and stigmatizing we need to secure the possibility for people with disability to see their rights justified according to already existing laws. This may not happen due to several barriers, social, architectural, related to the possibility of participating and being heard in trial, and many more. Law 104/1992, in particular at Article 37, ensures that both the victim and the perpetrator with disabilities are met in their rehabilitative and therapeutic needs during criminal law proceedings. Architectural accessibility is granted by DPR 24 luglio 1996 n. *Regolamento recante norme per l'eliminazione delle barriere architettoniche negli edifici, spazi e servizi pubblici* that applies to public buildings

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<sup>1068</sup> 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 disability that is why it is object of a specific provisions 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 the document: 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 here: <https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf>. For an overview of the issue from 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.

and public spaces<sup>1069</sup>. The specific issue of accessibility of the tribunal was addressed by the Corte di Cassazione in the case of a disabled defendant<sup>1070</sup>. The Court stated that the judge should have evaluated any possible place to carry out the process including the possibility of carrying it out outside the tribunal, that's 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<sup>1071</sup>» On the topic of accessibility of justice, with a focus on communication, the Constitutional Court n. 341/1999 granted the possibility for deaf people in court as defendants to have a translator<sup>1072</sup>. These decisions express general 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 disability.

The suggestion is that this balance should come about in the efforts to design and implement instruments to grant people with disabilities access to sexual 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.

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<sup>1069</sup> A comment to this law: L. Prestinenzia 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.

<sup>1070</sup> Corte di Cassazione, III sez. penale, 17 novembre 2001. The case concerned the legitimacy of the declaration of default of appearance (dichiarazione di contumacia) of a disabled defendant, who however immediately informed the judge he was incapable of entering the tribunal due to architectural barriers.

<sup>1071</sup> The translation is done by the author, here 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.

<sup>1072</sup> With this decision the unconstitutionality of article 199 cp was declared with a particular form of decision aimed at expanding the field of a specific law (pronuncia additiva). Here the court declared that it was against the constitution the fact that article 199 did not provide to a deaf-mute person the free assistance of a translator no matter her/his illiteracy. Here the original passage: «nella parte in cui non prevede[va, N.d.A.] 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 Corte cost. n. 341/1999, for a comment: Di Chiara, *Il «diritto all'interprete» dell'imputato sordomuto in caso di analfabetismo*, in *Diritto penale processuale*, 2000, p. 223 ss

## ***Knots on our fil rouge (2): the need for flexible and soft sources of law***

Throughout the whole work we have been observing how not only is the field of sexuality, disability and law unaddressed by legal scholars, but how, more in general the law doesn't enter this realm. There is no law of the State pertaining to this issue, an exception being made for the system which still inhibits the expression of sexual agency of people with disability with criminal law provisions.

In general we must recognize the difficulty even in imagining a formal law addressing the broad, complex and multiple field of sexuality and disability. This is also what emerged from the comparative analysis through models, where we could see how, in spite of having very different approaches towards the sexuality of people with disabilities, both the models theorized register the absence of any specific law provision on the topic. The only country that addressed the issue specifically (partially) chose to do it not with the adoption of a law, but with a set of guidelines. The adoption of soft law instruments, guidelines etc. can be seen in a positive way, together with a little adjustment and amendment of specific laws in order to legitimize the specific intervention of any guidelines and policy. This was the suggestion indeed for sexual assistance: turning it into "sexual facilitation" with specific boundaries and rules already framed by law regulating personal assistance (l. 104/1992). By adding the promotion of sexuality, sexual expression and sexual well-being to the objective of the law, then any good praxis could be elaborated, for example, by a Ministerial Circular. Similarly, if we consider, for example, the issue on sexual education. The step would mean approving a general law on sexual education programs in school, still lacking in Italy<sup>1073</sup>, with a specific provision stating that sexual education must be taught in an

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<sup>1073</sup> Italy is one of the few countries in Europe that do not address the topic of sexual education in schools. There is no specific law or soft law instrument regulating or prescribing sexual education as mandatory in schools in Italy. This was remarked as a problematic point by EU on the report because "Some experts argue that the lack of sexuality could lead to irresponsible and unconscious behaviors 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 c: citizens' rights and constitutional affairs, gender equality, *Policies for Sexuality Education in the European Union*- NOTE, 2013, p. 10. Available at this link: <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/462515/IPOL->

inclusive and accessible way, taking into account the specific needs of all the students. Then, again policy or guidelines could be developed with specific good praxis and suggestions to help educators in addressing the needs and in developing means to transmit the information effectively.

The advantage of regulating this field with flexible and soft sources of law looks at the necessity of developing good practices more than a rigid apparatus of norms that inevitably will not be capable of addressing the real needs. Such tools, located outside the Parliamentary itinerary, could be elaborated and approved more quickly and, above all, could be easily adjusted once the praxis evolves and improves itself. It would be fundamental to involve people with disability themselves in this process of elaboration of guidelines, praxis and instrument, 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<sup>1074</sup>) could be useful: this kind of institution could be responsible for the collection and elaboration of good practices, have consultative functions and issue non-binding guidelines. To favour its work and its democratic accountability this organism should be composed of different profiles capable of bringing their own important contribution to the discussion (e.g.: disability activists, medical professionals, scholars in the field of disability, social workers etc.)

### ***Knots on our fil rouge (3): the constitutional parameters in the field of disability and sexuality law***

In this fundamental operation of finding the right balance between protection and promotion and elaborating specific policies and guidelines it is important not to forget the constitutional compass. Indeed, all these measures are supported by the

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FEMM\_NT(2013)462515\_EN.pdf. For further insight on the sexual education system in Europe see: O. Loeber, S. Reuter, 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 and 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.

<sup>1074</sup> 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*, Trento, 2015, pp. 228-231

Constitution and at the same time should develop in sync with the binary set out by the constitutional jurisprudence on disability and sexuality.

Sexuality must first of all be framed within the fundamental rights recognized at Article 2 of the Constitution, as part of the bigger constitutional project that promotes individual self-development, that must be secured and promoted by the State.

The person with disability finds her/his specific space inside this notion, bringing with her/himself her/his constitutional statute, which is complex and articulated. For the person with disability the element of socialisation and personal development is already particularly significant, as the constant constitutional jurisprudence shows. When it comes to the field of sexuality, Article 2 implies the need for the State to erase the concrete barriers that inhibit the person with disability from living her/his sexuality fully. The measures must be oriented at granting and maximizing self-determination in the sexual sphere. The same barriers become relevant for Article 32 of the Constitution, as “socialisation can be seen as an essential element for health<sup>1075</sup>”, however in addressing the well-being of the person, attention must be given not to falling into a medical model of disability where the accent is not on the social construction of disability but on the medical aspect of it.

Article 3 of the Constitution is the last parameter directly involved and we should invoke it as an “anti-subordination principle”<sup>1076</sup> that opens up spaces to embrace and promote individual differences<sup>1077</sup> in our legal system. In this last form of the equality principle again, the recommendation would be to involve people with disabilities in the discussion and elaboration of policies and norms that see them as the protagonist so that their view can be incorporated by laws deeply rooted in the reality of the subjects they wish to protect.

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<sup>1075</sup> Corte cost. n. 251 del 2008

<sup>1076</sup> See B. Pezzini, *L'uguaglianza uomo-donna come principio anti-discriminatorio e come principio anti-subordinazione*, cit., p. 1141-1176

<sup>1077</sup> 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: L. Gianformaggio, *Eguaglianza, donne e diritto*, Bologna, 2005; T. Pitch, *I diritti fondamentali: differenze culturali, disuguaglianze sociali, differenza sessuale*, Torino, 2004

***Conclusive remarks: on the need of a constellation of instruments and the role of law as an actor of social change***

To conclude, we can suggest that to address the topic of sexuality and disability there is a need to embrace complexity. The complexity of the phenomenon of disability itself, which has a very strong social dimension but also a strongly embodied matrix and which comes in different forms; visible, invisible, more or less severe. 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 we look at a person in whom these two universes are reunited together.

Of this skein the jurist should not be scared, yet he/should 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 good practices. To a complex phenomenon, the law might answer with a constellation of instruments<sup>1078</sup>.

In this sense we can affirm that sexual assistance alone, even if formulated in coherence 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 of the legal system to provide an affirming culture of sexuality for people with disability.

To understand better this point, permit me to make an analogy with assisted suicide, *mutatis mutandis*. 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 to refuse medical treatments and the principle of informed consent and its concrete derivation and instruments, recently formalized by the law, such as anticipated directive on treatments (*Direttive anticipate di trattamento*) or the co-designed plan on medical treatment, would be an empty shell.

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<sup>1078</sup> In this sense see: C. Casonato, *21st Century Biolaw: A Proposal*, in *Rivista di Biodiritto/Biolaw Journal*, 1, 2017, pp. 86-89, where the author is arguing in favour of a plurality of procedures of rule-making 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.

It is no coincidence that such an audacious decision from the Constitutional Court that will follow Order n. 207/2018, arrives after Law 219/2017. On the contrary we can state that a similar decision would not have been possible without that Law 219/2017. Similarly, sexual assistance without the implementation of inclusive sexual education, services of sexual counselling, 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.

We have already acknowledged 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 on disability and in general to question the liberal paradigm of the individual and their standard of productivity, beauty and autonomy<sup>1079</sup>. The need to intervene 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 disability, intervening with social campaigns, in media representation and through education.

If the biggest challenge in this field is the one related to cultural and social change, then we should probably wonder what role the law should have in this. We embraced a theory according to which we must first recognize and then address the false neutrality of law and recognize how law itself is permeated by the social and cultural understanding of phenomena<sup>1080</sup>. This theoretical view reclaims its political nature, coming from the desire to alter a fundamental social relationship<sup>1081</sup> characterized in terms of oppression (usually expressed through dichotomy such as: female/male; normal/abnormal; black/white and so on). To do this, one of the methodologies proposed is the reconfiguration of the relationship between theory and praxis, oriented at offering practical solutions to real-life questions and increase the proper representation of human complexity<sup>1082</sup>. It is within this wide panorama that the law

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<sup>1079</sup> B. Casalini, *Disporre in autonomia del proprio corpo disabile*, in *il Mulino*, pp. 580-587.

<sup>1080</sup> 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

<sup>1081</sup> D. Morondo Taramundi, *Il dilemma della differenza nella teoria femminista del diritto*, Pesaro, 2004, pp. 5-6

<sup>1082</sup> J. Richardson, *Feminist legal theory and Practice: Rethinking the Relationship*, in *Feminist Legal Studies*, 13, 2005, pp. 275-293

can find its place in the field of sexuality and disability: by not forsaking its role in “orienting” society<sup>1083</sup>.

The law can find its role by appealing to its symbolic and transformative capabilities. This means recognizing that a broader and comprehensive social change can come to pass by the law affirming positively the existence and the agency of people with disabilities as sexual beings in society.

A law that, starting from the questions born within the social tissue and from the materiality of life, can actively contribute to social change.

A law anyone could look at and felt represented and recognized by, flesh and bones.

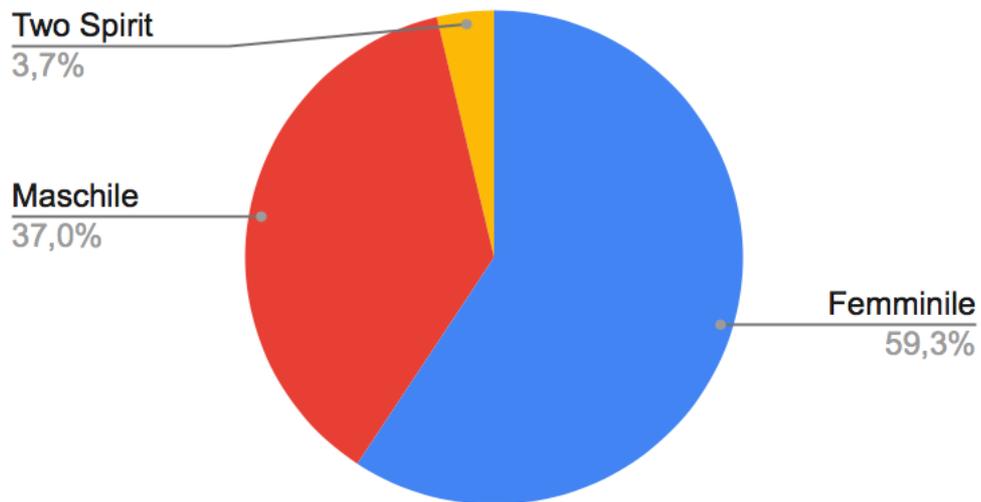
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<sup>1083</sup> See V. Pocar, *Guida al diritto contemporaneo*, Bari, 2002, V. Ferrari, *Diritto e Società. Elementi di sociologia del diritto*, Bari, 2007 more specifically on the discussion of the function of law see V. Ferrari, *Funzioni del diritto : 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. Papolizio, N. Riva, *Diritto e teoria sociale. Introduzione al pensiero socio-giuridico contemporaneo*, Roma, 2009; F. Ciaramelli, *Consensus sociale e legittimazione giuridica. Lezioni di filosofia del diritto*, Torino, 2013.

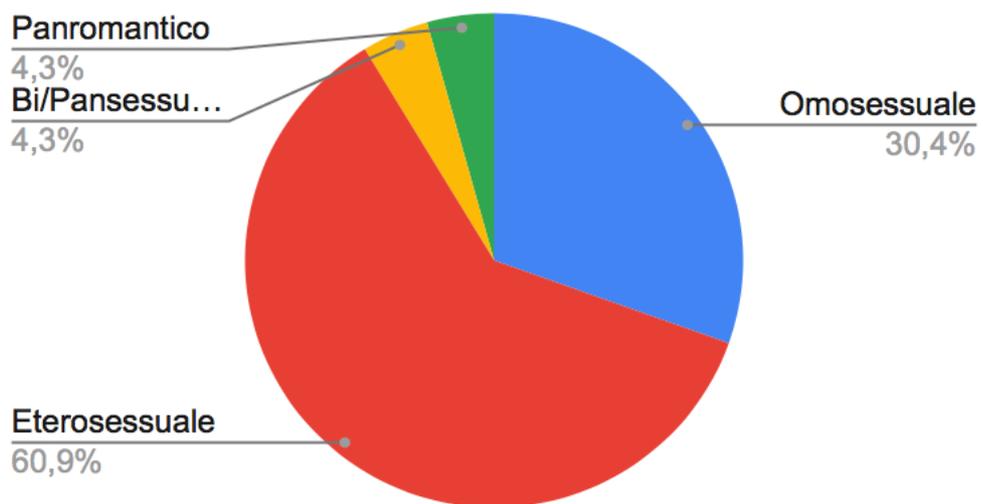


APPENDIX 1:  
OVERVIEW OF THE RESULTS OF THE SURVEY

## Genere

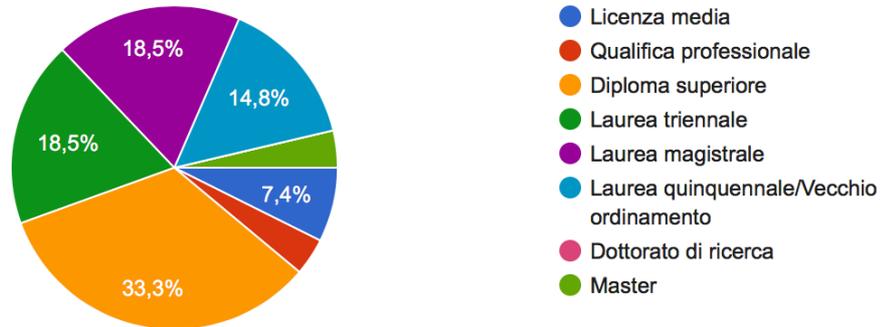


## Orientamento sessuale



## Istruzione e formazione

27 risposte



## Ti autoidentifichi come persona disabile?

Disturbo di personalità

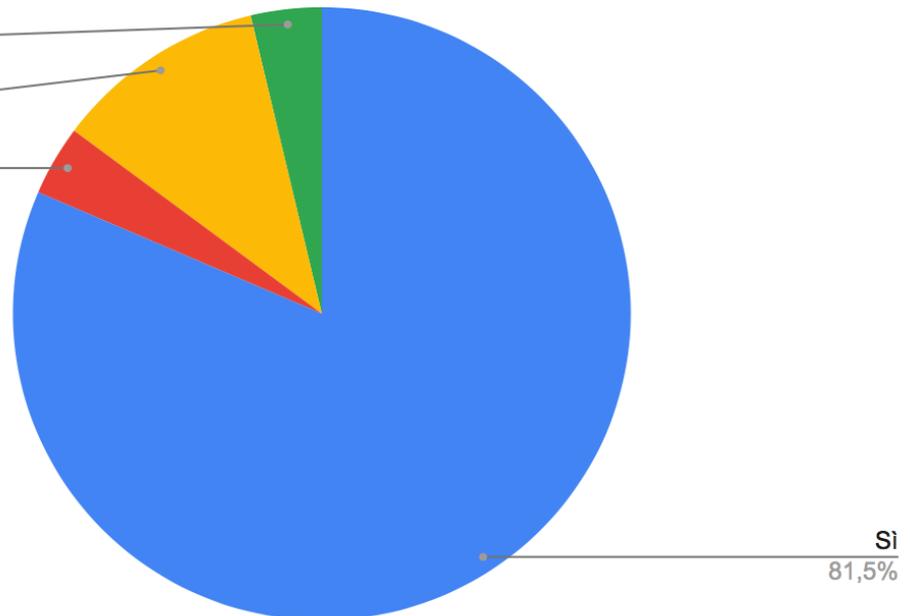
3,7%

No

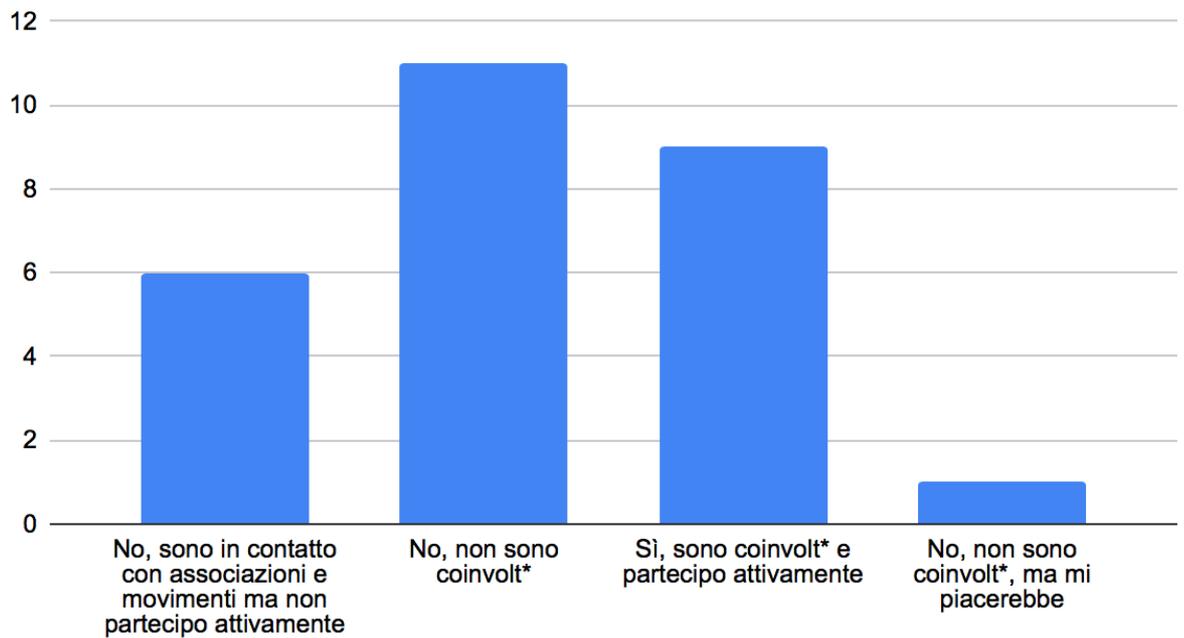
11,1%

Non sono né disabile...

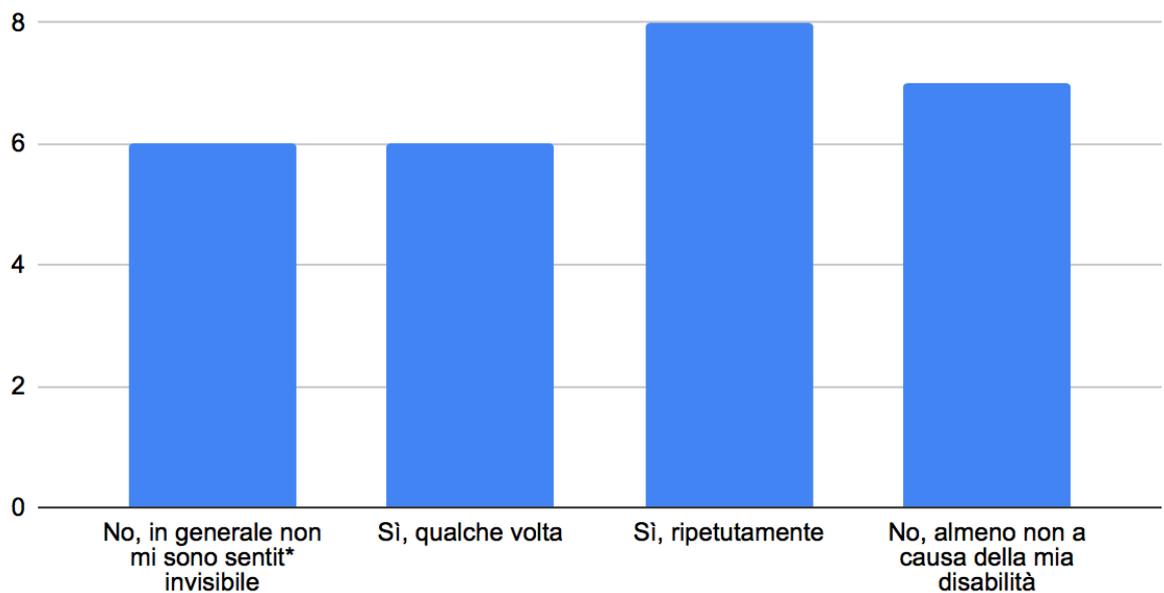
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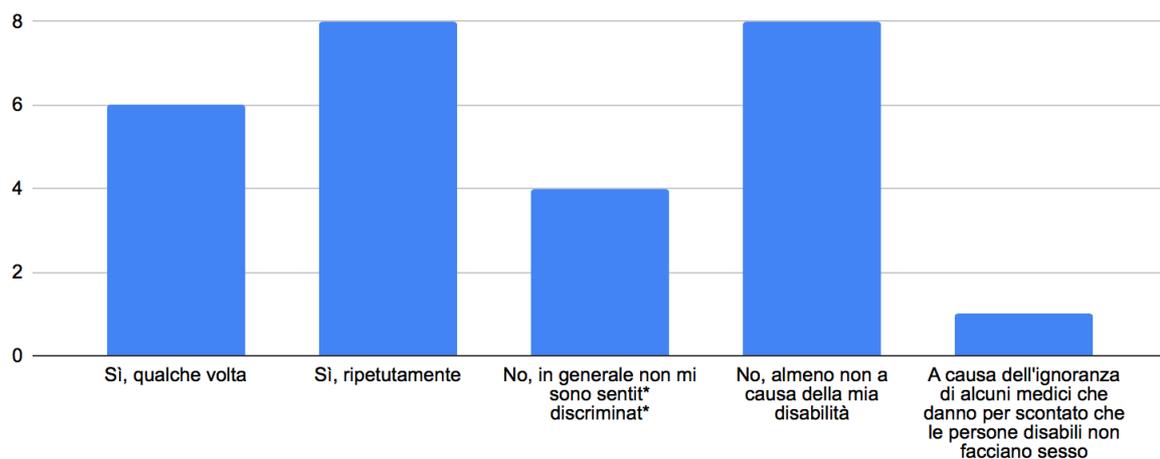
## Sei coinvolt\* in associazioni o movimenti politici?



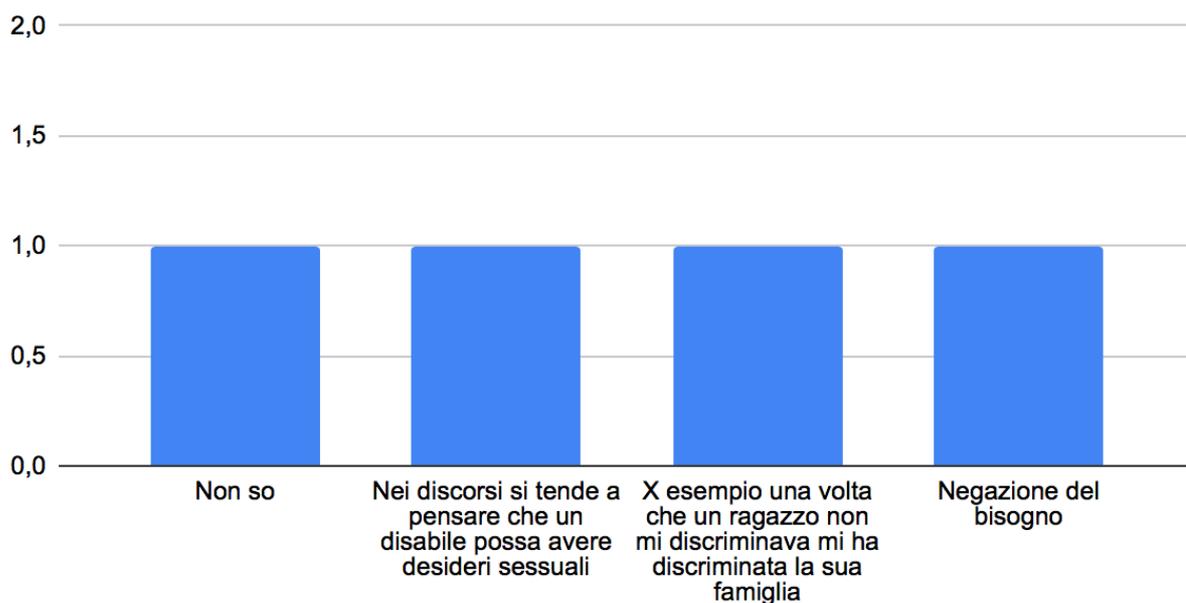
## Ti sei mai sentit\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità?



Ti sei mai sentit\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità?



Se sì, qual è l'esperienza che reputeri particolarmente significativa?

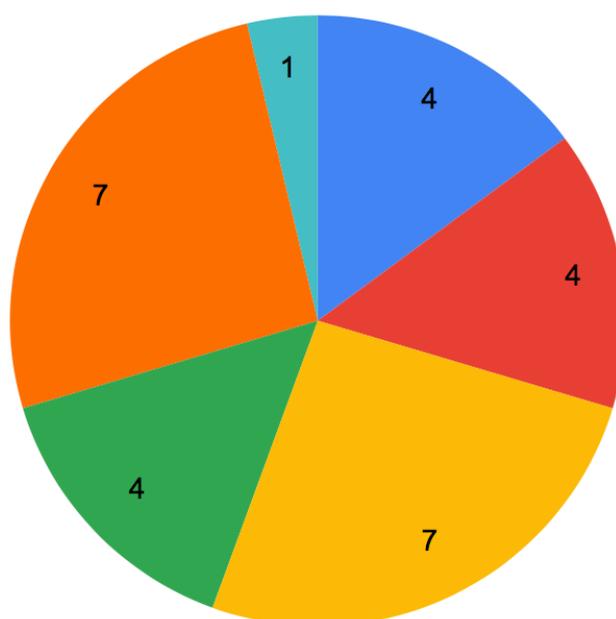


## Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili?

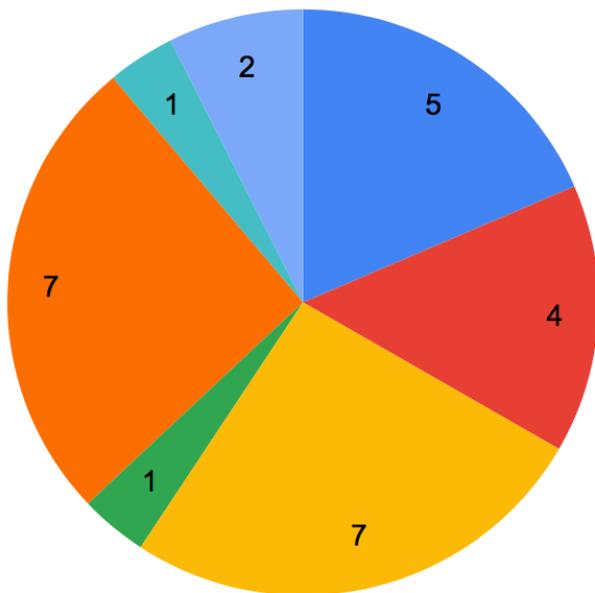


## Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale?

- No, la mia esperienza di educazione sessuale è stata positiva
- Sì, ma non in maniera significativa
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, perché la mia educazione sessuale è stata ignorata
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- Sì, ma nel senso che non ho avuto le stesse esperienze degli altri, alla stessa età. Non ho ricevuto una "educazione sessuale" particolare, ma questo mi accomuna a tutti quelli della mia genera...



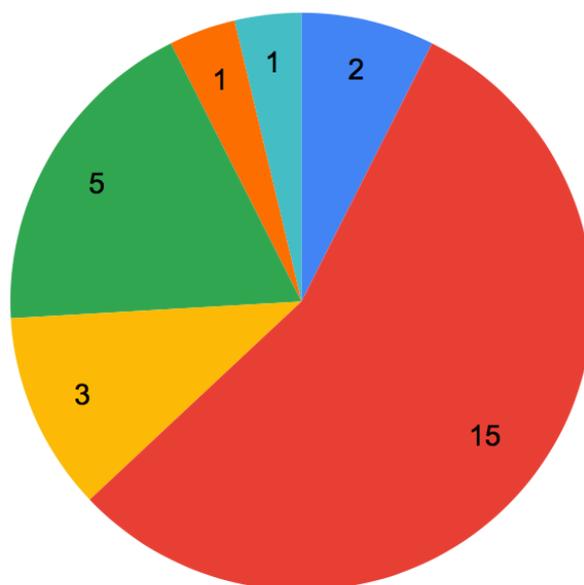
## Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva?



- Sì, ma non in maniera significativa
- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma mi sono informata in modo autonomo
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- disabilità sopraggiunta dopo aver avuto figlia
- No, la mia esperienza è stata positiva

## Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva?

- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, ma ho rivendicato i miei diritti
- ...non abbiamo chiarito quali sarebbero i "diritti sessuali".....



**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

Ero fidanzato con la mia ex, ci stavamo baciando e i nostri corpi erano molto vicini. La mia ex senti la mia fisiologica erezione e fece un salto all'indietro, non posso dire se per paura o sorpresa, ma mi ferì molto. Probabilmente era più un suo problema ma non sentirsi attraenti per una persona mi ferì molto. Le risposte che ho dato racchiude il principio " non ci sono esperienze sessualità rilevanti, ma mi è capitato di non riuscire capire se è la mia persona che non va bene o la mia disabilità". Questo confine per me è molto labile, essendo una persona con capacità del tutto quasi simile a quelle dei normo.

Ho subito isterectomia totale a 36 anni a causa di grave patologia ginecologica; purtroppo ho affrontato tutto da vergine senza mai avere avuto relazioni né vita intima.

Tuttora non ho una vita sessuale e la mia esistenza ed autostima risentono della mancanza totale di questo aspetto nel mio quotidiano. Questo stato d'animo è peggiorato dopo l'operazione.

Il mio percorso di autodeterminazione della mia omosessualità

Ho scelto di abortire, durante la mia ultima relazione stabile. Dopo aver scoperto della gravidanza non programmata lui non voleva abortirsi ma non si reputava neanche in grado di sostenermi nell'esperienza, che dava per scontato io attraversassi con la mia famiglia. Sono stata sostenuta da un amico per le procedure di rito. La mia famiglia non contemplava neanche la possibilità di scegliere sul da farsi, per loro la mia gravidanza era un pericolo da cui dovermi difendere.

Un disabile viene considerato asessuale ed assolutamente eterosessuale

Ho bisogno d' amore e lotta

## Hai mai sentito parlare di assistenza sessuale?



### Come la definiresti?

Una ottima educazione sessuale ed hai sentimenti		
Non è una alternativa adatta a me. Non è quello che cerco per migliorare il mio benessere.		
Non so		
Un "contentino" per sentirsi come gli altri. Sicuramente meno impegnativa per i "normodotati" rispetto ad una relazione stabile.		
Escludente		
un buon segno positivo se andrà a conclusione		

Personalmente non mi piace la proposta lovegiver, per la sovradeterminazione che vi è legata, l'atteggiamento di "abled savior" e il paternalismo. Mi sembra che non si prenda in considerazione il valore del supporto alla pari: ad esempio i migliori consigli su tipo i sex toys te li possono dare altre persone disabili, non persone non disabili.

L'intervento è calato dall'alto, è delineato come un progetto educativo, quasi riabilitativo. Attua il Modello Medico della disabilità invece che il Modello Sociale. Inoltre non mi piace l'idea che l'oeas lavori in sinergia con la famiglia, gli educatori, gli oss, gli psicologi, perché ne va della privacy.

Penso che un aiuto alla masturbazione nei casi in cui sia compromessa sia più che necessario, laddove richiesto (però non 8 incontri come propone Lovegiver: se uno ha difficoltà a masturbarsi, 8 volte non risolvono la situazione, dovrebbe essere continuativo, su richiesta). Questo andrebbe affiancato però anche a un indispensabile peer support, un supporto fra pari che vivono le stesse esperienze e problematiche, un confronto in un "safe space" sulle possibilità alternative di masturbazione a seconda dei diversi tipi di disabilità, i sex toys più adatti e altro. Certe informazioni te le può dare solo un supporto alla pari.

Per le persone con disabilità relazionali, cognitive o comunicative credo andrebbe fornita una educazione sessuale (che manca per tutti al momento) semplificata nel linguaggio, ma completa e dettagliata, ovviamente molto incentrata sul concetto di consenso, dato che le persone disabili in generale sono statisticamente più vittima di abusi.

Poi non condivido la narrazione della proposta Lovegiver: rende le persone disabili "altro", dà un messaggio sbagliato.

Ad esempio alcuni docufilm più recenti sulla figura dell'oeas hanno un messaggio terribile: la persona disabile viene trattata con paternalismo e non viene nemmeno considerata la possibilità che possa trovare un\* partner non a pagamento (occasionale o stabile che sia). Viene medicalizzata, trattata come "altra". Il nocciolo è che queste sessioni dell'oeas non mi sembrano "empowering", ma sminuenti!

Secondo me dovrebbe essere sdoganato il sex work in generale, nonché l'assistenza personale (che è tragicamente scarsa): dei bravi assistenti personali possono passare e impostare i sex toys senza problemi. Il problema secondo me nasce quando una soluzione è rivolta solo alle persone disabili ma messa in atto da persone non disabili. Se fosse una cosa di peer support organizzata solo da persone disabili sarebbe diverso, non ci sarebbe la sovradeterminazione che invece vedo, insieme al paternalismo.

Uno schifo		
Non saprei		
Una pratica probabilmente necessaria in alcuni casi, per quanto io credo nel rapporto sesso/amore		
Educazione alla sessualità propedeutica ad un corretto sviluppo psicofisico della persona a 360 gradi		
Un aiuto per vivere appieno la vita sessuale		
Diritto primario negato		

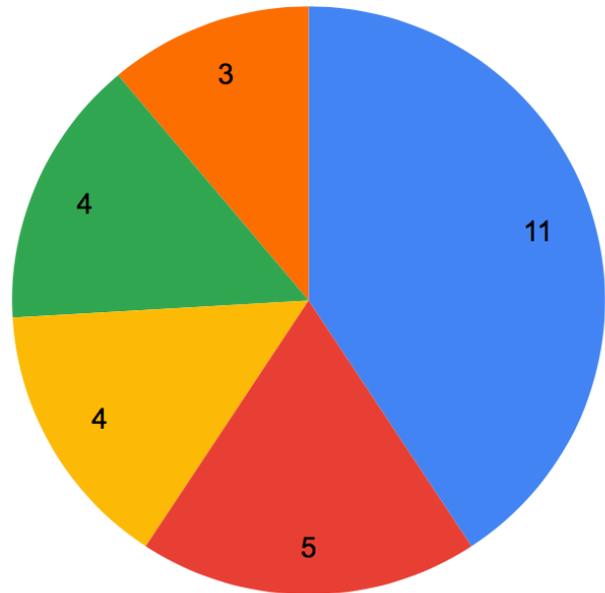
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L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso.

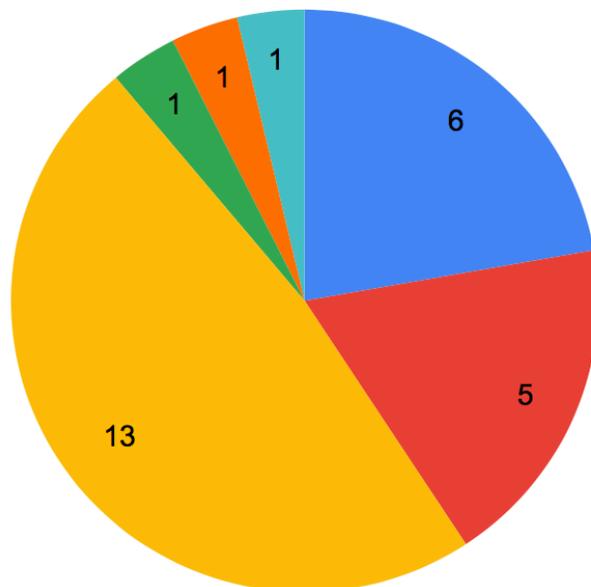
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Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc)

- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- No, il tema viene completamente ignorato
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità



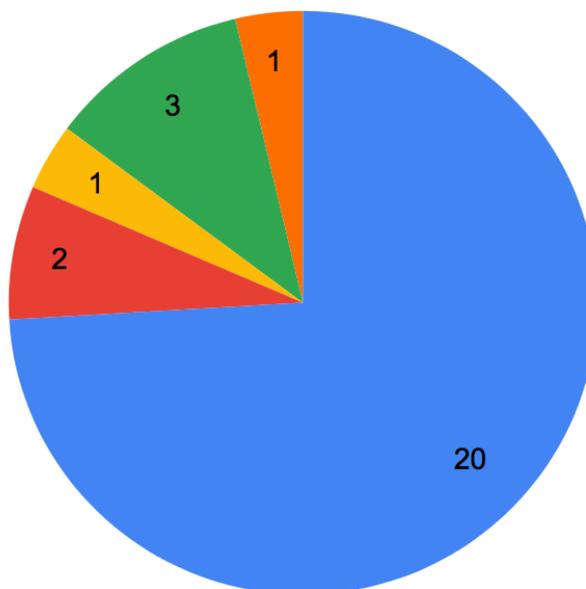
Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità?



- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, ma solo per persone con disabilità intellettiva
- Sì, se intesa come aiuto alla masturbazione e senza paternalismo e sovradeterminazione...
- Penso che più che altro serva una figura professionale in grado di spiegare alla pers...

## Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone...

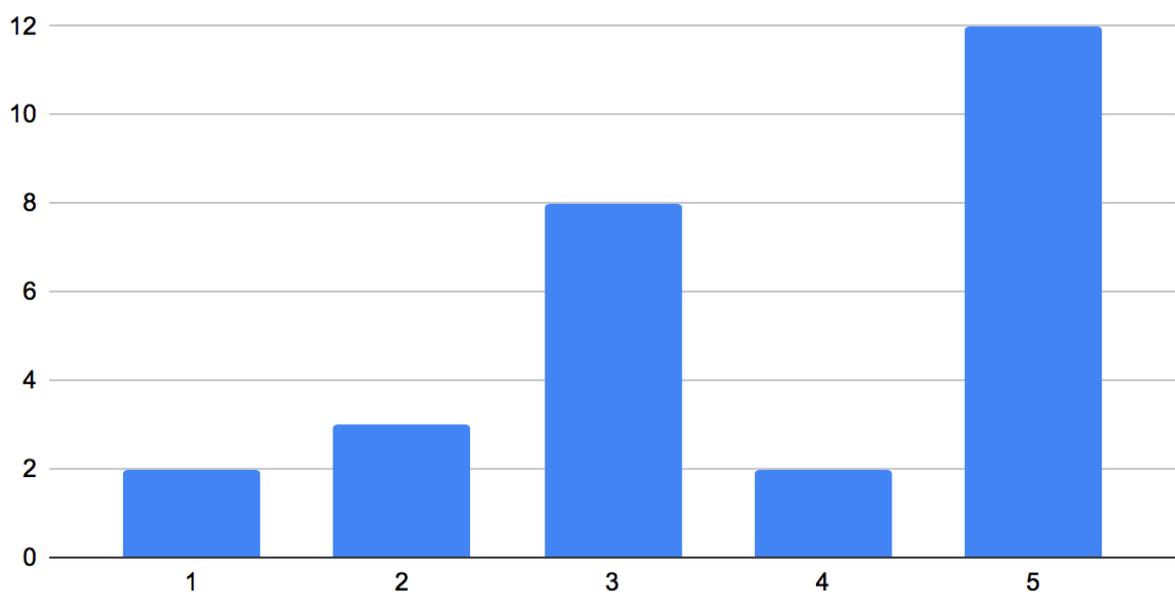
- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, la regolamentazione potrebbe essere pericolosa
- Credo che sia necessario che per esempio i ginecologi siano formati anche sulla disabilità
- No, si tratta di questioni private
- Se non entrano i demonizzatori



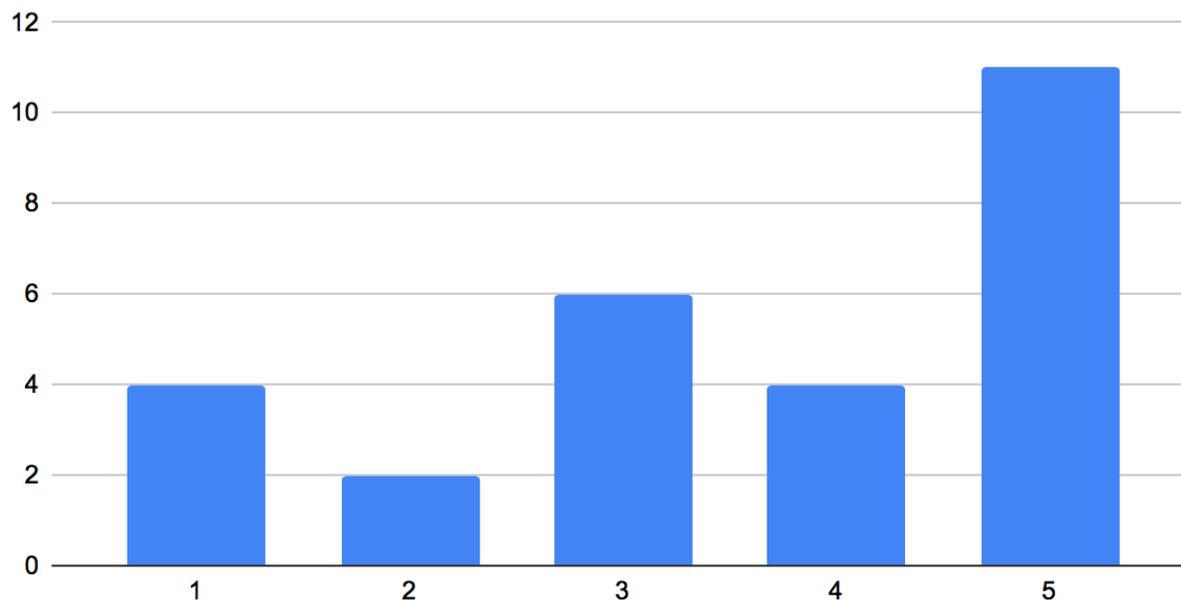
Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione)

19	Programmi di educazione sessuale mirati
18	Consulenza psicologica con personale formato ad hoc
13	Assistenza sessuale
13	Formazione specifica per operatori in ambito medico su disabilità e sessualità
7	Figura professionale dedicata per persone che vivono in comunità
1	Lasciare che ciascuno viva da sè la propria sessualità
1	Forse far capire ai non disabili che non c'è nulla di pericoloso nell'amare un disabile, non solo sessualmente ma anche emotivamente
1	Spinta socio-familiare
1	Fornire un servizio all'interno dell'ASL con costi in parte a carico degli utenti
1	Creare un albo professionale degli operatori dell'assistenza sessuale così da lasciare il singolo cittadino la possibilità di usufruire del servizio tramite ssn oppure privatamente.
1	Assistenza alla masturbazione

L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità



## L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali.



### Commenti e osservazioni

Nessuno

L'assistenza sessuale "ghettizza" le persone disabili in un ulteriore campo della vita umana: l'affettività. Personalmente sogno una società che mi apprezzi a 360 gradi e che mi valorizzi anche come persona che è in grado di dare e ricevere amore indipendentemente dal mio rapporto con la sessualità in senso stretto. E purtroppo penso si sia ancora lontani...

Secondo me serve di più una formazione specifica dei ginecologi

l'assistenza sessuale dovrebbe essere finanziata ma solo una volta finanziata adeguatamente l'assistenza personale, altrimenti le associazioni e le persone con disabilità stesse si rivolterebbero per l'iniquità...

I finanziamenti statali non sono mai abbastanza. In Italia una misura del genere susciterebbe scalpore

Dipende da chi e come viene fatta



APPENDIX 2:  
BREAKDOWN OF THE RESULTS OF THE SURVEY

## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettuale non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolt) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Trieste \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

### Occupazione

Impiegata \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

Che tipo di menomazione hai? \*

Sindattilia \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

- Sì, sono coinvolto\* e partecipo attivamente
- No, non sono coinvolto\*
- No, sono in contatto con associazioni e movimenti ma non partecipo attivamente
- No, non sono coinvolto\*, ma mi piacerebbe
- Altro: \_\_\_\_\_

L'esperienza della persona rispondente

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* invisibile
- Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* discriminat\*
- Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \*

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \*

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \*

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \*

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

\_\_\_\_\_

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

\_\_\_\_\_

Misure positive

\_\_\_\_\_

Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \*

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \*

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \*

1 2 3 4 5

L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \*

1 2 3 4 5

Commenti e osservazioni

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
 Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiormente che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

Disabilità e sessualità 15/11/19, 11:31

**Informazioni sulla persona rispondente**

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Ferrara \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Studente \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

Che tipo di menomazione hai? \*

Sindrome di BOR, sordità bilaterale (ma parlo molto bene come un udente grazie all'apparecchio acustico) \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

Lesperienza della persona rispondente

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli**
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa**
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata**
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere**
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

Ero fidanzato con la mia ex, ci stavamo baciando e i nostri corpi erano molto vicini. La mia ex sentì la mia fisiologica erezione e fece un salto all'indietro, non posso dire se per paura o sorpresa, ma mi ferì molto. Probabilmente era più un suo problema ma non sentirsi attratti per una persona mi ferì molto. Le risposte che ho dato racchiude il principio " non ci sono esperienze sessualità rilevanti, ma mi è capitato di non riuscire capire se è la mia persona che non va bene o la mia disabilità". Questo confine per me è molto labile, essendo una persona con capacità del tutto quasi simile a quelle dei normo.

### Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione**
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

Una ottima educazione sessuale ed hai sentimenti

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate**
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Disabilità e sessualità 15/11/19, 11:31

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale

**Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva**

No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità

Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità

Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione

No, non serve una formazione specifica per facilitare la sessualità delle persone disabili

**Altro: Mettere il primo è il secondo punto insieme**

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Disabilità e sessualità 15/11/19, 11:31

**Credi che debba essere oggetto di finanziamenti Statali? \***

**Sì, credo che debba essere oggetto di finanziamenti ad hoc**

Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale

No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto

Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Due cose nettamente separate e distinte. L'assistente sessuale insegna la dimensione affettiva e sessuale all'utente. Il se working lavora con persone che hanno già una dimensione sessuale.

**Misure positive**

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Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

**Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo**

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

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Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Mantova \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Impiegata di concetto \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

Tetraparesi spastica da PCI \_\_\_\_\_

**Sei coinvolt\* in associazioni o movimenti politici? \***

Sì, sono coinvolt\* e partecipo attivamente

No, non sono coinvolt\*

No, non sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolt\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

**Ti sei mai sentit\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentit\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* discriminat\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

Sì, sono diversi e radicati

Sì, ci sono, ma sono spesso inconsapevoli

Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale

No, non penso ci siano stereotipi in questo senso

Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

Sì, perché la mia educazione sessuale è stata ignorata

Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza di educazione sessuale è stata positiva

Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

Sì, perché la mia salute sessuale-riproduttiva è stata ignorata

Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza è stata positiva

Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

Sì, mi sono stati negati diritti sessuali-riproduttivi

Sì, mi sono stati negati diritti sessuali

Sì, mi sono stati negati diritti riproduttivi

No, non ho subito alcuna violazione dei miei diritti in queste sfere

Altro: \_\_\_\_\_

Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa

Ho subito isterectomia totale a 36 anni a causa di grave patologia ginecologica; purtroppo ho affrontato tutto da vergine senza mai avere avuto relazioni né vita intima. Tuttora non ho una vita sessuale e la mia esistenza ed autostima risentono della mancanza totale di questo aspetto nel mio quotidiano. Questo stato d'animo è peggiorato dopo l'operazione.

### Assistenza sessuale

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

Non è una alternativa adatta a me. Non è quello che cerco per migliorare il mio benessere.

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

Secondo me sono due cose diverse.

### Misure positive

Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

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Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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Disabilità e sessualità 15/11/19, 11:31

## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

https://docs.google.com/forms/u/1/d/1W-F-J5gLBUNUqgn3bqWCzA7h5W9R85dy-u\_SRI4qprintalresponses Pagina 43 di 380

Disabilità e sessualità 15/11/19, 11:31

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

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**Informazioni sulla persona rispondente**

**Sei maggiorenne? \***

Sì

**Genere \***

Femminile

Maschile

Altro: \_\_\_\_\_

**Orientamento sessuale**

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

**Città \***

Pescara \_\_\_\_\_

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

**Occupazione**

\_\_\_\_\_

**Ti autoidentifichi come persona disabile? \***

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

Idrocefala \_\_\_\_\_

**Sei coinvolto\* in associazioni o movimenti politici? \***

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**L'esperienza della persona rispondente**

\_\_\_\_\_

**Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli**
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata**
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata**
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali**
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

### Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia**
- Altro: \_\_\_\_\_

**Come la definiresti?**

\_\_\_\_\_

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica**
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

- Sì, la reputo essenziale perché alcune persone vivono la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

**Credi che debba essere oggetto di finanziamenti Statali? \***

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Nulla \_\_\_\_\_

**Misure positive**

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità? \***

- |                                  |                       |                       |                       |                       |
|----------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| 1                                | 2                     | 3                     | 4                     | 5                     |
| <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

- |                                  |                       |                       |                       |                       |
|----------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| 1                                | 2                     | 3                     | 4                     | 5                     |
| <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale. Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettuale non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolt\*) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Genova \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

### Occupazione

Centralista \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

Che tipo di menomazione hai? \*

Emparesi \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

- Sì, sono coinvolto\* e partecipo attivamente
- No, non sono coinvolto\*
- No, sono in contatto con associazioni e movimenti ma non partecipo attivamente
- No, non sono coinvolto\*, ma mi piacerebbe
- Altro: \_\_\_\_\_

L'esperienza della persona rispondente

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* invisibile
- Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* discriminato\*
- Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

Non so \_\_\_\_\_

Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \*

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \*

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \*

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \*

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa

\_\_\_\_\_

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

Non so \_\_\_\_\_

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivono la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

Diverso \_\_\_\_\_

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

Nessuno

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiormente che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

Disabilità e sessualità 15/11/19, 11:31

**Informazioni sulla persona rispondente**

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Torino \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Impiegata \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

Che tipo di menomazione hai? \*

Motoria \_\_\_\_\_

Sei coinvolt\* in associazioni o movimenti politici? \*

Sì, sono coinvolt\* e partecipo attivamente

No, non sono coinvolt\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolt\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

\_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

Ti sei mai sentit\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* invisibile

Altro: \_\_\_\_\_

Ti sei mai sentit\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* discriminat\*

Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

\_\_\_\_\_

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**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: Sì, ma mi sono informata in modo autonomo \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: Sì, ma ho rivendicato i miei diritti \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

Il mio percorso di autodeterminazione della mia omosessualità \_\_\_\_\_

## Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

\_\_\_\_\_

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Disabilità e sessualità 15/11/19, 11:31

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale

Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva

No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità

Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità

Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione

No, non serve una formazione specifica per facilitare la sessualità delle persone disabili

Altro: \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

**Credi che debba essere oggetto di finanziamenti Statali? \***

Sì, credo che debba essere oggetto di finanziamenti ad hoc

Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale

No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto

Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

\_\_\_\_\_

**Misure positive**

\_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

**Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).**

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Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

MILANO \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Impiegata \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

disabilità motoria \_\_\_\_\_

**Sei coinvolt\* in associazioni o movimenti politici? \***

Sì, sono coinvolt\* e partecipo attivamente

No, non sono coinvolt\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolt\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

**Ti sei mai sentit\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentit\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* discriminat\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

Nei discorsi si tende a pensare che un disabile possa avere desideri sessuali \_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

Sì, sono diversi e radicati

Sì, ci sono, ma sono spesso inconsapevoli

Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale

No, non penso ci siano stereotipi in questo senso

Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

Sì, perché la mia educazione sessuale è stata ignorata

Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza di educazione sessuale è stata positiva

Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

Sì, perché la mia salute sessuale-riproduttiva è stata ignorata

Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza è stata positiva

Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

Sì, mi sono stati negati diritti sessuali-riproduttivi

Sì, mi sono stati negati diritti sessuali

Sì, mi sono stati negati diritti riproduttivi

No, non ho subito alcuna violazione dei miei diritti in queste sfere

Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

Un "contentino" per sentirsi come gli altri. Sicuramente meno impegnativa per i "normodotati" rispetto ad una relazione stabile.

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

Non conosco la differenza. Certo è che l'assistente sessuale non è coinvolto emotivamente nel rapporto col disabile, quindi forse si riduce ad un lavoro come un altro

**Misure positive**

Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro:  
Forse far capire ai non disabili che non c'è nulla di pericoloso nell'amare un disabile, non solo sessualmente ma anche emotivamente

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

L'assistenza sessuale "ghettizza" le persone disabili in un ulteriore campo della vita umana. L'affettività. Personalmente sogno una società che mi apprezzi a 360 gradi e che mi valorizzi anche come persona che è in grado di dare e ricevere amore indipendentemente dal mio rapporto con la sessualità in senso stretto. E purtroppo penso si sia ancora lontani...

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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Disabilità e sessualità 15/11/19, 11:31

## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenti che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettuale non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Disabilità e sessualità 15/11/19, 11:31

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

**Informazioni sulla persona rispondente**

**Sei maggiorenne? \***

Sì

**Genere \***

Femminile

Maschile

Altro: \_\_\_\_\_

**Orientamento sessuale**

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

**Città \***

Venezia \_\_\_\_\_

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

**Occupazione**

Studentessa \_\_\_\_\_

**Ti autoidentifichi come persona disabile? \***

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

Visiva \_\_\_\_\_

**Sei coinvolto\* in associazioni o movimenti politici? \***

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**L'esperienza della persona rispondente**

**Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli**
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili**
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili**
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere**
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

### Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione**
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

\_\_\_\_\_

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo**
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

**Credi che debba essere oggetto di finanziamenti Statali? \***

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

è una questione molto complessa in cui non mi sento di entrare nel merito. Il confine è troppo sottile \_\_\_\_\_

### Misure positive

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

- |                       |                       |                       |                       |                                  |
|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|
| 1                     | 2                     | 3                     | 4                     | 5                                |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

- |                       |                       |                       |                       |                                  |
|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|
| 1                     | 2                     | 3                     | 4                     | 5                                |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettuale non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolt) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Bologna \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

### Occupazione

Assistente sociale \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

Che tipo di menomazione hai? \*

Disabilità motoria \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

- Sì, sono coinvolto\* e partecipo attivamente
- No, non sono coinvolto\*
- No, sono in contatto con associazioni e movimenti ma non partecipo attivamente
- No, non sono coinvolto\*, ma mi piacerebbe
- Altro: \_\_\_\_\_

L'esperienza della persona rispondente

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* invisibile
- Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* discriminat\*
- Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \*

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \*

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \*

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \*

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

\_\_\_\_\_

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivono la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

\_\_\_\_\_

Misure positive

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

Commenti e osservazioni

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**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiormente che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

Disabilità e sessualità 15/11/19, 11:31

**Informazioni sulla persona rispondente**

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Roma \_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 129 di 380

Disabilità e sessualità 15/11/19, 11:31

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Disoccupato \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 130 di 380

Disabilità e sessualità 15/11/19, 11:31

Che tipo di menomazione hai? \*

Spasticità distonica \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 131 di 380

Disabilità e sessualità 15/11/19, 11:31

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

\_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 132 di 380

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

## Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

Escludente

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: Si, ma solo per persone con disabilità intellettiva

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

**Credi che debba essere oggetto di finanziamenti Statali? \***

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Sono giusti entrambi

**Misure positive**

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

- |                       |                       |                                  |                       |                       |
|-----------------------|-----------------------|----------------------------------|-----------------------|-----------------------|
| 1                     | 2                     | 3                                | 4                     | 5                     |
| <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> |

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

- |                       |                       |                       |                       |                                  |
|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|
| 1                     | 2                     | 3                     | 4                     | 5                                |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

**Commenti e osservazioni**

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

genova \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

\_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

emiplegia dx derivata da grave emorragia cerebrale

**Sei coinvolt\* in associazioni o movimenti politici? \***

Sì, sono coinvolt\* e partecipo attivamente

No, non sono coinvolt\*

No, non sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolt\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

**Ti sei mai sentit\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentit\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* discriminat\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

Sì, sono diversi e radicati

Sì, ci sono, ma sono spesso inconsapevoli

Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale

No, non penso ci siano stereotipi in questo senso

Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

Sì, perché la mia educazione sessuale è stata ignorata

Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza di educazione sessuale è stata positiva

Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

Sì, perché la mia salute sessuale-riproduttiva è stata ignorata

Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza è stata positiva

Altro: disabilità sopraggiunta dopo aver avuto figlia

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

Sì, mi sono stati negati diritti sessuali-riproduttivi

Sì, mi sono stati negati diritti sessuali

Sì, mi sono stati negati diritti riproduttivi

No, non ho subito alcuna violazione dei miei diritti in queste sfere

Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

un buon segno positivo se andrà a conclusione \_\_\_\_\_

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

non saprei differenza \_\_\_\_\_

Misure positive

Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

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Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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Disabilità e sessualità 15/11/19, 11:31

## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

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Disabilità e sessualità 15/11/19, 11:31

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

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**Informazioni sulla persona rispondente**

**Sei maggiorenne? \***

Sì

**Genere \***

Femminile

Maschile

Altro: \_\_\_\_\_

**Orientamento sessuale**

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

**Città \***

Senigallia \_\_\_\_\_

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

**Occupazione**

Disoccupata\ \_\_\_\_\_

**Ti autoidentifichi come persona disabile? \***

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

Utilizzo una carrozzina elettrica \_\_\_\_\_

**Sei coinvolto\* in associazioni o movimenti politici? \***

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**L'esperienza della persona rispondente**

**Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro:  
A causa dell'ignoranza di alcuni medici che danno per scontato che le persone disabili non facciano sesso

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro:**  
Sì, che sia sempre difficile trovare partner e che le persone disabili siano indesiderabili a livello sessuale

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa**
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa**
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere**
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

### Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione**
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

Personalmente non mi piace la proposta lovegiver, per la sovradeterminazione che vi è legata, l'atteggiamento di "abled savior" e il paternalismo. Mi sembra che non si prenda in considerazione il valore del supporto alla pari: ad esempio i migliori consigli su tipo i sex toys te li possono dare altre persone disabili, non persone non disabili. L'intervento è calato dall'alto, è delineato come un progetto educativo, quasi riabilitativo. Attua il Modello Medico della disabilità invece che il Modello Sociale. Inoltre non mi piace l'idea che l'oeas lavori in sinergia con la famiglia, gli educatori, gli oss, gli psicologi, perché ne va della privacy.

Penso che un aiuto alla masturbazione nei casi in cui sia compromessa sia più che necessario, laddove richiesto (però non 8 incontri come propone Lovegiver: se uno ha difficoltà a masturbarsi, 8 volte non risolvono la situazione, dovrebbe essere continuativo, su richiesta). Questo andrebbe affiancato però anche a un indispensabile peer support, un supporto fra pari che vivono le stesse esperienze e problematiche, un confronto in un "safe space" sulle possibilità alternative di masturbazione a seconda dei diversi tipi di disabilità, i sex toys più adatti e altro. Certe informazioni te le può dare solo un supporto alla pari.

Per le persone con disabilità relazionali, cognitive o comunicative credo andrebbe fornita una educazione sessuale (che manca per tutti al momento) semplificata nel linguaggio, ma completa e dettagliata, ovviamente molto incentrata sul concetto di consenso, dato

che le persone disabili in generale sono statisticamente più vittima di abusi.

Poi non condivido la narrazione della proposta Lovegiver: rende le persone disabili "altro", dà un messaggio sbagliato.

Ad esempio alcuni docufilm più recenti sulla figura dell'oeas hanno un messaggio terribile: la persona disabile viene trattata con paternalismo e non viene nemmeno considerata la possibilità che possa trovare un\* partner non a pagamento (occasionale o stabile che sia). Viene medicalizzata, trattata come "altra". Il nocciolo è che queste sessioni dell'oeas non mi sembrano "empowering", ma sminuenti!

Secondo me dovrebbe essere sdoganato il sex work in generale, nonché l'assistenza personale (che è tragicamente scarsa): dei bravi assistenti personali possono passare e impostare i sex toys senza problemi. Il problema secondo me nasce quando una soluzione è rivolta solo alle persone disabili ma messa in atto da persone non disabili. Se fosse una cosa di peer support organizzata solo da persone disabili sarebbe diverso, non ci sarebbe la sovradeterminazione che invece vedo, insieme al paternalismo.

È indubbiamente vero che in Italia le persone disabili hanno in media abbastanza difficoltà ad accedere alla sessualità, ma il problema è più ampio e pervasivo di così: come "categoria" non possiamo accedere facilmente alle relazioni perché siamo isolati socialmente (barriere di ogni tipo e mancanza di assistenza), di conseguenza non possiamo accedere facilmente alla sessualità, ma nemmeno al lavoro, all'istruzione, al trasporto, al tempo libero! Molte persone crescono senza fare le dovute esperienze, con tutte le conseguenze sulla personalità e la vulnerabilità che ne deriva.

Come attivista, mi confronto costantemente con persone disabili, e la situazione ad esempio negli USA è drasticamente diversa. Faccio parte di gruppi fb chiusi di supporto alla pari americani sia legati alla disabilità in generale che a tema sessualità e disabilità, e le domande che si pongono le persone riguardano: le posizioni a letto, i sex toys accessibili, il dating online quando sei disabile, i problemi di coppia o di relazione, l'abilismo e i rifiuti, il fare coming out quando sei disabile (con le problematiche annesse), le questioni legate alle relazioni occasionali o poliamorose, i contraccettivi disability friendly, strategie per fare sesso orale o altro quando hai una mobilità ridotta, come affrontare una gravidanza con certe patologie... Questo per dare un'idea: sono dei gruppi utilissimi. Chiaramente molti di loro hanno assistenza 24 ore garantita dallo stato, e possono condurre una vita libera. O magari un po' meno, ma di certo non scarsa come da

noi.

Se si va nei gruppi a tema italiani, le domande che vengono poste sono praticamente solo a proposito dell'oeas o a proposito del fatto che le persone disabili non li vuole nessuno. Come categoria siamo super oppressi purtroppo.

Non credo nemmeno che la proposta lovegiver così come è concepita attualmente possa avere un suo valore di "tappabuchi" (cioè mentre aspettiamo che l'assistenza personale sia sdoganata, le barriere architettoniche e sensoriali vengano abbattute e il sex work sia sdoganato). Infatti il messaggio che viene fuori è tossico per la percezione delle persone disabili, per i motivi sopra elencati

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc)

- \*  
 Sì, c'è una certa attenzione al tema, sia mediatica che politica  
 Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate  
 Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità  
 No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo  
 No, il tema viene completamente ignorato  
 Altro: \_\_\_\_\_

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale  
 Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva  
 No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità  
 Altro:  
 Sì, se intesa come aiuto alla masturbazione e senza paternalismo e sovradeterminazione, oppure come "educazione sessuale accessibile"

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità  
 Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione  
 No, non serve una formazione specifica per facilitare la sessualità delle persone disabili  
 Altro: \_\_\_\_\_

**Credi che debba essere oggetto di finanziamenti Statali? \***

- Sì, credo che debba essere oggetto di finanziamenti ad hoc  
 Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale  
 No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto  
 Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

hanno poco in comune. l'assistenza sessuale è per una categoria specifica di persone, il sex work è per tutti. Il sex work è estremamente più eterogeneo

**Misure positive**

Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \*

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \*

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: Assistenza alla masturbazione

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \*

1	2	3	4	5
<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \*

1	2	3	4	5
<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Commenti e osservazioni

Grazie per aver partecipato al questionario!

La tua partecipazione è fondamentale. Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

**Informazioni sulla persona rispondente**

**Sei maggiorenne? \***

Sì

**Genere \***

Femminile

Maschile

Altro: \_\_\_\_\_

**Orientamento sessuale**

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

**Città \***

torino \_\_\_\_\_

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

**Occupazione**

Impiegata \_\_\_\_\_

**Ti autoidentifichi come persona disabile? \***

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

motoria \_\_\_\_\_

**Sei coinvolto\* in associazioni o movimenti politici? \***

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**L'esperienza della persona rispondente**

**Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

### Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

\_\_\_\_\_

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

**Credi che debba essere oggetto di finanziamenti Statali? \***

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

\_\_\_\_\_

**Misure positive**

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

- |                       |                                  |                       |                       |                       |
|-----------------------|----------------------------------|-----------------------|-----------------------|-----------------------|
| 1                     | 2                                | 3                     | 4                     | 5                     |
| <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

- |                       |                                  |                       |                       |                       |
|-----------------------|----------------------------------|-----------------------|-----------------------|-----------------------|
| 1                     | 2                                | 3                     | 4                     | 5                     |
| <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettuale non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolt\*) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Benevento \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

\_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

Che tipo di menomazione hai? \*

patologia neuromuscolare \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

- Sì, sono coinvolto\* e partecipo attivamente
- No, non sono coinvolto\*
- No, sono in contatto con associazioni e movimenti ma non partecipo attivamente
- No, non sono coinvolto\*, ma mi piacerebbe
- Altro: \_\_\_\_\_

L'esperienza della persona rispondente

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* invisibile
- Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* discriminato\*
- Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \*

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \*

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \*

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \*

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa

Ho scelto di abortire, durante la mia ultima relazione stabile. Dopo aver scoperto della gravidanza non programmata lui non voleva abortirsi ma non si reputava neanche in grado di sostenermi nell'esperienza, che dava per scontato io attraversassi con la mia famiglia. Sono stata sostenuta da un amico per le procedure di rito. La mia famiglia non contemplava neanche la possibilità di scegliere sul da farsi, per loro la mia gravidanza era un pericolo da cui dovermi difendere.

### Assistenza sessuale

Hai mai sentito parlare di assistenza sessuale? \*

Sì, conosco la questione

Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia

No, non ne ho mai sentito parlare, non so cosa sia

Altro: \_\_\_\_\_

Come la definiresti?

monca nei presupposti

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

Sì, c'è una certa attenzione al tema, sia mediatica che politica

Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate

Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità

No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo

No, il tema viene completamente ignorato

Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale

Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva

No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità

Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità

Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione

No, non serve una formazione specifica per facilitare la sessualità delle persone disabili

Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

Sì, credo che debba essere oggetto di finanziamenti ad hoc

Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale

No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto

Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

una doverosa giustapposizione. Sono discorsi che dovrebbero confluire.

Misure positive

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

- |                       |                                  |                       |                       |                       |
|-----------------------|----------------------------------|-----------------------|-----------------------|-----------------------|
| 1                     | 2                                | 3                     | 4                     | 5                     |
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**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

- |                       |                       |                       |                                  |                       |
|-----------------------|-----------------------|-----------------------|----------------------------------|-----------------------|
| 1                     | 2                     | 3                     | 4                                | 5                     |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> |

Commenti e osservazioni

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**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiormente che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

Disabilità e sessualità 15/11/19, 11:31

**Informazioni sulla persona rispondente**

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Crescentino (VC) \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Nessuna \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJh7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJh7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 202 di 380

Disabilità e sessualità 15/11/19, 11:31

Che tipo di menomazione hai? \*

Spina bifida \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

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Disabilità e sessualità 15/11/19, 11:31

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

X esempio una volta che un ragazzo non mi discriminava mi ha discriminata la sua famiglia \_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJh7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJh7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 204 di 380

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: Più che altro penso che sia ignoranza nel senso di non conoscenza

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

## Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

\_\_\_\_\_

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Disabilità e sessualità 15/11/19, 11:31

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale

Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva

No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità

**Altro:**  
Penso che più che altro serva una figura professionale in grado di spiegare alla persona disabile come gestire la propria sessualità in relazione alla propria patologia e viceversa

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità

Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione

No, non serve una formazione specifica per facilitare la sessualità delle persone disabili

**Altro:**  
Penso che serva di più che chi si occupa di salute sessuale della persona debba avere anche una formazione in disabilità

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Disabilità e sessualità 15/11/19, 11:31

**Credi che debba essere oggetto di finanziamenti Statali? \***

Sì, credo che debba essere oggetto di finanziamenti ad hoc

Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale

**No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto**

Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Boh? \_\_\_\_\_

**Misure positive**

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Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

**Altro:**  
Credo che sia necessario che per esempio i ginecologi siano formati anche sulla disabilità

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

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Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

Secondo me serve di più una formazione specifica dei ginecologi \_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

reggio emilia \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

impiegata \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

disabilità motoria \_\_\_\_\_

**Sei coinvolto\* in associazioni o movimenti politici? \***

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, non sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**L'esperienza della persona rispondente**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentito\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminat\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

Sì, sono diversi e radicati

Sì, ci sono, ma sono spesso inconsapevoli

Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale

No, non penso ci siano stereotipi in questo senso

Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

Sì, perché la mia educazione sessuale è stata ignorata

Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza di educazione sessuale è stata positiva

Altro:  
Sì, ma nel senso che non ho avuto le stesse esperienze degli altri, alla stessa età. Non ho ricevuto una "educazione sessuale" particolare, ma questo mi accomuna a tutti quelli della mia generazione almeno. Qualche ora sui condom a scuola e un grande silenzio in famiglia sull'argomento. Ma, ripeto, è quel che capita anche ai normo, l'educazione sessuale si fa... sul campo, e tra amici.

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

Sì, perché la mia salute sessuale-riproduttiva è stata ignorata

Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza è stata positiva

Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

Sì, mi sono stati negati diritti sessuali-riproduttivi

Sì, mi sono stati negati diritti sessuali

Sì, mi sono stati negati diritti riproduttivi

No, non ho subito alcuna violazione dei miei diritti in queste sfere

Altro: ...non abbiamo chiarito quali sarebbero i "diritti sessuali".....

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

\_\_\_\_\_

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

\_\_\_\_\_

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

l'assistenza sessuale è una forma di sex work (e per me il sex work non ha alcuna connotazione negativa)

**Misure positive**

Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

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Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

L'assistenza sessuale dovrebbe essere finanziata ma solo una volta finanziata adeguatamente l'assistenza personale, altrimenti le associazioni e le persone con disabilità stesse si rivolterebbero per l'inequità...

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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Disabilità e sessualità 15/11/19, 11:31

## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

https://docs.google.com/forms/u/1/d/1W-F-J5gLUHnUqgn3bqWCzA7h5W8R58dyt-u\_SRI4gprintalresponses Pagina 227 di 380

Disabilità e sessualità 15/11/19, 11:31

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

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**Informazioni sulla persona rispondente**

**Sei maggiorenne? \***

Sì

**Genere \***

Femminile

Maschile

Altro: \_\_\_\_\_

**Orientamento sessuale**

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

**Città \***

Torino \_\_\_\_\_

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

**Occupazione**

Studente \_\_\_\_\_

**Ti autoidentifichi come persona disabile? \***

Sì

Altro:  
Non sono né disabile né davvero abile. Ho la distrofia muscolare di Becker che ti permette di avere una vita apparentemente normale, ma con parecchi limiti: qualunque tipo di sforzo (che può essere una banale passeggiata) porta a dolorosi crampi e acido lattico. In più la malattia è degenerativa, per cui si può finire in carrozzina a un'età indefinita, così come si può camminare per sempre. Ogni caso è a sé. Ecco perché non posso dirmi né disabile, né abilissimo.

**Che tipo di menomazione hai? \***

Distrofia muscolare di Becker \_\_\_\_\_

**Sei coinvolto\* in associazioni o movimenti politici? \***

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**L'esperienza della persona rispondente**

**Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

### Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

\_\_\_\_\_

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

- Sì, la reputo essenziale perché alcune persone vivono la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

**Credi che debba essere oggetto di finanziamenti Statali? \***

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Qualunque tipo di sex working non è meno degno. Nel caso di assistenza sessuale però penso che sarebbe bene avere anche una formazione in ambito psicologico-relazionale

**Misure positive**

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

- |                       |                       |                       |                       |                                  |
|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|
| 1                     | 2                     | 3                     | 4                     | 5                                |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

- |                       |                       |                       |                       |                                  |
|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|
| 1                     | 2                     | 3                     | 4                     | 5                                |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenti che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettuale non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Sassari \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

### Occupazione

Impiegata amministrativa \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

Che tipo di menomazione hai? \*

Disabilità fisica \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

- Sì, sono coinvolto\* e partecipo attivamente
- No, non sono coinvolto\*
- No, sono in contatto con associazioni e movimenti ma non partecipo attivamente
- No, non sono coinvolto\*, ma mi piacerebbe
- Altro: \_\_\_\_\_

L'esperienza della persona rispondente

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* invisibile
- Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* discriminato\*
- Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \*

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \*

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \*

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \*

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

Uno schifo

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, non credo che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

\_\_\_\_\_

Misure positive

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: Lasciare che ciascuno viva da sé la propria sessualità

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

- |                                  |                       |                       |                       |                       |
|----------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| 1                                | 2                     | 3                     | 4                     | 5                     |
| <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

- |                                  |                       |                       |                       |                       |
|----------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| 1                                | 2                     | 3                     | 4                     | 5                     |
| <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Commenti e osservazioni

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**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenti che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

Disabilità e sessualità 15/11/19, 11:31

**Informazioni sulla persona rispondente**

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Napoli \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Docente \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 258 di 380

Disabilità e sessualità 15/11/19, 11:31

Che tipo di menomazione hai? \*

Deambulazione \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 259 di 380

Disabilità e sessualità 15/11/19, 11:31

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

\_\_\_\_\_

\_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 260 di 380

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale**
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili**
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili**
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere**
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

## Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione**
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

**Non saprei** \_\_\_\_\_

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate**
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Disabilità e sessualità 15/11/19, 11:31

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale

Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva

No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità

Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità

Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione

No, non serve una formazione specifica per facilitare la sessualità delle persone disabili

Altro: \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

**Credi che debba essere oggetto di finanziamenti Statali? \***

Sì, credo che debba essere oggetto di finanziamenti ad hoc

Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale

No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto

Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Non saprei

\_\_\_\_\_

**Misure positive**

\_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1W-F-J5gLUHJgm3bqWCJh7h5WR8Bdy-u\\_SRI4gprintallresponses](https://docs.google.com/forms/u/1/d/1W-F-J5gLUHJgm3bqWCJh7h5WR8Bdy-u_SRI4gprintallresponses) Pagina 266 di 380

Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

[https://docs.google.com/forms/u/1/d/1W-F-J5gLUHJgm3bqWCJh7h5WR8Bdy-u\\_SRI4gprintallresponses](https://docs.google.com/forms/u/1/d/1W-F-J5gLUHJgm3bqWCJh7h5WR8Bdy-u_SRI4gprintallresponses) Pagina 267 di 380

Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Ivrea \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Artista freelance \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

Disabilità motoria \_\_\_\_\_

**Sei coinvolt\* in associazioni o movimenti politici? \***

Sì, sono coinvolt\* e partecipo attivamente

No, non sono coinvolt\*

No, non sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolt\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

**Ti sei mai sentit\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentit\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* discriminat\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

Sì, sono diversi e radicati

Sì, ci sono, ma sono spesso inconsapevoli

Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale

No, non penso ci siano stereotipi in questo senso

Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

Sì, perché la mia educazione sessuale è stata ignorata

Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza di educazione sessuale è stata positiva

Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

Sì, perché la mia salute sessuale-riproduttiva è stata ignorata

Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza è stata positiva

Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

Sì, mi sono stati negati diritti sessuali-riproduttivi

Sì, mi sono stati negati diritti sessuali

Sì, mi sono stati negati diritti riproduttivi

No, non ho subito alcuna violazione dei miei diritti in queste sfere

Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

Una pratica probabilmente necessaria in alcuni casi, per quanto io credo nel rapporto sesso/amore

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

In alcuni casi potrebbe rientrare nella casistica, purché si parli comunque e sempre di libero esercizio, cioè senza coercizioni, violenze o obblighi di sorta.

**Misure positive**

Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

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Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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Disabilità e sessualità 15/11/19, 11:31

## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

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Disabilità e sessualità 15/11/19, 11:31

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

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**Informazioni sulla persona rispondente**

Sei maggiorenne? \*

Sì

**Genere \***

Femminile

Maschile

Altro: \_\_\_\_\_

**Orientamento sessuale**

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

**Città \***

Milano \_\_\_\_\_

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

**Occupazione**

Impiegato \_\_\_\_\_

**Ti autoidentifichi come persona disabile? \***

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

Malattia rara congenita \_\_\_\_\_

**Sei coinvolto\* in associazioni o movimenti politici? \***

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**L'esperienza della persona rispondente**

**Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

Un disabile viene considerato asessuale ed assolutamente eterosessuale

### Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

Educazione alla sessualità propedeutica ad un corretto sviluppo psicofisico della persona a 360 gradi

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

- Sì, la reputo essenziale perché alcune persone vivono la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

**Credi che debba essere oggetto di finanziamenti Statali? \***

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Nessun legame tale da impedire ai disabili di poter usufruire di un'assistenza (di qualsiasi tipo esso sia) in grado di fortificare ed accrescere lo sviluppo psicofisico di persone già messe alla prova dalla vita.

### Misure positive

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro:  
Fornire un servizio all'interno dell'ASL con costi in parte a carico degli utenti. Creare un albo professionale degli operatori dell'assistenza sessuale così da lasciare il singolo cittadino la possibilità di usufruire del servizio tramite ssn oppure privatamente.

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

- 1 2 3 4 5
- 

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

- 1 2 3 4 5
- 

### Commenti e osservazioni

I finanziamenti statali non sono mai abbastanza. In Italia una misura del genere susciterebbe scalpore

### Grazie per aver partecipato al questionario!

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettuale non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolt\*) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Firenze \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Fisioterapista \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

Che tipo di menomazione hai? \*

Cecità parziale \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

- Sì, sono coinvolto\* e partecipo attivamente
- No, non sono coinvolto\*
- No, sono in contatto con associazioni e movimenti ma non partecipo attivamente
- No, non sono coinvolto\*, ma mi piacerebbe
- Altro: \_\_\_\_\_

L'esperienza della persona rispondente

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* invisibile
- Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* discriminat\*
- Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

\_\_\_\_\_

Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \*

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \*

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \*

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \*

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa

\_\_\_\_\_

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

\_\_\_\_\_

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivono la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

\_\_\_\_\_

Misure positive

\_\_\_\_\_

Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \*

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \*

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \*

1 2 3 4 5

L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \*

1 2 3 4 5

Commenti e osservazioni

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**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
 Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiormente che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

Disabilità e sessualità 15/11/19, 11:31

**Informazioni sulla persona rispondente**

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Trento \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Impiegato \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: No \_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 314 di 380

Disabilità e sessualità 15/11/19, 11:31

Che tipo di menomazione hai? \*

Sclerosi multipla, diabete \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, non sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

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Disabilità e sessualità 15/11/19, 11:31

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

\_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 316 di 380

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

## Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

\_\_\_\_\_

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Disabilità e sessualità 15/11/19, 11:31

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale

Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva

No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità

Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità

Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione

No, non serve una formazione specifica per facilitare la sessualità delle persone disabili

Altro: \_\_\_\_\_

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Disabilità e sessualità 15/11/19, 11:31

**Credi che debba essere oggetto di finanziamenti Statali? \***

Sì, credo che debba essere oggetto di finanziamenti ad hoc

Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale

No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto

Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Può darsi una mano a capire la tua sessualità \_\_\_\_\_

**Misure positive**

[https://docs.google.com/forms/u/1/d/1W-F-J5gLUHJgm3bqWCJA7h5W858dy-u\\_SRI44sprntalresponses](https://docs.google.com/forms/u/1/d/1W-F-J5gLUHJgm3bqWCJA7h5W858dy-u_SRI44sprntalresponses) Pagina 322 di 380

Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

[https://docs.google.com/forms/u/1/d/1W-F-J5gLUHJgm3bqWCJA7h5W858dy-u\\_SRI44sprntalresponses](https://docs.google.com/forms/u/1/d/1W-F-J5gLUHJgm3bqWCJA7h5W858dy-u_SRI44sprntalresponses) Pagina 323 di 380

Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Trento \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

Occupazione

Impiegato \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: No \_\_\_\_\_

**Che tipo di menomazione hai? \***

Sclerosi multipla, diabete \_\_\_\_\_

**Sei coinvolt\* in associazioni o movimenti politici? \***

Sì, sono coinvolt\* e partecipo attivamente

No, non sono coinvolt\*

No, non sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolt\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

**Ti sei mai sentit\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentit\* discriminat\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentit\* discriminat\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

Sì, sono diversi e radicati

Sì, ci sono, ma sono spesso inconsapevoli

Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale

No, non penso ci siano stereotipi in questo senso

Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

Sì, perché la mia educazione sessuale è stata ignorata

Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza di educazione sessuale è stata positiva

Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

Sì, perché la mia salute sessuale-riproduttiva è stata ignorata

Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici

Sì, ma non in maniera significativa

No, credo la mia esperienza sia molto simile a quella delle persone non disabili

No, la mia esperienza è stata positiva

Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

Sì, mi sono stati negati diritti sessuali-riproduttivi

Sì, mi sono stati negati diritti sessuali

Sì, mi sono stati negati diritti riproduttivi

No, non ho subito alcuna violazione dei miei diritti in queste sfere

Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

\_\_\_\_\_

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

Può darsi una mano a capire la tua sessualità \_\_\_\_\_

**Misure positive**

Disabilità e sessualità 15/11/19, 11:31

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo

No, si tratta di questioni private

No, la regolamentazione potrebbe essere pericolosa

Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

Programmi di educazione sessuale mirati

Consulenza psicologica con personale formato ad hoc

Figura professionale dedicata per persone che vivono in comunità

Assistenza sessuale

Formazione specifica per operatori in ambito medico su disabilità e sessualità

Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

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Disabilità e sessualità 15/11/19, 11:31

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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Disabilità e sessualità 15/11/19, 11:31

## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

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Disabilità e sessualità 15/11/19, 11:31

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

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**Informazioni sulla persona rispondente**

**Sei maggiorenne? \***

Sì

**Genere \***

Femminile

Maschile

Altro: \_\_\_\_\_

**Orientamento sessuale**

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

**Città \***

Trento \_\_\_\_\_

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

**Occupazione**

Impiegato \_\_\_\_\_

**Ti autoidentifichi come persona disabile? \***

Sì

Altro: No \_\_\_\_\_

**Che tipo di menomazione hai? \***

Sclerosi multipla, diabete \_\_\_\_\_

**Sei coinvolto\* in associazioni o movimenti politici? \***

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**L'esperienza della persona rispondente**

**Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

**Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

**Se sì, qual è l'esperienza che reputi particolarmente significativa?**

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

\_\_\_\_\_

### Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

\_\_\_\_\_

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

- Sì, la reputo essenziale perché alcune persone vivono la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenti l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

**Credi che debba essere oggetto di finanziamenti Statali? \***

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Può darsi una mano a capire la tua sessualità

\_\_\_\_\_

**Misure positive**

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità? \***

- |                       |                       |                                  |                       |                       |
|-----------------------|-----------------------|----------------------------------|-----------------------|-----------------------|
| 1                     | 2                     | 3                                | 4                     | 5                     |
| <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> |

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

- |                       |                       |                       |                       |                                  |
|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|
| 1                     | 2                     | 3                     | 4                     | 5                                |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

**Commenti e osservazioni**

\_\_\_\_\_

**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiorenni che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettuale non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolt) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

### Informazioni sulla persona rispondente

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: \_\_\_\_\_

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: \_\_\_\_\_

Città \*

Pergine \_\_\_\_\_

### Istruzione e formazione \*

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

### Occupazione

Impiegata \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: \_\_\_\_\_

**Che tipo di menomazione hai? \***

Tremori e perdita di forza negli arti \_\_\_\_\_

**Sei coinvolto\* in associazioni o movimenti politici? \***

- Sì, sono coinvolto\* e partecipo attivamente
- No, non sono coinvolto\*
- No, sono in contatto con associazioni e movimenti ma non partecipo attivamente
- No, non sono coinvolto\*, ma mi piacerebbe
- Altro: \_\_\_\_\_

**L'esperienza della persona rispondente****Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* invisibile
- Altro: \_\_\_\_\_

**Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \***

- Sì, ripetutamente
- Sì, qualche volta
- No, almeno non a causa della mia disabilità
- No, in generale non mi sono sentito\* discriminato\*
- Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

\_\_\_\_\_

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \*

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa

\_\_\_\_\_

**Assistenza sessuale**

Hai mai sentito parlare di assistenza sessuale? \*

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

Come la definiresti?

Un aiuto per vivere appieno la vita sessuale

L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \*

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \*

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \*

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

Credi che debba essere oggetto di finanziamenti Statali? \*

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?

nessuno

Misure positive

Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \*

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: \_\_\_\_\_

Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \*

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: \_\_\_\_\_

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \*

- |                       |                       |                       |                       |                                  |
|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|
| 1                     | 2                     | 3                     | 4                     | 5                                |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \*

- |                       |                       |                       |                       |                                  |
|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|
| 1                     | 2                     | 3                     | 4                     | 5                                |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

Commenti e osservazioni

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**Grazie per aver partecipato al questionario!**

La tua partecipazione è fondamentale.  
Per qualsiasi domanda, informazione, curiosità scrivimi all'indirizzo [carlamaria.reale@unitn.it](mailto:carlamaria.reale@unitn.it)

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## Disabilità e sessualità

Il presente questionario è rivolto alle persone maggiormente che si auto-identificano come disabili, con lo scopo di comprendere meglio i bisogni e la percezione intorno a questioni legate alla sessualità e ai propri diritti sessuali.

Il questionario è parte di una ricerca, di approccio socio-giuridico, sulla disabilità e la sessualità, volta a comprendere se e quali misure positive può porre in essere lo Stato per favorire lo sviluppo della sessualità e l'autodeterminazione delle persone disabili.

Il presente questionario è stato approvato dal "Comitato etico per la sperimentazione con l'essere umano" dell'Università di Trento, richiede circa 12 minuti per la sua compilazione, la partecipazione è su base volontaria e può essere interrotta in qualsiasi momento.

Con la presente la persona che partecipa dichiara che, la propria eventuale disabilità psico-sociale o intellettiva non intacca la capacità di prestare il consenso per la compilazione del questionario e la partecipazione alla ricerca. \*

ACCONSENTO

Sbarrando la seguente casella presti il tuo consenso alla partecipazione al questionario, anonimo, dichiarando di comprendere e accettare lo scopo dello stesso ed accettando dunque di partecipare con il tuo contributo alla ricerca sopracitata. \*

ACCONSENTO

Nel ringraziarti per la tua disponibilità e cortesia, di seguito alcune indicazioni che possono essere utili per la compilazione: 1) Le domande prevedono di scegliere una sola opzione di risposta, se non diversamente indicato 2) Alcune domande presentano termini con il simbolo asterisco (\*) es: Coinvolt\*. Questa formula permette di comprendere in un solo termine il maschile e il femminile della stessa parola, nel rispetto anche di identità non binarie (per ribadire l'esempio di cui sopra Convolta/coinvolto) 3) Nella domanda relativa al genere di identificazione della persona rispondente vi è la possibilità di segnalare "maschile", "femminile" o riempire la casella "altro". Si è scelto di non procedere ad una classificazione per lasciare spazio alla persona rispondente di auto-definirsi e rappresentarsi. Non si presume che tutte le persone rispondenti siano cisgender, ma è lasciato alla discrezionalità e sensibilità della persona rispondente se fare emergere o meno questo dato relativo all'identità di genere. 4) In alcune domande compare il termine "menomazione", traduzione dell'inglese "impairment", poiché lo studio aderisce ad un modello sociale della disabilità 5) Alcune domande sono aperte e danno la possibilità, ove lo si desidera, di raccontare la propria esperienza. Non è obbligatoria una risposta a questi quesiti, ma sarebbe molto importante dare voce alle esperienze personali, per permettere di comprendere al meglio le dimensioni indagate dal presente questionario. 6) Le risposte alle domande aperte o parte di queste potrebbero essere inserite nel lavoro di tesi o in presentazioni pubbliche relative ai risultati della tesi stessa 7) In fine, la categoria "altro" consente di esprimere e articolare posizioni differenti da quelle previste, diviene perciò spazio importante per condividere la propria esperienza/idea/opinione/posizione. \*

HO COMPRESO E PROSEGUO

Disabilità e sessualità 15/11/19, 11:31

**Informazioni sulla persona rispondente**

Sei maggiorenne? \*

Sì

Genere \*

Femminile

Maschile

Altro: Two Spirit

Orientamento sessuale

Omosessuale

Eterosessuale

Bi/Pansessuale

Asessuale

Altro: Panromantico

Città \*

Enna

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 369 di 380

Disabilità e sessualità 15/11/19, 11:31

**Istruzione e formazione \***

Licenza media

Qualifica professionale

Diploma superiore

Laurea triennale

Laurea magistrale

Laurea quinquennale/Vecchio ordinamento

Dottorato di ricerca

Master

Altro: \_\_\_\_\_

**Occupazione**

Disoccupato Artista \_\_\_\_\_

Ti autoidentifichi come persona disabile? \*

Sì

Altro: Disturbo di personalità \_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 370 di 380

Disabilità e sessualità 15/11/19, 11:31

Che tipo di menomazione hai? \*

Psichica \_\_\_\_\_

Sei coinvolto\* in associazioni o movimenti politici? \*

Sì, sono coinvolto\* e partecipo attivamente

No, non sono coinvolto\*

No, sono in contatto con associazioni e movimenti ma non partecipo attivamente

No, non sono coinvolto\*, ma mi piacerebbe

Altro: \_\_\_\_\_

**Lesperienza della persona rispondente**

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 371 di 380

Disabilità e sessualità 15/11/19, 11:31

Ti sei mai sentito\* invisibile, rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* invisibile

Altro: \_\_\_\_\_

Ti sei mai sentito\* discriminato\* rispetto ai tuoi bisogni sessuali, a causa della tua disabilità? \*

Sì, ripetutamente

Sì, qualche volta

No, almeno non a causa della mia disabilità

No, in generale non mi sono sentito\* discriminato\*

Altro: \_\_\_\_\_

Se sì, qual è l'esperienza che reputi particolarmente significativa?

Negazione del bisogno \_\_\_\_\_

[https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u\\_SRI4qprintallresponses](https://docs.google.com/forms/u/1/d/1/W-F-J5gLUHJgm3bqWCJA7h5WR8Bdy-u_SRI4qprintallresponses) Pagina 372 di 380

**Pensi che ci siano degli stereotipi sulla sessualità delle persone disabili? \***

- Sì, sono diversi e radicati
- Sì, ci sono, ma sono spesso inconsapevoli
- Sì, lo stereotipo principale è che le persone con disabilità non abbiano una vita sessuale
- No, non penso ci siano stereotipi in questo senso
- Altro: \_\_\_\_\_

**Se si è selezionata la risposta "No, non penso di siano stereotipi in questo senso", saltare le successive due domande. Pensi che questi stereotipi abbiano influenzato negativamente la tua educazione sessuale? \***

- Sì, perché la mia educazione sessuale è stata ignorata
- Sì, perché i programmi di educazione sessuale sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza di educazione sessuale è stata positiva
- Altro: \_\_\_\_\_

**Pensi che questi stereotipi abbiano influenzato negativamente la tua salute sessuale e riproduttiva? \***

- Sì, perché la mia salute sessuale-riproduttiva è stata ignorata
- Sì, perché i programmi di salute sessuale-riproduttiva sono tarati su persone non disabili, non prendono in considerazione i miei bisogni specifici
- Sì, ma non in maniera significativa
- No, credo la mia esperienza sia molto simile a quella delle persone non disabili
- No, la mia esperienza è stata positiva
- Altro: \_\_\_\_\_

**Pensi di aver mai subito una violazione dei tuoi diritti nella sfera sessuale e riproduttiva? \***

- Sì, mi sono stati negati diritti sessuali-riproduttivi
- Sì, mi sono stati negati diritti sessuali
- Sì, mi sono stati negati diritti riproduttivi
- No, non ho subito alcuna violazione dei miei diritti in queste sfere
- Altro: \_\_\_\_\_

**Se hai risposto affermativamente alle precedenti domande, in questo spazio puoi raccontare una tua esperienza che reputi significativa**

Ho bisogno d' amore e lotta

## Assistenza sessuale

**Hai mai sentito parlare di assistenza sessuale? \***

- Sì, conosco la questione
- Sì, ne ho sentito parlare ma non mi è ben chiaro cosa sia
- No, non ne ho mai sentito parlare, non so cosa sia
- Altro: \_\_\_\_\_

**Come la definiresti?**

Diritto primario negato

**L'assistenza sessuale o facilitazione sessuale può essere definita come un insieme di servizi volti a favorire l'espressione della sessualità dell'utente. Può ricomprendere diverse pratiche, come predisporre un ambiente che consenta e favorisca l'intimità, incoraggiare e rendere possibile l'interazione sociale, procurare beni e servizi sessuali, facilitare l'utente nella masturbazione o nei rapporti sessuali con terze parti o con l'assistente stesso. Che tu sappia, nel tuo paese, l'assistenza sessuale è argomento di dibattito pubblico? (Tv, articoli web e di giornale, radio, manifestazioni pubbliche, dibattiti politici ecc) \***

- Sì, c'è una certa attenzione al tema, sia mediatica che politica
- Sì, c'è una certa attenzione al tema, ma è alimentato soprattutto dalle associazioni dedicate
- Sì, ma solo negli ambienti associativi e nei movimenti che si occupano dei diritti di persone con disabilità
- No, non c'è molta attenzione sul tema, nonostante alcune associazioni cerchino di essere attive a riguardo
- No, il tema viene completamente ignorato
- Altro: \_\_\_\_\_

**Credi che questa possa aiutare alcune persone a vivere meglio la propria sessualità? \***

- Sì, la reputo essenziale perché alcune persone vivano la propria dimensione sessuale
- Sì, credo che possa essere un buon supporto sia per alcune persone con disabilità fisica che psico-sociale e intellettiva
- No, penso che le persone disabili non abbiano bisogno di misure specifiche per esprimere la propria sessualità
- Altro: \_\_\_\_\_

**Pensi che l'assistenza sessuale debba essere prestata da persone con una formazione specifica? \***

- Sì, penso ad una formazione specifica che riguardi anche gli aspetti medici delle disabilità
- Sì, una formazione che attenzi l'aspetto psicologico e relazionale di questa professione
- No, non serve una formazione specifica per facilitare la sessualità delle persone disabili
- Altro: \_\_\_\_\_

**Credi che debba essere oggetto di finanziamenti Statali? \***

- Sì, credo che debba essere oggetto di finanziamenti ad hoc
- Sì, ma credo possa rientrare a vario titolo nel budget fornito dallo stato per l'assistenza personale
- No, non credo che lo stato dovrebbe fornire finanziamenti per questo genere di supporto
- Altro: \_\_\_\_\_

**Che rapporto vedi fra assistenza sessuale e lavoro sessuale (sex working) in generale?**

Sfera del Diritto

**Misure positive**

**Credi che lo stato possa tramite leggi o policy prendere delle misure per favorire lo sviluppo della sessualità delle persone con disabilità? \***

- Sì, lo stato dovrebbe farsene carico per garantire l'accessibilità anche in questo campo
- No, si tratta di questioni private
- No, la regolamentazione potrebbe essere pericolosa
- Altro: Se non entrano i demonizzatori

**Secondo te, quali di queste misure potrebbero essere utili/adequate? (è possibile selezionare più di un'opzione) \***

- Programmi di educazione sessuale mirati
- Consulenza psicologica con personale formato ad hoc
- Figura professionale dedicata per persone che vivono in comunità
- Assistenza sessuale
- Formazione specifica per operatori in ambito medico su disabilità e sessualità
- Altro: Spinta socio-familiare

Ti presentiamo di seguito una serie di affermazioni relative all'assistenza sessuale e ti chiediamo di indicarci il tuo grado di disaccordo/accordo rispetto a queste ultime. Il grado di disaccordo/ accordo va da 1 (decisamente in disaccordo) a 5 (decisamente d'accordo).

**L'assistenza sessuale può essere un aiuto e un supporto nel vivere meglio la sfera sessuale per le persone con disabilità \***

1 2 3 4 5

**L'assistenza sessuale dovrebbe essere oggetto di finanziamento Statali. \***

1 2 3 4 5

**Commenti e osservazioni**

Dipende da chi e come viene fatta

**Grazie per aver partecipato al questionario!**

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