

III. THE EXPERIENCES

Secular Bioethics Versus Catholic Bioethics: An Attempt To Understand A Very Italian Debate

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1. BIOETHICS VERSUS THE SECULAR STATUS OF THE STATE: A DIFFICULT COHABITATION

Defining bioethics is certainly a complicated task regardless of when and where such an attempt is carried out. Trying to do it in Italy is a nearly impossible task because of the almost daily opportunities to perpetuate the discussions on the many questions that are involved in the debate.

I will base my analysis on the constitutional rules that regulate the unavoidable general principles that govern matters pertaining to the beginning and the end of life, but also on the constitutional principles that regulate the relationship between the Italian state and the various religious organizations, more specifically the Catholic Church. One cannot ignore the role that religious organizations may have, and in some case demand to have, in the process of defining new state laws to govern ethically sensitive matters. Such a role, though, impinges upon the decisional processes of a secular state, even though the state must be respectful of the ethics of all religious groups.

What currently determines the debate on bioethics and its regulation is the marginality or, to be more precise, the almost total irrelevance of other religious bioethics. In scientific debates¹, and also in institutional organizations such as the National Committee on Bioethics, the positions held by the various religious organizations may briefly emerge²,

¹ *Bioetica e confessioni religiose* (edited by E. CAMASSA) Conference report. Faculty of Law, Trento, Italy, 12 May 2006, Padova, Cedam, 2007 (currently being printed).

² S. FERRARI, *Bioetica interculturale*, in : *Il Comitato Nazionale di Bioetica. 1990-2005. Quindici anni di impegno*, Workshop, Rome, Italy, 30 November- 3 December 2005 page 265.

but are likely to disappear when the lawmakers regulate medically assisted procreation, or the Living Will (Health-care directive) or other bioethical matters.

In other countries, particularly in the USA, the debate is split between two different philosophies, a secular one and a religious one (which encompasses all creeds). However, it should be remembered that in Italy, whenever one refers to religious ethics, that is implied to mean Catholic ethics. The growing radicalization of the dispute between Catholic bioethics and secular bioethics and the inability to mediate between the two different positions (which is often the result of an unwillingness to listen carefully and consider the opposite position, while at the same time getting more and more entrenched into one's own position) are causing profound rifts that may be difficult to reconcile. The reciprocal accusations, of ethical and cultural relativism from one side, and of absolutism, or even fundamentalism, from the other side, run the risk of causing splits within the Catholic world, as they appear to go beyond the traditional and well-consolidated contrast between Catholics and their secular counterparts³. The choice between the “*sanctity of life*” and the resulting impossibility to dispose of it, as promoted by Catholic bioethics, and the “*quality of life*” and the possibility to dispose of it, as promoted by secularists, may be different when an individual (whether a believer or a non believer) is faced by contingent situations, especially if he or she has a political or a legislative role. The perverse effect of this juxtaposition appears to have produced an inability to be *secular Catholics*, but rather *devout atheists* – something that applies to both politicians and citizens alike⁴.

Trying to explain such a typically Italian situation is not at all easy. Undoubtedly the general crisis of the political system, which includes its values, has given more room to the Catholic Church to promote its teachings whenever new legislation touches on ethical matters. This is provided for by Canon Law (Can. 47), and also by the Concordat between the Italian state and the Catholic Church, which states that “the position of the Catholic Church on bioethics is not against the law, but is a legitimate exercise provided for by Italian law”⁵.

The passing of laws regulating divorce and abortion in the 1970s had already given rise to strong opposition from the Catholic Church. I think it is fair to say that, more than thirty

³ M.C. FOLLIERO, *Diritto ecclesiastico. Elementi. Principi non scritti. Principi scritti. Regole*, Torino, Giappichelli, 2007, page 129, note 3: Readers, who learned about *secular status* from the media even before they found it in law books, utilize it as a watershed between *left* and *right* issues. Secularists tend to consider some issues as *left issues*, and they consider the Church's efforts to influence civil law an unwarranted interference. *Right issues* are perceived as a prerogative of Catholics: a group of people that includes those who practice Roman Catholicism, those who find that Catholic ethics matches their own ethical and political views, and those who believe that the Catholic religion encompasses reassuring traditional values, such as heterosexual marriage.

⁴ Cf. G. ZAGREBELSKY, *Gli atei clericali e la fonte del potere*, in *Lo Stato e la Chiesa*, La biblioteca di Repubblica, Rome 2007, page 53 : “Relativists and absolutists can only fight each other. But the Church is not alone: there are those who support it from the outside. Moreover, they spur it because they find it too submissive. They do not care about its truth and its moral teachings, but support its authority in order to exploit it politically”.

⁵ Cf. G. DALLA TORRE, *La bioetica nei rapporti tra lo Stato e la Chiesa* in: *Il Comitato nazionale di bioetica : 1990-2005, Quindici anni di impegno*. Workshop Rome, 30 November - 3 December 2005, page 182.

years later, the level of the dispute has grown and evolved. *Conferenza Episcopale Italiana* (CEI) had for some time expressed concern about the act that regulates medically assisted procreation. Lately, its concern pertains to the very much opposed, and by now almost certainly ditched, bill for the recognition of *Rights and Duties of Cohabiting People*⁶, and its likely involvement with a bill to regulate *Living Wills (Health-care directives)*. It cannot be denied that CEI'S involvement is getting more incisive. This has caused perplexity within the Catholic world, which has become concerned that there might be political exploitation of some Catholic teachings. In a time that Jürgen Habermas calls *post-secularism*, it is undoubtedly true that religion has taken on a new and unexpected political meaning, and that, from a private role, it has moved forward to a strong role in the public debate. This is certainly true for the Catholic religion, but it is perhaps even truer for Islam, which has become ever more politicized. What appears evident is that some politicians try to “use Christianity, Catholicism and the Church as unifying elements of identity in order to face the threat of terrorism inspired by Islamic fundamentalism”⁷. It is the moral duty of the Church and its century-old wisdom to prevent this from happening.

During a recent meeting on *The secular state and its recent changes*⁸, Paolo Prodi, said that: “The Western world has learned over the years to keep the sacred at bay without chasing it away. This is our achievement of a secular status, an achievement that is now under threat from attacks by religious fundamentalism and new political religions”. Mr. Prodi also added that Italy's liberal civilization was born from the dialogue between the state and the church, between law and ethics, and that this will be threatened or at least be transformed into something else if the dualism that was at the root of its characteristics was lost: the distinction and the concurrence of human history and history of salvation, the separation of powers, sacred and political, even before the division among the state internal powers.

If we carefully examine the Italian events of the last thirty years, a period that saw the end of the Christian Democrat Party, the political party of reference for Catholics⁹,

⁶ The Bindi –Pollastrini legislative decree, Atti del Senato 1339, is an attempt to grant rights to cohabiting people, even those of the same sex, trying at the same time to avoid creating a new type of family different from the one Article 29 of the Italian Constitution defines as a “natural union founded on marriage”. Faced with the likely approval of a law granting rights to cohabiting partners, the *Avvenire* newspaper, in an article dated 6 February 2007, stressed the need to defend the family as a natural union founded on marriage, and called on Catholics, including politicians, for help, declaring its clear opposition with a “*non possumus*”, an opposition that is bound to become “a divide that will inevitably carry weight on future political events in Italy”.

⁷ P. SCOPPOLA, *Il ritorno della religione e il pericolo del conflitto*, in *Dibattito sul laicismo*, edited by E. SCALFARI, *La biblioteca di Repubblica*, Rome, 2005, page 32; the author refers to the defense of Christian values as identity values, claimed by some youth organizations of the right, and recalls the precedent set by *Action Française*, condemned by Pius XI, who had seen in the movement an attempt to exploit Catholicism for political reasons.

⁸ P. PRODI, *Dalle secolarizzazioni alle religioni politiche*. Lecture delivered at the meeting on “*Lo stato secolarizzato e le sue trasformazioni oggi*”, Centro per gli studi storici italo germanici ITC Trento, Italy, 17 October 2006.

⁹ Cf. P. SCOPPOLA, *La democrazia dei cristiani. Il cattolicesimo politico nell'Italia unita*, Bari, Laterza, 2005.

an increase in migratory fluxes, and a greater presence of a sometimes aggressive Islam, we may understand the changes that took place in the role of the Catholic Church and the ways it exercises its legitimate teachings - ways that are not comparable with those exercised in other countries even though a large Catholic majority may be present there as well.

Regardless of the historical and legal reasons that justify this different and special relationship between the Italian state and the Catholic Church, we cannot ignore that this new Church approach vis-à-vis its presence in the Italian society has generated many questions on the meaning that should be given to the old adage “Give unto Caesar....”¹⁰. Many constitutional experts and many clergymen have become aware, during recent years, of the need to redefine Italy’s secular status and the boundaries between the two orders, which the Italian Constitution (Article 7) defines as “independent and sovereign”, one suggesting a reflection “on the lost spirit of the Concordat”¹¹, and the other¹² the re-examination of the principle based on recent CEI’s interventions. Even though one may accept that bioethics be included among the matters upon which the Church may freely express its opinion to offer guidance to Catholics, it is difficult to hide one’s perplexity when learning that the agenda of a recent CEI’s meeting included the modification of the Italian electoral law, the reform of the Italian judicial system, the control over some credit institutions, the role of the Bank of Italy and its Governor, telephone wiretapping and its publication in newspapers.

The boundaries that limit the area of influence of the Church are constantly moved forward, and this is further aggravated by *Caesar’s* inaction, made worse by the political world’s ever-growing lack of assertiveness which results in the inability to enforce what pertains to its role.

In the light of all this, it becomes obvious that there is an urgent need to redefine the boundaries between the role of the state and that of the church. This would also clarify the meaning of *secular status*, especially because its original meaning is lost and has been replaced by an *Italian-style secular status*, which is characterized by the principle of collaboration and the non-indifference of the state towards religions. All this should justify a

¹⁰ G. DALLA TORRE, *La bioetica nei rapporti tra lo Stato e la Chiesa*, in IL COMITATO NAZIONALE DI BIOETICA: 1990-2005. QUINDICI ANNI DI IMPEGNO, op. cit, page 182.

¹¹ G. ZAGREBELSKY, *Stato, Chiesa e lo spirito perduto del Concordato*, in *Lo Stato e la Chiesa*, Rome, La biblioteca di Repubblica, 2007, page 89. The author, while analyzing the premises of the 1984 *Accordo*, which mediated between the Constitutional principles of the Italian Republic and the declarations of the Second Vatican Council, sees in the Church’s current approach towards politics as a violation of the sound “secular status” indicated in *Gaudium et spes*.

¹² G. CASUSCELLI, *La lay status e le democrazie: lay status della “Repubblica democratica”, secondo la Costituzione italiana*, in: *QDPE*, Bologna, il Mulino, 1, 2007, page 185. The author examines the meaning of mutual collaboration and prohibition against interfering in each other’s areas of competence agreed upon by the Italian state and the Catholic Church, and the *bona fide* implementation of the 1984 *Accordo*. The author writes about the agenda of CEI meetings chaired by Cardinal Ruini held on September 19-22, 2005, and wonders what possible links may exist between petrol increases or the role of the bank of Italy and the salvific mission of the Church.

serious revision by the Church hierarchy of some recent interventions¹³ that may have been too passionate, and which could backfire triggering anticlerical sentiments¹⁴.

Giovanni Fornero in his *Catholic bioethics and secular bioethics*¹⁵ suggests that *secular status* may have two different meanings, a *strong one* and a *weak one*. The two meanings are interconnected but are not conceptually superimposable. A *weak* secular status means “a critical and anti-dogmatic attitude that, based on the presumption that one cannot claim to know the truth better than everyone else, is inspired by the values of pluralism, freedom, and tolerance; in other words the principle of reciprocal independence of all human activities”. We “commonly refer to a secular State that, bearing in mind the existence of a variety of opinions and beliefs, practices rigorous neutrality in matters of ideology and faith in order to guarantee the existence of an open society.” A *strong* secular status means a tolerant attitude of a state that goes beyond any faith or metaphysics with religious roots, and behaves *etsi Deus non daretur*¹⁶.

The Italian Constitution certainly does not match the latter description, although it does not have an explicit disposition clearly indicating the existence and the contents of the secular status principle. If we examine the stance that emerges from the Italian Constitutional Court rulings¹⁷, it appears evident that the legislator has considered it possible to derive the existence of the state’s secular status from a variety of laws, moreover qualifying it as “supreme principle” of the legal system. The Constitutional Court appears to have what Fornero defines as a *weak* secular status, given that “The secular status principle, as it emerges from Articles 2, 3, 7, 8, 19, 20 of the Constitution, does not imply indifference of the State towards religions, but on the contrary a guarantee that the State offers for the safeguard of religious freedom, in a plurality of beliefs and cultures”¹⁸. In a 1993 ruling, the Constitutional Court¹⁹, asked to rule on the legitimacy of a regional act (*Urban regulations of religious service*)²⁰, stated that “in that field the intervention of public powers must comply with the supreme principle of secular status of the State, which is one of the characteristics of the State as indicated in the Constitution of the Italian Republic”.

¹³ In an article published by the Repubblica newspaper on 17 May 2007, A. ASOR ROSA, *I limiti della Chiesa* points out that “A millenarian institution like the Church of Rome cannot be devoid of wisdom. This wisdom that has endured the passing of the millennia lies ... in practicing and preaching a formidable sense of limits” and that the “Church errs (at times spectacularly) when it exercises its sense of measure without a proper measure”.

¹⁴ CEI’s new president, Monsignor Bagnasco, has received intimidations and threats in recent months.

¹⁵ G. FORNERO *Bioetica cattolica e bioetica laica*, Milano, B. Mondadori, 2005, page 67.

¹⁶ From Ugo Grozio to G.E. RUSCONI, *Come se Dio non ci fosse. I laici, i cattolici e la democrazia*, Torino, Einaudi, 2000.

¹⁷ Cf. A. ALBISETTI, *Il diritto ecclesiastico nella giurisprudenza della Corte Costituzionale*, Milano Giuffrè, 2000; M. CANONICO, *Il ruolo della giurisprudenza Costituzionale nell’evoluzione del diritto ecclesiastico*, Torino, Giappichelli, 2005; for the secular status of the State see page 25.

¹⁸ Corte Costituzionale, 11 April 1989, no. 203.

¹⁹ Corte Costituzionale 27 April 1993, no.195.

²⁰ Regione Abruzzo, 16 March 1988, Act no. 29.

However, the principle of secular status of the State - utilized by the Constitutional Court to verify the legitimacy, for example, of penal safeguard of religious denominations, or the swearing formula - is often ignored by the public administration and, even more importantly, by the lawmaker, especially when dealing with bioethics issues.

In this perspective, a secular state does not profess a religion, does not distinguish between different religious denominations, but coexists with the religion that is traditionally followed by the people and, to a certain extent, lives by, and thus legislates, the culture and ethics that this religion has produced over time. The obvious risk is that the rules that are born out of this process do not represent a plurality of religions, but rather that they tend to represent only one religious group.

2. ACT 40 AND MEDICALLY ASSISTED (AND JURIDICALLY OBSTRUCTED) PROCREATION²¹

A brief analysis of the most relevant normative aspects of the law that regulates medically assisted procreation may shed light on the bioethics debates that took place in Italy in recent times.

After the law passed in the '70s that introduced divorce in Italy, and also Act 194 (1978) that authorized abortion within certain limitations of time and causes, no common ground was found that would enable the lawmaker to regulate artificial insemination. More and more sophisticated artificial insemination techniques have produced results that would have been unthinkable only a few years ago²². Although unregulated by the law, physicians that were not always deontologically correct have used these techniques. Doubts became increasingly more numerous about the lawfulness of what was technically possible, especially since at the base of it all there were sensitive issues connected to the creation of a new life.

The absence of appropriate laws was compensated by guidelines issued by the National Bioethics Committee²³, founded in 1990, and by the Italian Medical Association,

²¹ C.CASONATO, *Legge 40 e principio di non contraddizione : una valutazione d'impatto normativo*, in: *La procreazione medicalmente assistita: ombre e luci*, i E.CAMASSA e C.CASONATO, (edited by) Trento, 2005, page 32.

²² I refer to the phenomenon of the so-called mothers-grandmothers, that is to say the possibility that post-menopausal women may become pregnant thanks to special therapies.

²³ For information about the role of *Comitato Nazionale di Bioetica* (CNB) and the relationship between *Bioetica e religioni*, Cf. PAGE RICCI SINDONI, in: *Il Comitato Nazionale per la Bioetica. 1990-2005*, op. cit., page 447. The author reports on the Italian social and cultural contexts, which are characterized by a large number of Catholics, whose Christian feelings express a kind of collective ethos. CNB needs to avoid conforming to any particular denomination, in order to avoid setting up barriers between Catholics and secularists, a recurring problem in the social and political life of Italy. CNB has adopted pluralism in ethical values as an intellectual challenge in order to avoid head-on clashes while maintaining at the same time a sound secular attitude in its approach to bioethical issues.

which, through the adoption of a Deontological Code²⁴, imposed stringent rules on physicians utilizing medically assisted procreation procedures.

Politicians, for their part, having to adopt decisions that would inevitably involve different ethical, religious and philosophical concepts²⁵, had the choice between mediation and safeguard of pluralism or, alternatively, an option in favor of a single concept that is transferred from an unregulated sphere to a normative one. The Italian lawmaker could, in this sensitive field, choose between regulation based on a strict model, which, with its prohibitions, would bind even those who do not agree with it, or a permissive model, which does not oblige anyone and allows the right of dissenting people to conscientious objection.

In the past, the permissive model had been adopted to regulate abortion, while, more recently, the lawmakers have utilized a tendentially strict model when formulating the Medically Assisted Procreation Act²⁶.

The 2004 Medically Assisted Procreation Act introduced rules that established clear limitations on a sector that had until then exploited freely all the possibilities that science offered. The *quality* of this act justifies legitimate doubts, unless one subscribes to a thesis expressed by some MPs according to whom “a bad law is better than no law”.

The time that immediately preceded the passing of the act was marred by very bitter ideological confrontation that compelled Parliament to adopt (with an all-party vote) a particularly restrictive law, especially when compared to those that exist in other European countries. In fact, some questionable choices were made where “the objective to operate a correct balancing of the interests at play was sacrificed to the determination to affirm the reasons of the *winners*²⁷, even though there was an awareness that they were passing a law that would need to be modified”.

The inevitable result was the adoption of a law that was full of contradictions, both within itself and towards the general jurisdiction. Although the rights that are guaranteed by the Constitution (such as women’s health, the integrity of the embryo, the freedom of scientific research, and the interest of the child in the womb to have two parents) may occasionally appear to be conflicting, it is nonetheless fair to say that the proposed solutions are not always convincing.

²⁴ For the 1998 Medical deontological code, and the relationship between medical science and law cf. *Biodiritto in dialogo*, edited by C. CASONATO, C. PICIOCCHI, Padova, Cedam, 2006.

²⁵R. TONIATTI, Foreword to: *La procreazione medicalmente assistita: ombre e luci*, edited by E. CAMASSA and C. CASONATO, Trento, 2005, page 8.

²⁶ Cf. C. CASONATO, *Introduzione al biodiritto. La bioetica nel diritto costituzionale comparato*, Trento, 2006, page 131.

²⁷ S. CANESTRARI, Act 40: procreazione e punizione, in *La procreazione medicalmente assistita: ombre e luci*, op. cit. page 71. On the political debate *ibidem*, C.FLAMIGNI, Problemi e prospettive della legge sulla procreazione medicalmente assistita, page 141. The author maintains that the MPs that approved the law admit that a bad law is better than no law, and that any improvement in the law that could have been adopted during parliamentary readings was blocked by a so called “patto di Maggioranza” of the Parliament that had resolved to approve the bill without any changes.

The primary objective of the law appears to be the willingness to guarantee the attribution of rights to the embryo through a very high level of protection. Article 1 of the law describes the finalities and the subjective conditions of access to medical procedures, and specifies that such is allowed “according to the conditions set out by this law, which ensures the safeguard of the rights of everyone, including the child in the womb”. The rights of the child in the womb are also behind the prohibition of the utilization of cryogenic techniques, suppression of the embryos, and reduction of multiple pregnancies. At the political level, the choice was made to grant the child in the womb full legal personality, putting it at the same level as everyone else involved. The 2005 Constitutional Court ruling has since mitigated the scope of the law. In fact, the Court - while declaring that the abrogative referendum relating to part of Act 40 was valid - stated in reference to the above-mentioned Article 1 that “the norm presents a simply enunciative content, as the safeguard of everyone involved, including the child in the womb, has to be derived from all existing legislative rules”.

The legal provisions pertaining to access to medical techniques, ban on cloning, and the creation of hybrids or chimeras are similar to those adopted in the majority of countries that are geographically and culturally close to Italy. However, it is fair to say that a great part of the norms that make up Act 40 are dealt with differently in those countries. The fact that in Italy access to treatment is exclusively limited to sterile couples, that there is a ban on heterologous fertilization, that pre-implantation diagnosis is forbidden as is the utilization of techniques for the discovery of hereditary diseases, and last but not least issues surrounding the creation of no more than three embryos and the accompanying obligation that all have to be implanted, have resulted in *procreative tourism* towards countries that have legislations that allow practices that are banned in Italy. This development was obvious from the start. Its success can be easily verified browsing the Net, where many sites can be found, primarily Spanish and Swiss, but also English and Turkish, which advertise, in Italian, their techniques and the results they have achieved so far. The utilization of the Italian language helps childless couples in their efforts to gather clear information about the opportunities that such foreign centers offer.

Obvious considerations could be made regarding the costs connected to *procreative tourism*, costs that make procreation techniques available only to those private individuals that can afford them. However, what appears to be even more inconsistent is not only the legitimate safeguard offered to the child born from heterologous fertilization who is granted legitimacy, but also the irrational non-punishability of the couple that availed itself of the medical procedure abroad. The lawmaker seems to apply the objectionable principles of the *Not in my backyard* attitude, thus implicitly recognizing the right of the couple to travel abroad in order to obtain medical procedures not available in Italy.

The doctrine has raised many doubts not only on the scientific validity of some political choices that have caused a predictable drop in the success rates of the techniques that the law still allows, but also, from a more juridical point of view, on the level of coheren-

ce of Act 40 compared with the more general juridical context in which it should have found application²⁸.

What appears to be even more incoherent is that access to medically assisted procreation facilities may be offered (if the DICO bill is approved) to cohabiting heterosexual couples²⁹, which will not be asked to supply any information regarding the length of their cohabitation - an information that is required in other countries, such as France, Austria and Switzerland, to name but a few. In practical terms, this means that, at least in theory, access to medically assisted procreation will be available to singles, and will allow heterologous fertilization to unmarried cohabiting couples, but not to regularly married ones.

From a different point of view, some consider the access granted to cohabiting people to these medical techniques as a kind of *reduction of the rights exclusively reserved to legalized marriages*³⁰, and a first significant step towards the recognition of an alternative family model, which is no longer based on a *natural society founded on marriage* as identified by Article 29 of the Italian Constitution.

A worrying addition (even though the guidelines that were adopted pursuant to a decree by the Ministry of Health on July 21st, 2005 seem to soften it) is the ban on the possibility to cancel the implantation of the fertilized egg, as if a coercive implantation against the will of the woman was concretely and juridically conceivable. The contrast with Article 32 of the Italian Constitution - which excludes compulsory medical treatments that are contrary to human rights, even if imposed by the law - is obvious. More doubts are raised by the prohibition of carrying out a pre-implantation diagnosis of possible medical problems that may exist in the fertilized egg, and other limitations imposed by the law, given that Act 194 (1978) that regulates abortion allows women to have access to tests to warrant abortion if the continuation of the pregnancy is thought to cause the expectant mother psychological or physical risks.

This normative contrast has been a good opportunity to reopen a discussion (which may have been set aside since) on Act 194 and its application, given that it recognizes the women's freedom to have an abortion within the first 90 days of pregnancy.

This never resolved conflict, which has divided the doctrine, public opinion and political forces in Parliament, found new impetus because of the 2005 referendum. The call to

²⁸ C. TRIPODINA, *Studio sui possibili profili di incostituzionalità della legge 40 del 2004 recante <norme in materia di procreazione medicalmente assistita>*, in *Diritto pubblico*, no. 2, 2004, page 506.

²⁹ Article 5 defines as possible beneficiaries of the medically assisted procreation techniques "Legal age couples of different sex, married or cohabiting, of fertile age, both living". Cf. R. VILLANI, *La nuova legge sulla procreazione medicalmente assistita*, in *Studium Iuris*, no. 5, 2004, page 579. The author points out that Italian law does not recognize nor safeguard de facto families, highlighting the dichotomy of the possibility of access to medically assisted procreation techniques and the harshness and the prohibitions that are a characteristic of the law. M. DOGLIOTTI, *La legge sulla procreazione medicalmente assistita: problemi vecchi e nuovi*, in *Famiglia e Diritto*, no. 2, 2004, page 118, comments on Article 6, which obliges physicians to suggest to their patients an adoption as an alternative to medically assisted procreation, pointing out that cohabiting couples are not allowed to adopt.

³⁰ L. PALAZZANI, *La legge italiana sulla procreazione assistita: aspetti filosofico-giuridici*, in *Il diritto di famiglia e delle persone*, 1999, page 758.

Catholics issued by CEI to abstain from voting at the referendum – which would have caused the referendum to fail because the required quorum would not have been reached (as in the end happened) thus rendering the referendum nil – caused doubts and heated disputes. The call to abstain from voting, although juridically legitimate, came as a surprise to many Catholics, and provoked accusations of foul play and “opportunistic exploitation of that quote of abstentions fatally deriving from disinterest or indifference”³¹.

The debate over Act 40 and its limitations saw on one side those who thought that priority should be given to people wishing to become parents through the utilization of scientific methods that are available today, and on the other side those who demanded that priority be granted to the embryo, which was therefore entitled to an encompassing safeguard.

It is indeed true, as it was stated in defense of the law and confirmation of the secular status of the state that had approved it, that Italy is not ruled by a *Catholic* law. This becomes evident when we compare the *Donum Vitae* guidelines issued on February 22, 1987 by *Congregazione per la Dottrina e la Fede* and see that not all the guidelines became part of Act 40.

The principles upon which the Catholic Church has expressed an opinion³² (the defense of life from its conception, the concept of the embryo as a person, the condemnation of procreation techniques other than intra-corporeal insemination that takes place in the natural sexual union of a married couple, the ban on intervention on the embryo, the condemnation of abortion without exception) have not entirely been adopted. Having said that, the role of the teachings and the stances of the Catholic hierarchy cannot be denied. Similarly, the role that Catholic bioethics had in the development of the law cannot be underestimated. Preemptive calls to Catholic politicians of all parties to comply with the principles of Catholic bioethics did not go unheeded.

THE LIVING WILL (HEALTH-CARE DIRECTIVE): A FORTHCOMING LAW?

As it often happens in Italy, but also in other countries, the legislative calendar seems to respond more to current events than to careful planning with well-defined priorities. It is often a case of crisis management³³ that compels the lawmaker to act promptly. A case

³¹ G. ZAGREBELSKY, *Lo Stato e la Chiesa*, op. cit. Page 44. The author also says “Knowing the wisdom and the prudence of the Church, I am bound to think that advice given by bad or cunning advisers has been heeded without paying careful attention to the perverse effects of the positions taken...In any case, the decision whether to keep the law, or dispose of it, will depend on reasons that have little to do with a proper evaluation of the issues, and the free and fair debate that was reasonable to expect. Those who believe in the possibility, the need and the importance of constructive dialogue between secular and Christian cultures cannot help thinking that the result is bitterly disappointing”.

³² Cf. L.PALAZZANI, *La bioetica “cattolica”*, in: *Bioetica e confessioni religiose*: E. Camassa, (edited by) Atti del Convegno, Faculty of Law, Trento, Italy, 12 May 2006, Padova, Cedam 2007 (currently being printed).

³³ G. FORNERO, *BIOETICA cattolica e bioetica laica*, op.cit., page 18: “this always happens, especially in the so-called “frontiers of bioethics”, when dealing with crucial or exceptional cases, which appear to be ready-made to create inextricable doubts and tax the beliefs of doctors, patients and families. Individuals have

in point was the so-called Welby case³⁴. Discussions over the possibility of introducing Living Wills (Health-care directives to be communicated to health care givers when a person is unable to do so independently because of old age or illness) into Italy had been held for some time. However, nothing much had resulted from the discussions, and it was only the Welby case that brought the issue to the fore, and the resulting need for a law to regulate when and how a Living Will is appropriate.

A law on health-care directives has been considered useful by many, albeit not indispensable.

In the Italian legal system, there are already rules that define brain death, others that forbid (excluding exceptional circumstances) acts to dispose of one's body, punish suicide, punish one who assists another in suicide, rules that punish homicide even when committed against a consenting individual; and also Constitutional laws (Articles 13 and 32) for the safeguard of the right to health and freedom of choice of medical therapies. The existence of these norms does not mean that they are capable of offering answers to some crucial questions. It is worth remembering that medicine has advanced so quickly in recent years that some basic concepts such as death³⁵ have become more complex, while others have been introduced, such as prolonged artificial life support, and informed consent.

"Science advances faster than the rest of society including members of parliament, who have been charged with establishing the rules, but are often incapable of intervening quickly³⁶".

Mr. Welby's case, which was highly publicized (at the instigation of Mr. Welby himself) and politicized, offered a good opportunity to reopen discussions in an attempt to produce a set of rules that could be widely shared. Although a common ground had already been reached, Mr. Welby's case was perhaps mishandled, and neither the media nor the Catholic Church was capable of assessing it fairly. The refusal by the Catholic Church

to decide not whether a given *action* based on certain principle is morally appropriate, but rather if the *principle* upon which the action is based is a valid one".

³⁴ Piergiorgio Welby was struck at age sixteen by amyotrophic lateral sclerosis, which forced him to be connected to a respirator in order to survive. He started asking for the machine to be switched off in 1997, and wrote an open letter to the President of the Italian Republic in September 2006, asking for his wish to be honored. The President, Mr. Napolitano, replied expressing hope that a political debate on the issue could be started. In December 2006, Mr. Welby's lawyers filed an application with the tribunal in Rome to stop all attempts to prolong his life artificially, which was declared inadmissible because of the lack of norms to regulate the issue. On 20th December 2006, Dr. Mario Riccio, sedated Mr Welby and then unhooked his respirator. The Italian Medical Association found Dr Mario Riccio's behavior legitimate. However, even though the Public Prosecution Office asked for the case to be dismissed, the investigating magistrate asked for a committal for trial for the homicide of a consenting individual on 8th June 2007.

³⁵ The criteria to define "death" based on the cessation of all brain activities undoubtedly took into consideration the needs linked to organ donation, cf. R.BARCARO, P.BECCHI, *Morte cerebrale e trapianto d'organi*, in *Bioetica*, 2004, page 25; for an overview of this issue, cf. C.A. DEFANTI, *Vivo o morto? La storia della morte nella medicina moderna*, Milano, 1999.

³⁶ I.MARINO, in: *Dialogo sulla vita*, colloquio tra Carlo Maria Martini e Ignazio Marino, L'Espresso, 26 April 2006, page 52, where both men argue their respective positions, Cardinal Martini as a biblical scholar, and Professor Ignazio Marino as a scientist and a bioethics expert.

to conduct a religious funeral³⁷, that Mr. Welby's mother had asked for, created dismay among Catholics.

In July 2006, the Senate's *Commissione Igiene e Sanità* collated numerous bills pertaining to health-care directives that had been submitted by MPs of all parties. Under the leadership of Professor Ignazio Marino, it set up a series of hearings with experts with the aim of producing a single bill to be discussed in Parliament.

Bearing in mind the constitutional principle of the voluntariness of health treatments, and thus acknowledging that individual consent must be honored, the provision of a Living Will (Health-care directive) would allow the expression of such consent, or lack of consent, whenever an individual can no longer be able to do so.

The necessary proviso for the validity of the consent is that it is an *informed* consent; even though scientific progress could shortly go beyond today's therapies, thus rendering today's consent not necessarily an informed and valid one in the future. This is one of the reasons that have convinced politicians of the need to ensure that a doctor is present when the Living Will is prepared in order to explain what the Living Will entails, together with a trusted person (fiduciary), who will be charged with interpreting the will of the person signing a Living Will should it become necessary to adapt it to future new scientific developments. One of the more controversial aspects, which might prevent the presentation of a unified bill³⁸, concerns the compulsory filling in of the Living Will document.

A stumbling point is finding a clear definition of *prolonged artificial life support*, given that this has a very subjective meaning, a meaning that could also vary, in the mind of the same person, over time and in the light of new scientific discoveries. To give an example, simple procedures such as hydration and parenteral feeding are seen either as ordinary therapies or as prolonged artificial life support therapies depending upon whom the question is addressed, Catholics or secularists.

Emerging difficulties stem from the fear, more or less hidden, that the approval of a Living Will Act might constitute a somehow implicit legitimation of passive euthanasia. It is worth remembering that *National Bioethics Committee* in its 1995 document *Bioethical questions at the end of human life* and in its 2003 document *Health-care directives*

³⁷ Cardinal Ruini, the then president of CEI, drawn into the issue when the request to hold a religious funeral was made after Mr. Welby's death, wrote: "The painful decision not to grant permission to hold a religious funeral stems from the fact that the departed clearly and deliberately asked until the very end that his life be terminated. Under these circumstances, a different decision by the Church would have been impossible and contradictory, as it would have legitimated a behavior that goes against God's law". An article in the *Corriere del Trentino* on 26/1/2007, GIOVANNI PASCUZZI, *L'amore di Dio e la ribellione*, commented on the church's decision quoting the old Latin adage "*Summum jus, summa iniuria*", and spoke about love, suffering, and forgiveness. In his words, God's love must be greater than an individual's rebellion to pain. A. MELLONI wrote in *Chiesa madre, Chiesa matrigna*, Torino, Einaudi, 2004 (before Mr. Welby's case): A church that has finally begun to ask forgiveness for its past mistakes appears unable to forgive others today, and is unable to deal with the many facets of contemporary living.

³⁸ Cf. *Dichiarazioni anticipate di volontà sui trattamenti sanitari*; Raccolta di contributi forniti alla Commissione igiene e sanità., no. 5, March 2007, XV Legislatura., Senato della Repubblica, Rome.

had stated that the Living Will cannot contain dispositions in favor of euthanasia, which may go against positive law, clinical practice rules and deontology.

Such fears had already been conveyed during the Commission hearings at the Senate, when all parties had made a call towards the introduction of the Living Will, but at the same time asked that a clear statement against euthanasia be given.

It seems likely that an agreement may be reached that identifies the Living Will as a “chance to express *one’s preference in dying* (not of dying) or *after one’s death*”³⁹; which would mean the opportunity of choosing palliative treatments, hospitalization instead of home care, the type of psychological or religious support, the ways one wishes to be accompanied during the last period of one’s life, but also one’s choices regarding organ transplants, funeral arrangements, and the option to give one’s body to science. A likely agreement may be reached over the nomination and role of a fiduciary.

Efforts to focus on points that may be agreed upon through dialogue whilst trying to avoid exacerbating differences⁴⁰ may allow Italy to give itself a law to regulate health-care directives, empowering the patient in his/her right to self-determination, but at the same time without accepting euthanasia. Excessive treatment, when the likely outcome appears not to justify its continuation, and the decision to stop it, need to be regulated, so as not to open a back door to life termination, but rather to accept that death cannot always be prevented, even though there might exist instruments that may artificially prologue life. If it is considered part of the Christian morality to defend life, time has now come for both Christians and secular people to accept death as part of life⁴¹.

³⁹ L.PALAZZANI, during a Senate hearing, *Dichiarazioni anticipate di volontà sui trattamenti sanitari*, op. cit. Page 52.

⁴⁰ CEI’s Secretary General, Monsignor Betori, on 17 May 2007 took a stand against several issues: They make embryos available for medical experimentation, legally protect abortion, and are getting ready to do the same for euthanasia, thus infringing the sanctity of the beginning and the end of human life.

⁴¹ The catechism of the Catholic Church states: The interruption of medical procedures that may be onerous, dangerous, extraordinary or disproportioned to the likely results may be legitimate. The intent is not to cause death, but to accept that death cannot be avoided. The decision must be made by the patient, if he or she has the competence and the faculty to do so, or, alternatively, by those who are legally empowered to do so, honoring the desire of the patient and his or her legitimate interests.

