

Mediterranean, Knowledge, Culture and Heritage 4

Aurora VESTO - Alberto MARCHESE

THE MEDITERRANEAN: THE SEA OF LAW

PERSONAL AND CULTURAL IDENTITY
UNACCOMPANIED FOREIGN MINORS
ORGANIZED CRIME



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Giuseppe D'Angelo and Emiliana Mangone

The Book Series, published in electronic open access, shall be a permanent platform of discussion and comparison, experimentation and dissemination, promoting the achievement of methodological action-research goals, in order to enforce the development of the territories and of the local and European identities, starting from the cultural heritage and from the Mediterranean Area. All the research work revolves around three key topics:

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Preface by the Series Editors

«The law is reason, free from passion», stated the Greek philosopher Aristotle in the IV century B. C. The Mediterranean is a sea of law: since many centuries, its shores have seen the birth of juridical cultures which, often, have later spread in other parts of the worlds. From the law of ancient Rome to the Islamic juridical system arisen after the Muslim conquest of Middle East and North Africa; from the national law developed in the European countries during the Modern Era to the common European system of last years, the Mediterranean has always been a central place for the elaboration and the definition of juridical frameworks.

In the «big and terrible world» of today, the juridical framework, including both communitarian and national laws, as well as the Islamic systems based on *Chari'ah*, is rapidly evolving, in order to face the new challenges posed by society. Think, for example, to migrations, which, as is know, deeply involve the Mediterranean. In the last two centuries, and mainly in the XX century, national and international institutions have tried to establish a juridical framework, through the signature of treaties and conventions, as well as with the implementation of specific migration laws in the individual countries, in order to govern the phenomenon. However, despite the efforts, the population movements continue to pose problems that need to be promptly faced and require, as a consequence, a continuous juridical elaboration.

The book series *Mediterranean, Knowledge, Culture, Heritage*, which since its establishment proposes an interdisciplinary approach to research, cannot neglect the juridical frameworks. This book, written by two Italian scholars, Aurora Vesto and Alberto Marchese, provides an interesting and new analysis about the legal system of the Mediterranean, addressing several topics: personal and cultural identity, with contributions about the relation between cultural identity, religious freedom and civil order, so difficult in the present moment, and the dignity of transsexual people under Italian law; the unaccompanied foreign minors, a very difficult challenge posed today by the migratory phenomena, which is examined under several points of view, including the medical aspects and the health care; the international organized crime, with special attention to its effects in the civil law regulations.

The aim of the book, therefore, it is not to provide an exhaustive knowledge of the legal frameworks of the Mediterranean, but to examine some little known aspects and provide a new and fresh contribution to research.

The book perfectly matches the mission of the series *Mediterranean, Knowledge, Culture and Heritage*, which since its establishment has published studies dealing with several scientific fields, in order to shed light on the more and more complex reality of the Mediterranean Basin.

Fisciano, Italy
November 2017

Emiliana Mangone
Giuseppe D'Angelo

AURORA VESTO - ALBERTO MARCHESE

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Real Alcázar of Seville (detail). Courtesy Emiliana Mangone

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Introduction

Χθιζὸς ἔεικοστῶ φύγον ἤματι οἴνοπα πόντον·
τόφρα δέ μ' αἰεὶ κῦμα φόρει κραιπναί τε θύελλαι
νήσου ἀπ' Ὠγυγίης· νῦν δ' ἐνθάδε κάββαλε δαίμων

*Yesterday, the twentieth day, I escaped to the sea color of the wine:
until then, I constantly dragged the wave and violent storms
away from Ogygia; and now here he threw a god
(Odyssey, VI, 170-172)*

The Mediterranean Sea, a geographical and cultural topos, has always represented a “privileged place” for both the judicial culture of people and the trade routes to grow and develop.

The various legal traditions of the systems practised in the countries of the so-called “Mediterranean basin” continue to merge and amalgamate in the quest for a “living law” that can regulate contemporary society in a modern, orderly way.

The following pages connect topics that may seem to widely differ but that share a minimum common denominator: being elective members of the communal *Mare Nostrum*.

These topics not to exclude weaker and more vulnerable categories, such as unaccompanied foreign minors, people who undergo complex sexual changes to align their bodies with their psyche, and all forms of discrimination that put further distance between foreigners, as the problems of protecting one's religion. These issues have been analysed in the light of both current legislation and *e jure condendo*, with a focus on social inclusion and protection of the particular interests of these people.

Recent Italian judgments provide an interesting opportunity to reconsider the current Italian provisions on sex reassignment, along with the juridical condition of people undergoing this process. This issue requires a multidisciplinary approach, including the contribution not only of Juridical Sciences, but also of Medical Sciences and Philosophy (with a special reference to gender studies).

Thus, an interdisciplinary analysis is required in order to properly examine the legal framework, to explore the psychiatry, surgical and endocrinology spheres, and to scrutinize the implications from a philosophical perspective, in an attempt to realize a holistic and dynamic reconsideration of transsexual and transgender people.

Belonging to a sex and therefore to a social role constitutes both the condition and the obstacle for the construction of a personal *identity* and the social *identification* of the subject.

These two profiles, identity and identification, which traditionally coincide, in cases of transsexualism can enter into conflict.

This scenario concerns the emergence of health-related issues with reference to the phenomenon of “borderless emigration”, which require urgent regulation within the legislation of individual host states, issues relating to the protection of personal identity, for example on the topic of religious symbols, and problems linked to the worryingly rapid spread of international terrorism and mafia-type organized crime, in the so-called *sud trafficking* economic-geographic regions.

The religious dimension is at the center of cultural debate.

Indeed, the Supreme Court of Cassation, with decision No. 24084 of May 15, 2017, rejects the appeal of a Sikh ethnic Indian, already convicted of the crime by art. 4, law No. 110 of 1975, for the abusive harbor of a ritual knife (kirpan) and does not consider the “cause of justification” related to the symbolic nature of the white-weapon.

The essay dedicated to this topic gives the opportunity for a reflection on the problem of the protection of cultural identity and religious freedom in the light of the principles of civil law on the compensation of damage to their image for discriminatory reasons.

With regard to the issue of immigration, it seemed particularly interesting to analyze the health problems that can trigger a real short-circuit between medicine and law, especially for contagious diseases and compulsory vaccinations.

For instance, the exponential increase in migratory flows poses the problem of revising therapeutic protocols from an ethical and legal standpoint. This phenomenon gives rise to “complex therapeutic relationships”, within which health care providers know that patients do not always share scientific references and some key concepts such as illness, health, diagnosis and prognosis, because of their culture of origin.

There is no natural “social contract” in this area between those who suffer and those who should provide care. The health care worker must adopt a multiculturally compatible and effective approach, and should be as open as possible to varying their clinical and scientific contribution, linking their work to that of other individuals capable of bridging the existing situational gap. From a strictly legal point of view, protection of every human being's health responds to an intimate need for human solidarity and, at the same time, to a logic of public health-related prevention. It necessary engage specific epidemiological observers to assess the phenomenon of migration.

Recent legislation, and the resulting clamour of the news, lead to the discussion about the compulsory vaccinations and their harmful consequences. About this, it is highlighted the great problem on the necessity to reconcile fundamental and different instances such as the protection of the public health from infections and the right of each person to not be subjected to a “compulsory medical treatment” against his will, if not for express provision of law.

The purpose is to delineate the delicate profile of the health legislation related to vaccinations.

Another very important aspect is - as mentioned - that of social issues related to the spread of organized crime.

Primo Levi has taught, in *I sommersi e i salvati*, that when faced with extreme evil must not only express indignation, but we must strive to understand with our reason scientifically the origin of the phenomenon. The question is always the same: why ordinary people have behaved in this terrible way?

The same survey method should be used in the analysis of the Mafia and terrorism. We try to understand the genesis and the reasons for such behavior. Is it perhaps the profit ethics the key to everything? What drives some men to death the brand for their own actions?

The third millennium mobsters act abiding by the logic of profit and invest the fruits of their crime in public limited companies. They wish to increase their capital and they do it with scientific method.

All these issues need to be examined further and particular attention should be given to them, especially in the years to come; they are the focus of the present work, which aims at proving readers with a basic outline of the phenomenon.

August 2017

Aurora Vesto
Alberto Marchese

Part 1

Personal and Cultural identity

The difficult equilibrium between cultural identity, religious freedom and civil order

AURORA VESTO

1. Criminal Court of Cassation, Sect. I, 15.05.2017, No. 24084

The I Criminal Section of the Supreme Court of Cassation, No. 24084 of 15 May 2017, rejected the recourse of an ethnic Indian *Sikh*, already condemned by the Court of Mantua to a penalty of two thousand euros for a fine with regards to the offense referred to in art. 4 Law no. 110 of 1975, by asserting that he “carried out of his home without a justified reason, a knife of a total length of 18.5 cm eligible for the offense due to its features”.

At the appeal, the Indian man had invoked the liability on “justified grounds”, and specifically, he claimed that the knife in question (called *kirpan*) had to be regarded as a symbol, like his turban, and consequently carrying it with him fulfilled his ethical duties.

Conversely, the Supreme Judges who, in confirming the sentence, pointed out that the decision taken by the immigrant to settle in a society where the reference values are different to those of his country of origin, demands respect and it is not tolerable that the attachment to one’s own values, even if they are legitimate in the country of origin, leads to a conscious violation of the host society.

In order to make the ruling convincing, the Court of Cassation also refers to Article 9 of the European Convention on Human Rights, as well as the internal legislation, which stipulates that the freedom to manifest one’s religion can only be subject to restrictions which, by law are necessary measures in a democratic society for the protection of public order, public health or morals, or for the protection of the rights and freedoms of others.

2. Legal multiculturalism in Western society among cultural liability, the principle of self-determination and legal aspects

The ruling being commented on offers the opportunity for a wider reflection on the protection of cultural identity (Parolari 2016, 16-17), especially where it conflicts with the principle of self-determination (Kymlicka, 1995; Dworkin, 1978; Eco, 2006; Galeotti, 1999) in the ethical and religious sphere.

To this end, the first problematic node that deserves to be dissolved is that of the concrete configurability - within our legal order - of all the elements, *de facto* and *de jure*, that allow a full qualification of the same in terms of *Multicultural legal order* (Mill, 1859; Raday, 2003).

A legal system inspired by the principle of multicultural protection is primarily based on a subjective element of a relational nature, which occurs when a state includes within it a multiplicity of minority groups belonging to different cultures.

It has to involve social aggregates that are quantitatively smaller than the rest of the population, placed in a non-dominant position and whose members, even though they have acquired citizenship, retain ethnic-linguistic-religious features which are markedly dystonic to those of the context of reference, while at the same time, they have an implicit will to preserve their cultural identity.

Full membership of multiculturalism involves, in itself, the attribution of specific “culturally oriented” rights and it is a postulate for the interpretation and proper systematic placement of the reference standards. It is easy to understand that qualifying a particular order as a *Multicultural system* (Mill, 1859, Facchi, 2001; Raday, 2003) requires a (necessarily) biunivocal relationship between a social group and a host state, which must be characterized by legality, even before being based on *de facto* elements, such as multi-linguality and multiethnicity (on the Mediterranean case, see Hadhri & Mangone, 2016).

Multiculturalism presupposes that within the social fabric the same dignity is promoted among the different members, even in the general respect of a dominant culture, which, if it is not respected, entails legal consequences.

Ultimately, a greater awareness is required of the fact that in addition to the observance of a widespread and reciprocal respect, living together requires the concrete will to guarantee equality for everyone in the enjoyment of fundamental freedoms (Berlingò, 2000; Ruggeri, 2015), in a perspective of mutual rights and obligations. With such a structure, adhering to multiculturalism ends with qualifying *ab externo* the same form of state, surpassing the limits of the welfare assurance of the *Welfare State* and promoting a higher conception of the human person (Ferrajoli 1989), thus balancing the principle of freedom (in its first declination of *formal equality* of each individual before the law) and that of solidarity (which is designed to promote *substantial equality*).

Cultural diversity thus passes from a discriminatory element - as it has historically been in the past - through social inclusion (Rodotà, 2012, 62-63) in order to rebalance, with specially targeted actions, the minority status of certain social groups.

For instance, belonging to a specific (and pre-established) social group, characterised by sharing ethical reference values (Falzea, 1939), allows its members to be given a particular form of protection precisely because of the legal position they have.

Indeed, if one thinks of the protection of religious freedom that contributes to defining the asymptotic trend of the acceptance of cultural differences (Dieni, 2000), as shown by the different positions, even recent ones, taken on the subject by legal theory and case-law.

The qualification of our order as a multicultural legal system creates a strong propensity to protect pluralism in religious matters (Berlingò, 2002). In this sense, there are recent controversies regarding religious identity and free practice of worship, in the belief that the acceptance of certain religious symbols determines social identification (Pino, 2008, 119-151): i.e., in order to be considered to be useful members of a particular ethnic or religious group, it is necessary to share and repeat certain rituals (for example, baptism or confirmation in the Catholic church) whereby it becomes public and it manifests the will to join the community of reference (Facchi, 2001).

In this sense, issues related to clothing and the display of religious symbols are important, as almost all European countries have decided, especially with regard to the possibility of displaying certain symbols in non-private places (public or open to the public) or by some individuals who, for reasons of work or social *status* hold public offices or otherwise play a special role within the so-called civil society (Ferrari, 1991, 271-285). Indeed, the principle of secularism belongs to this perspective, which, as the non-identification of the state with any form of ethical-religious orientation, does not tolerate the display of any religious symbol in public offices¹; although adherence to a prospect of multicultural secularism should not hinder the possibility of using and displaying in public certain religious symbols, given, inter alia, the provisions of art. 19 of the Constitution which explicitly refers to the possibility of “freely professing one’s religion in any form, individual or associated, to propagate its worship and to practice it in private or public” with only the limit of respect for good habits (Cfr. Spatafora, 2013, 172-173).

¹ In this sense, cf. Criminal Cassation 01.03.2000, n. 439, in *Centro Elettronico di Documentazione [Electronic Documentation Centre] of the Court of Cassation* (from now: *CED Cass*).

3. Conclusive perspectives: the difficult role of cultural identity

In the case in point, problems emerge that transcend the episodic nature of the individual matter, especially with reference to the principle of non-discrimination and its compensation. When it examined the question, the Court of Cassation firstly approached it in terms of a procedure to define it, in the sense of qualifying (on the basis of the constitutional parameter) the religious freedom as a “justified reason” to elude the anti-juridical aspect of the offense.

The prevailing jurisprudence approach recognises liability value of the “justified reason” (de Vero, 1993) if “[...] the requirements of the agent correspond to legitimate relational rules relative to the nature of the object, the means of verifying the fact, under the subjective conditions of the bearer, to the places of the occurrence and the normal function of the object [...] ».

It will therefore be necessary to contextualize, in space and time, the individual conducts and only then it is possible to proceed with the effective balancing between the various interests at stake which, as in this case, require, on the one hand, a general principle of public security and, on the other hand, respect for their own cultural and religious identity.

The motivational plan of the ruling, however, slips in the sense of denying the liability value of carrying the knife *kirpan* on the assumption that the knife is structurally a dagger capable of offending, even though it is intrinsically endowed with a strong religious connotation of symbolic value. Neither would it be right to say otherwise, in the sense that the religious value of the object and the almost sacredness with which it is normally worn by the members of the *Sikh* ethnic grouping can only eliminate its danger, since the concrete offensive attitude of any object is to be investigated with the sole reference to its technical characteristics and not to the personal motivations of those who will then use it.

Moreover, in any democratic system there is no “absolutely fundamental” principle or right, a sort of axiological “tyranny” (Rodotà, 2012, 68) which, as the Constitutional Court reported in 2013, would endanger “keeping” of our order.

The second part of the ruling is absolutely contradictory to the indications, where a generic “obligation for the immigrant to conform his or her values to those of the Western world, in which he freely chose to enter”, is assumed, postulating the existence in our country of a unitary cultural and juridical fabric, which would be primarily based on the public security to be protected and preserved at all costs.

The generic recall of “western values” which has not been better contextualized, together with the reference to a presumed *cultural unity* which, however, cannot exist in an order inspired by the principle of multicultural pluralism, representing two unmistakable logical-legal contradictions of the entire motivational system.

Specifically, with regard to the protection of cultural identity, this can also be achieved through the external conformation of one's clothing, in a manner consistent with one's beliefs. This is the case of the Islamic *burka* (or of the *chadri* and of *paranaja*) and therefore also of the *kirpan*. In such cases, if one tries to justify the hostile attitude to each garment of clothing solely on the basis of a general reference to the above-mentioned "Western values" or, worse still, to the alleged uniqueness of the cultural context, it would be risky to put in place, with regards to some subjects, an indefinite set of discriminatory conducts, in contrast with the principle of cultural pluralism.

It is therefore possible, for this purpose, to consider a fair compensation for non-pecuniary damage in favour of the "victim" of the discriminatory act for the infringement of a right of a constitutionally protected person². The right to non-discrimination is a right which, if it is breached, allows the independent non-pecuniary compensation³ since it has already been incorporated into legislative and constitutional protection.

And in this specific case, it is the individual's right to his or her cultural identity that has been infringed, as an application of the right not to be subject to discrimination and offensive treatment based on his or her ethnic or religious affiliation.

Indeed, the Court of Cassation with joint divisions⁴ has clarified that the "breach of the rules prohibiting racial discrimination is one of the situations in which the law expressly provides for the restoration of non-pecuniary damage even outside a criminal case"; moreover, the damage suffered by the single component would, in that case, have a twofold operational dimension (individual and community), which could reverberate in the juridical sphere of all the other subjects belonging to the same ethno-religious community and thus create an indiscriminate enlargement, in the form of damage incurred by direct family members, of the concretely compensable harm.

These short notes already justify a critical judgment on the *obiter dictum* of the ruling and legitimise its obliteration in the light of the principle enshrined in the second paragraph of Article 9 of the European Convention on Human Rights, which states that

the freedom to manifest one's religion or belief cannot be subject to restrictions other than those laid down by law and which constitute necessary measures, in a democratic society, to protect public security, law and order, public health or morals, or the rights and freedoms of others.

Ultimately, this is a demonstration that the future of modern democracies is steadily facing a crossroads: if, on the one hand, it is always possible to take the path of self-protectionist "resistance", as has happened in recent times in France

² See: Court of Milan, 23.09. 2009, in *Corriere del Merito*, 2010, 1, 19.

³ Article 2059 of the Italian Civil Code.

⁴ Cf. Joint Civil Divisions of the Court of Cassation, 11.11. 2008, n. 26972.

and the Netherlands; on the other hand, the main road seems to lead to increasingly new and complex forms of cosmopolitanism, in the name of the concrete integration of different ethical and social instances to achieve peaceful coexistence.

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The dignity of transsexual persons under Italian law: the meaning of being in the civil clerk registry

AURORA VESTO

1. Italian law: Rules on sex reassignment surgery

The sexual change involves various profiles: the rectification of marital status, the legitimacy of the actions with regard to the body; the right to the health care, the right to confidentiality, the dissolution of marriage, the principle of “self-determination” of the person.

According to Italian law (Law of 14 April 1982, n. 164 - Rules on sex reassignment surgery), concerning sexual rectification, the Court can authorize the sex role reassignment surgery only after examination and approval of the psycho-physical conditions by a psychologist or a psychiatrist.

According to article 1 of the present law

Sex reassignment is carried out on the basis of the final decision by the Court which has the power of *res judicata* that attributes to a person a sex other than that set out in the birth certificate following changes of his sexual characteristics. Disputes mentioned in the first paragraph are governed by art. 31 d.lgs. 1 September 2011, n. 150.

But, as a result of which procedure can a transgender obtain the registry reassignment in the public records of marital status?

Law n. 164/1982 has been “transplanted” with few modifications, in art. 31 leg. decree n. 150 of 2011, in virtue of a government delegation (contained in art. 54, l. 18 June 2009, n. 69), having as objective the “reduction and simplification of the civil procedures”. The discipline is even more “smoky and generic” since it only foresees summary presumptions for the civil registry change of sex.

According to art. 31, paragraphs 4-5, of the d.lgs. n. 150/2011

When an adaptation of the sexual characteristics is necessary by means of medical-surgical treatment, the Court authorizes it with the last final sentence (...). With the sentence that receives the request for rectification of sex role attribution, the Court orders the Official of the City Clerk's Office where the birth was first registered to carry out the rectification in the relative registry

The lack of explicit provisions has created the following doubt, in order to obtain the change of sex in the civil status registry is it necessary for the person to undergo sex role reassignment surgery of the primary sexual characteristics or not?

With a generic formulation, the legislator, in 1982, attributed explicit importance to the disagreement between legal sexual identification and the one perceived by the subject, allowing the rectification of the sexual role attribution with the final constitutive sentence becoming producing effects *ex nunc*, as a result of the modifications of the sexual characteristics accompanied by the persuasion of the subject to belong to the different and opposite sex from the one assessed at birth on the basis of the morphological observation of the external sexual characteristics. The fact upon which the regulations is based is the necessary correspondence between body and psyche. Therefore only if the sex attributed and assessed at the moment of the birth no longer corresponds to the new and diverse sexual characteristics taken on by the interested party, does sex role attribution rectification take place. Differently, an operation for sex change would be completely unlawful.

The right to gender identity finds its summary legal foundation in the constitutional provisions concerning the protection of the person (art. 2 of the Constitution of the Italian Republic), and in art. 32 of the Constitution, on the presumption that the safeguarding of health is also meant as psychological health, conceived not in a biological sense but as an instrument which is functional to the development of the person.

It is interesting to emphasize that the correction of gender and name change creates a problem of continuity and/or discontinuity in legal matters concerning the subject which could certainly determine a change in the position of the same with respect to the judicial system, with reference to relationship, personal and otherwise pending the date of correction, destined to undergo changes in some cases.

2. Surgical intervention in primary sex characteristics is fundamental for the sex correction in the Public Registry

The prevailing opinion is subordinate to the request for the correction of sex role attribution by the subject undergoing sex reassignment surgery of genital reproductive organs and the modification of the primary sexual organs.

The acquisition of the primary sexual characteristics of the different sex to be attributed, is needed, even if the functionality of the new organs is not requested.

This new position stems from a social need, which puts the legal provision on track and steers toward a restrictive reading of the regulations and that essentially requires a surgical modification of the primary sexual characteristics.

According to this opinion, the phrase “when an adjustment of sexual characteristics is necessary” (ex art. 31 d.lgs. n. 150/2011) indicates that in order to obtain the rectification of data in the Registry Office, sex reassignment surgery must be carried out.

In this perspective, the legislation of some countries (Belgium, Denmark, Finland, France, Georgia, Italy, Switzerland, Malta, Rumania, Slovakia, Slovenia and Ucraina) can be included, where it is necessary for the person to undergo sex reassignment surgery and not to be able to procreate.

3. The surgery to adjust primary sexual characteristics is not a necessary condition for sex reassignment. Therefore adequate hormonal therapy and esthetic treatment on secondary sexual characteristics are sufficient

However an evolutionary interpretation of legislation which takes into account socio-cultural transformation brings the analyst to not make a distinction in the area of the changes necessary in order to obtain rectification only if the same determine “an approach by the subject toward the sex perceived and desired”.

According to this different hermeneutics opinion, it is not yet necessary to proceed with sex reassignment surgery when this is considered to be detrimental to the physical health or only to the psyche of the subject or not useful in light of old age.

In some cases, the subject can reach his psycho-physical wellbeing through the modification of secondary sexual characteristics, obtained after hormonal and esthetic treatments.

This state of psycho-psychical wellbeing must be able to be completed and made public with the rectification of the registry data. This is the direction in which a systematic interpretation of the legislation, which disciplines the subject, is going; according to art. 31, s. 4, leg. dec. no. 150/2011, excludes every and any form of constriction to undergo medical-surgical treatment, foreseeing the possibility to resort to the same only when the adjustment of the primary sexual characteristics is necessary, since gender identity disorder has determined a conflicting attitude of refusal by the subject of his own sexual organs, susceptible to being modified only through surgical treatment. Therefore, this is the verification the judge must carry out in order to evaluate the necessity of the medical-surgical treatment to be authorized.

Following an extensive interpretation, the use of the term “adjustment” and of the locution “when necessary” indicates the non-necessity to modify all the sexual characteristics but their simple evolution in order to bring the exterior identity of the subject closer to the one which corresponds to the new sex.

Other suppositions would witness an evident compression of the right to a gender identity, which is a component of personal identity as protected by art. 2 of the Constitution as well as a *vulnus* to the subject's discretion to self-determination in order to undergo a certain health treatment which cannot be imposed unless in the presence of specific legal regulations, nonetheless within the limits deriving from the respect of the dignity of the person, as sanctioned by art. 32 of the Constitution. In this perspective, therefore, the imposition of sex role reassignment surgery, as a *condicio sine qua non* for the correction of the Public records of gender, would certainly be detrimental to the dignity of the transsexual person, a value specifically qualified as inviolable by art. 1 of the Treaty of Nice (Astone, 2016, 309-310).

A part of judicial decision concerning substance move in this direction by recognizing

the right to a sexual identity not only to those who, feeling deeply that they belong to the other gender, have modified their primary sexual characteristics, but also to those who, without modifying their primary sexual characteristics have built a different gender and stop at significantly adjusting the aspect of their bodies .

The decision of the Court of Messina, based on respect for the dignity of the individual who must live his values "daily with the most freedom", holds an incomplete evolution of the sexual characteristics to be sufficient to realize "a significant approach on the part of the applicant toward the identity typical of the new sex", without obligating the interested party to undergo surgical modification which could also result in damage to physical and psychological health, or could deprive the subject of the ability to procreate.

In this itinerary of cultural development, the sentence of the judges from Messina was followed by an important pronouncement of the European Court of Human Rights, 10.3.2015, *Affaire YY c. Turkey*, which recognizes the right of the transsexual to the modification of the Public Records, independently from the person undergoing a surgical operation, in that a person cannot be made to undergo forced sterilization. In fact, the Court of Strasburg confirms the right of the person to refuse to undergo an unjustified procedure so invasive of psychophysical integrity, which violates the right to the respect of private and family life, guaranteed by art. 8 of European Convention on Human Rights.

The notion of private life is definitively characterized within the right to realize one's own sexuality by means of sexual transition.

In addition, the judicial precedent of the Supreme Court of Cassation reject the obligation to surgery unless "the acquisition of a new gender identity" constitutes a "last haven" verified "through rigorous technical scrutiny in judicial setting". The Court recognizes a balance of interests in light of the principle of "proportionality": a person cannot be forced to undergo invasive surgery to modify primary sexual characteristics, but medical-surgical "adjustment" treatments of the secondary sexual characteristics can be insisted on. Rather, it is necessary to "embrace the medical

psychological pathway which is more coherent with the personal process of change of the identity of gender". In other words it must be corroborated by "rigorous judicial verification" in order to ascertain the certainty of the juridical relations.

In 2015, for the first time, the Supreme Court therefore admitted a sex rectification even in the absence of a surgical intervention to adjust the primary sexual characteristics: the crux of the reevaluation of the sexual self-determination of the person, in light of a dynamic and personalized consideration as much a concept of health as of gender identity.

Nevertheless one cannot ignore the risk that recognizing the possibility to rectify sex role attribution, without the need for surgical intervention, allows the possibility of marriage between persons who present the homogeneity of sexual characteristics on a physical-morphological level, thus circumventing the ban inherent in the current legal system. "The dissolution or the suspension of the civil effects of the marriage can be requested by one of the spouses" (...) when "the sentence of rectification of sex role attribution becomes final pursuant to regulation l. 14 April 1982, n. 164" (art. 3 l. Divorce).

In some countries (Austria, Croatia, United Kingdom and Portugal) in order to obtain juridical recognition of sexual rectification, neither the obligation to undergo surgical intervention nor the verification of sterilization and the hormonal treatment are sanctioned.

The freedom to self-determination of the person is significant.

The Constitutional Court is moving towards the path in favor of rectification separate from surgical intervention with sentence 5.11.2015, n. 221, according to which, the exclusion of the necessity for surgical intervention for the purpose of Public Records rectification appears to be the corollary of an approach which - coherence with supreme constitutional values - entrusts individuals with the choice of the modalities through which to realize, with the assistance of doctors and other specialists, one's own personal transition pathway, which in any case must regard the psychological, behavioural and physical aspects which contribute to the makeup of gender identity.

For the Court, surgical intervention on primary sexual characteristics is not necessary for the purpose of Public Records rectification.

The person must be able to choose his own transition pathway.

The choice to undergo surgical modification of sexual characteristics can only be the result of "a process of self-determination towards the objective of a sex change". Therefore, resorting to surgery constitutes only one of the possible pathways to adapt one's exterior image to one's personal identity as perceived by the subject. In fact, the Constitutional Court sentence reads that

the prevalence to safeguard the health of the individual concerning the correspondence between anatomical and Public Records gender, holds that surgical treatment is not a prerequisite to proceeding to rectification (...), but is a possible means to obtaining complete psychophysical wellbeing.

Therefore, one can conclude that also Constitutional Court, as well as that of Cassation, agrees that the choice of modality through which to obtain - with medical assistance and with that of other specialists - a personal “transition pathway”, must however regard the psychological, behavioural and physical aspects which make up gender identity.

Surgical treatment is an eventual instrument, a functional means to the realization of complete psychophysical wellbeing in that it leads to a correspondence between the individual’s features and those of the gender one belongs to.

There are two recent legal decisions worthy of mention in this regard.

According to the Court of Santa Maria Capua Vetere¹, if there is no textual reference to the procedures used for carrying out a sex change (surgical, hormonal or resulting from a congenital situation), this means that surgical treatment - just one of the ways in which the sex can be changed - has to be excluded as a requirement for accessing the process for legally amending personal details.

The judge actually observes how in this case, irrespective of the surgical procedure for which authorization was sought, there are conditions for granting the change of gender and name. Indeed, according to the report on file, there is a clearer and more accepted association with the female gender, which is manifested by: insistence by third persons on the gender being female; typical female appearance and clothing; preference for roles and behavioural features typically attributed to the female gender; emotional relationships with male subjects, experienced from a subjective female perspective.

Similarly, the Court of Bari also states², in this case, that the male plaintiff does not wish to undergo destruction of his sex and reconstructive surgery on the basis of the psychological perception of his gender being female, which has led him to undergo feminizing hormone therapy and surgical breast implantation. In fact, consistent with the psychiatric report which emphasised the importance of amending personal details (regardless of surgical intervention), there are also allegations made by the individual concerned during the cross-examination hearing, from which the constant concern of the man emerges at having to produce documents that prove that he is of the male gender and not the female gender with which he identifies more. The court therefore accepts the plaintiff’s claim, excluding the necessity for prior surgical intervention and ordering the civil registrar of the City of Bari to carry out the required amendment to the relevant birth registration, so that the recorded indication of sex as “male” must be changed to “female”.

Moreover the concept of “human dignity”, cannot be determined a priori, it is not static, but must make the identity of the person emerge, without compromise, without having to arrange it into a typical formula, foreseen and accepted by the

¹ Court of Santa Maria Capua Vetere, Sect.. I, sent. 12.05.2017.

² Court of Bari, Sect. I, sent. 22.05.2017.

legal system. Ex art. 3, par. II, of the Italian Constitution, different situations must be treated in different way, with the result that it is necessary to identify concrete measures suited to favor the process of reuniting “soma” and “psyche”, without resorting to automatic and general sex role reassignment surgery.

Thus outlined, in the case of transsexualism, dignity constitutes the criteria for the resolution of the conflict between the general interest of the subject requesting the change of gender and the public interest to the certainty of the legal relations.

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Part 2

Unaccompanied foreign minors: protection measures and the health care system

Unaccompanied Foreign Minors

AURORA VESTO

1. Immigration and the vulnerability of the weaker categories: the entry procedures to Italy concerning minors

The right to immigration is composed of the set of regulations which define the legal treatment of foreigners, both minors and adults, based on diverse, and often diametrically opposed, principles with respect to what Italian legislation provides for family and minors' rights.

For instance, the regulations on immigration contained in the current text, (legislative decree 25 July, 1998, n. 286 – Consolidation act of the provisions concerning the discipline of immigration and the regulations on the condition of the foreigner), appears to have been inspired by a political choice to limit the access of foreign citizens to the national territory and to circumvent their rights: the non-EU immigrants are often perceived as a potentially disruptive force to public safety and as undesired competitors on both the job market and the system of social assistance.

In this scenario, unaccompanied minors play a major role, they are in a delicate condition the Italian system must be prepared to safeguard in reason of their “vulnerability” (on a specific case, the Egyptians in Italy, see Bianchi, 2017).

The general principles of the Consolidation Act on Immigration, article 2 – “Rights and duties of the foreigner”, attribute to the foreigner, “ the fundamental rights of the human person foreseen by the regulations of internal legislation, by the current international conventions and by the principles of international law generally recognized”. In addition, the second subsection specifies that “the foreigner regularly residing on national soil enjoys all rights in civil matters attributed to the Italian citizen, except where the international conventions in effect for Italy and the present Consolidation Act provide differently”. The recognition of these rights states that “the foreigner regularly residing, participate in local public life” (art 2, subsection 4, T.U.) and that

treatment equal to that of the citizen be recognized regarding jurisdictional protection of rights and legitimate interests in the relationship with the public administration regarding access to public services, within the limits and methods provided by the law (art. 2 subsection 5, T.U.).

An effective participation cannot limit access to social services and training (ex art. 2 Cost) which are necessary for the manifestation of the individual's personality.

Among the immigrants, pregnant women and unaccompanied minors compose the more vulnerable categories and are thus should be protected.

As concerns the position of minor foreign immigrants, the Consolidation Act attempts to limit the migratory phenomenon whilst guaranteeing "the priority", the best interest of the minor, "in conformity with art. 3, subsection 1, of the Convention on the rights of the child dated November 20, 1989, ratified and executive pursuant to law 27 May, 1991, n. 176" (art. 28, subsection 3, of legislative decree 286/1998).

The entry procedure and residence in Italy of the foreign minor depends above all on his family conditions, in other words, if the minor:

- a) Enters or is present on national soil accompanied by his parents or by an adult who has legal representation;
- b) Or if the minor is in Italy alone, that is, "unaccompanied" by his parents or by an adult who has parental responsibility for him.

In the first case, the entry in Italy of a minor following his parents is allowed (art 29, subsection 4, legislative decree n. 286/1998) if the latter have a residency permit or a visa for work, study, religious reasons and have both the availability of housing and a minimum annual income (art. 29, subsection 3, cit.), required for family reunification. In reality, in the majority of cases, the foreign minor arrives in Italy after the emigration of the adult, following a request for "family reunification" (ex art. 29, d.l.s. n.286/1998) advanced by the parent, by the foster parent, or by the foreign tutor already resident in Italy holder of a residence permit lasting no less than one year.

It is not infrequent, as well, that the minor enters our country in view of a request for international adoption (regulated by Capo I, of Title III, of the law 4 May, 1983, n. 184) on the behalf of a couple resident in Italy.

Instead, the situation is much more complex in the second case; that is, whenever the foreign minor is "unaccompanied".

"Unaccompanied" is meant to describe those minors who are on the Italian soil without an adult (parent or tutor) having a legal responsibility for them.

The case can regard both a minor whose right to residency in Italy is no longer valid, as well as a minor who has entered the country illegally.

Art. 19, subsection 1 *bis*¹, d.lgs. n. 286/1998, safeguards the unaccompanied foreign minor, providing that "in no case can the unaccompanied foreign minor be

¹ This subsection was included by article 3 subsection 1 letter A), 7 April, 2017, n. 47.

deflected at the border”² and that he must obtain a residence permit, released by the police commissioner, “for under age” (ex art 10, subsection 1, let. a), 7.04.2017, n. 47)³. In any case, despite granting residence permit for under age, the situation of these minors, who are already in a vulnerable dimension, is strongly precarious⁴, in that it is referred to the “Committee for foreign minors”⁵: this committee (to which the minors have to be signaled once they obtain a residence permit for under age), has a very important role, that is to proceed with an accurate investigation, in the country of origin of the minor, in order to evaluate whether or not it would be opportune to deflect him, especially if this would guarantee his right to family reunification⁶.

1. Ministerial decree 01.09.2016, n. 103734

The decree of the Ministry of the Interior of 01.09.2016, n. 103734⁷, “Institution of governmental welcoming centers dedicated to unaccompanied foreign minors “, establishes in art. 1 “the welcoming procedure, the structural standards, coherent with regional legislation, and the services to be provided” that the government welcoming centers have to respect, in order to “assure a welcome adequate to their minor age, in respect of the fundamental rights of the minor and of the principles expressed in art. 18 of the same legislative decree”.

Article 2 let. a of the decree defines “as an unaccompanied minor: a citizen of a country not belonging to the European Union and a stateless person under eighteen years of age, who, for any reason, finds himself on national soil, without assistance and legal representation”. The first welcoming stations must be in easily reached locations and must “guarantee access to services and to the social life of the territory” (art. 3, subsection I decree).

² In general the deflection of the foreigner is, however, limited to exceptional cases (there must be “reasons of public order or State security” ex art. 13, subsection 1, lgs. decree n. 286/1998) and must be carried out by an immediately executive motivated decree and then carried out by the Chief of Police by having the person escorted to the border by the police force.

³ The importance of the residence permit is evident, since only after obtaining it does the foreign minor have a right (to the same conditions as Italian minors) to health care, and therefore to all the services offered by the national health care service (medicine, hospital stays, specialist medical examinations, certificates etc.), subject to registration to the service (art. 34 lgs. decree n. 286/1998).

⁴ In addition, art. 31 of the Consolidation Act, provides for the possibility that the minor can be deflected “however on condition that the same provision does not carry severe consequences for the minor, upon request by the Chief of Police by the Family Court. The Family Court must decide promptly and however, take no more than 30 days”.

⁵ Disciplined by art. 33 Consolidation Act on immigration.

⁶ In this last case, the Committee orders, following the necessary authorization without reservation by Family Court, the so-called “assisted repatriation”, which is denied by the Courts because of mandatory trial requirements or if there is pending legal action against the minor.

⁷ Published in the Official Journal on 8 September, 2016, n. 210.

Even though the regulation foresees that “every center assure the continuous residence of the unaccompanied foreign minor over the 24 hours, for a period no longer than 60 days” (art. 3 subsection 2, decree), experience shows that often their stay in these structures is longer than 60 days.

Every first welcoming center “guarantees hospitality for 50 minors in at least two locations exclusively destined to this purpose. Each location can welcome a maximum of 30 minors” (art. 3, subsection 3 decree).

Article 5 of the decree disciplines the regulations of the center, establishing the procedures for the distribution of welcoming services in order to ensure age appropriate living conditions which are appropriate to the wellbeing and the development of the unaccompanied foreign minor, establishing among other things, daily outings, the procedure for the filling out of the individual forms, meal distribution, the procedures for learning the Italian language, the work shifts of each professional figure, as well as the tasks necessary to guarantee continuity and regularity of the services, also through periodic multidisciplinary group meetings of the operators.

2. Ministerial decree 7 April, 2017, n. 47 “Dispositions concerning measures of protection of the unaccompanied foreign minors”

With the law dated April 7, 2017 n. 47⁸, the legislators intervened to safeguard the minor due to his condition of “greater vulnerability”.

In consideration of this, the law (including subsection “1 bis” in article 19 of the legislative decree 25 July, 1998, n. 286) states that “in no case can the unaccompanied foreign minor be deflected at the border”. Thus conferring an ample safeguard to those unaccompanied foreign minors who find themselves on Italian soil without their parents. After having defined, according to the law, that by “unaccompanied foreign minor” the law means “the minor not having Italian citizenship or that of the European Union who, for whatever reason finds himself on Italian soil or otherwise subject to Italian jurisdiction, without assistance and parental representation or that of others adults legally responsible for him on the basis or current Italian legislation” (art. 2), in article 1 the law declares that “the unaccompanied foreign minor holds the rights concerning the protection of minors equal to the treatment of Italian or European minors”.

The implicit reference to Italian regulations conforms the condition of the minor, who, for whatever reason, “finds himself to be on Italian soil”; the consequence of this reference is the applicability of both the ordinary and special legislation to the unaccompanied foreign minors thus the law dated 4 May, 1983, n.184, “Right of the minor to a family”. The motivation for the law on adoption can be traced to article 1 subsection 4, of decree n. 184/1983, which states that,

⁸ In the Official Journal 21 April, 2017, n. 93.

“when the family is not able to provide for the growth and education of the minor, the institutes of the present law are applied”, and subsection 5, “the right of the minor to live, grow and be educated within a family is assured without distinction of sex, ethnicity, age, language, religion and in the respect of the cultural identity of the minor and however not in contrast with the fundamental principles of the law”. The law, whilst advocating the organization of support interventions within the family in order to privilege the growth and education of the minor in his family of origin, recognizes adoption as an exceptional solution, to be turned to only when it is impossible to address the abandonment of the minor in other ways. Capo 1 “adoption of foreign minors”, of title III, “international adoption”, of decree n. 184/1983, specifically regulates international adoption. It is a phenomenon which has become even more important in our legal system whose primary purpose is the protection of children, confirming what was already ordered by the Hague convention on May 29, 1993 regarding the protection of minors and cooperation on the subject of international adoption. In particular, these adoptions can only take place if the competent authorities of the country of origin have ascertained that the international adoption corresponds to the best interest of the minor⁹.

This legislative framework of reference is also the result of the present position which the family has assumed in our society. Family law, in fact, following law 10.12.2012, n. 219 and legislative decree 28.12.2013 n. 154, has opened new horizons in a “child central” dimension, in which the minor is placed at the center (of the family and of all the social training necessary for his growth) of the system. The family role is declining according to the European principles as well.

Above all, the CEDU comes to mind and thus articles 8¹⁰, 12¹¹, 14¹²; then the Charter of the fundamental rights of the European Union (Charter of Nice), which besides banning (ex art. 21) all types of discrimination, also of a sexual nature, in art. 24, covers the rights of the minor, whose interests “must be considered preeminent”.

Also decree n. 47/2017, in perfect continuity with Italian adoptions laws and with the principle of subsidiarity, in art. 6, subsection 2, with the inclusion in art. 19 of the legislative decree 18.08.2015, n. 142, of subsection 7-quarter which states that, “whenever suitable family members are identified to take care of the unaccompanied foreign minor, it is preferable to community placement”, thus attributing community placement as being marginal, subordinate to the familiar reality of the minor who must therefore be placed in the condition to nurture his personality within both the family of origin as well as in society. The centrality of

⁹ For research on international adoption in favor of *singles*, when it is proven to be functional in the best interests of the minor, I refer to the contribution of Astone (2011).

¹⁰ Article 8, first subsection, guarantees the respect for private and family life against any unjustified interference by public authorities and against the inertia of the same in guaranteeing adequate conditions for the effective enjoyment of the rights guaranteed by the CEDU.

¹¹ Article 12 assures every person the right to marry and have a family.

¹² Article 14 strikes discrimination in the enjoyment of those rights as guaranteed by the Convention.

the interests of the minor (unaccompanied foreign) is evident in the exercise of the “provision for assisted and voluntary repatriation” which is adopted by the jurisdictional court for minors (once heard the minor and the tutor, taking into account the family investigations carried out in the country of origin or in a third country, as well as the report of the jurisdictional social services with regards to the situation of the minor in Italy) when “reunification” of the minor “with his family in the country of origin or in a third country corresponds to the greater interests of the minor” (art. 8, subsection 1, law n. 47/2017).

If it is not possible to identify family members, or if this is not in line with the best interests of the child, then the law provides the instruments to foster family care.

Article 7 of law n. 47/2017 in fact, by including, after the first subsection of article 2 of the l. 4 May 1983, n. 184, subsection 1-bis, states that “the local authorities can promote the sensitization and training of foster parents in order to favor family foster care of the unaccompanied foreign minor, prioritizing it with respect to remaining in welcoming centers”.

Article 5 of law n. 47/2017, which concerns “The identification of unaccompanied foreign minors”, the first subsection provides that “after article 19 of legislative decree 18 August, 2015, n. 142, the following is included:

Article 19-bis (Identification of the unaccompanied foreign minor). -1. From the moment when the unaccompanied foreign minor has come into contact with, or has been indicated to the police authorities, social services (...), the qualified personnel of the welcoming center will hold, where possible assisted by organizations, institutions or associations with proven and specific experience in the protection of minors, an interview with the minor in order to understand his personal and family history and help to bring out any other element useful to his protection, (...). The presence of a cultural mediator is guaranteed at the interview.

Following the interview, “the qualified personnel from the welcoming center will compile a specific social file which identifies elements useful to determine the best long term solution in the best interest of the unaccompanied foreign minor. The social file will be forwarded to the social services of the City of destination and to the Public Prosecutor’s Office of Family Court” (article 9, subsection 2, l. n. 47/2017).

The regulations in subsection 3 of article 5, of regulation n. 47/2017 are applicable. They state that

the identity of the unaccompanied foreign minor is ascertained by the public safety authority, assisted by the cultural mediator, in the presence of the tutor or of the temporary tutor if previously nominated, only after an immediate humanitarian assistance for the same minor has been guaranteed. If the declared age is in doubt, it will be ascertained by consulting identity documents through the collaboration of diplomatic-consular representatives. The intervention of the diplomatic-consular authorities is not to be requested in cases in which the presumed minor has expressed the desire to request international protection or when a possible need for international protection emerges following the interview provided in subsection 1. This intervention cannot be carried out if it would create danger of persecution and the cases in which the minor declares he prefers not to avail himself of the diplomatic-consular authorities.

Despite this, if doubts remain regarding the age declared by the minor, it will be the responsibility of the Public Prosecutor, at the Family Court, to authorize the necessary socio-health tests in order to ascertain the age.

As soon as the presumed age is determined, it must be communicated to the minor or the foster parent and the judicial authorities whilst indicating in the final report “the margin of error” (art. 5, subsection 7) and even when doubts regarding the minor’s age persist, “the presumed age for all legal intents and purposes” (subsection 8). The ordinance attributing age must be notified to both the foreigner and to the foster parents exercising parental rights where nominated, thus allowing grounds for appeal in Claims Court according to article 737 c.p.c. ss.

It is the responsibility of the Police Commissioner to grant a residence permit to those foreign minors for whom deflection or expulsion is not allowed (art. 10 l. n. 47/2017); specifically when the law orders a ban of deflection or expulsion, the Police Commissioner grants permission to reside either for being a minor or for “family reasons”. In the first case, the residence permit is granted upon petition of the same minor, directly through the foster parent, even before the assignment of a tutor according to article 346 of the civil code and is valid until the attainment of the age of majority. Vice versa, in the second case, the residence permit is granted by the Police Commissioner to the 14 year old unaccompanied foreign minor, who is entrusted to (in accordance with article 9, subsection 4, law 4 May, 1983, n. 184) or under the protection of an Italian citizen with whom he resides, or it is granted to the over 14 year old minor entrusted to (also in accordance with the same article 9 subsection 4, of law n. 184/1983) or under the protection of a foreigner regularly residing on national soil or of an Italian citizen living with the same minor.

Article 12 (l. n. 47/2017), includes subsection 2-bis after subsection 2 of article 19 of the legislative decree 18 August, 2015, n. 142, which states that in the choice of a placement, among those available, the needs and characteristics of the same minor resulting from the interview in accordance with article 19-bis, subsection 1, are to be taken into account. The typology of services offered by the welcoming centers must be in accordance with article 117, second subsection, letter m) of the Constitution, concerning the minimum standards of service and assistance provided by the residential structures for minors and must be authorized or accredited according to national or regional regulations on the subject.

Article 13, subsection 2, of law n. 47/2017, authorizes long term integration measures to support the unaccompanied foreign minor once he reaches the age of maturity, who, although he has undertaken a pathway to social inclusion, because of his circumstances “necessitates prolonged support aimed at the positive outcome of his pathway to autonomy”; once ascertained “the Family Court can order, also upon request of Social Services, via motivated decree, the deferment to social services for foster care, however not past the age of 21”.

Evidently, the importance of Social Services in the pathway to social inclusion in society is important. Their role is to provide all activities relative to the

predisposition and supply of services, whether free or paid, or of economic benefits in order to remove or overcome situations of need and difficulty which the minor meets on his “new” life pathway. Article 14 of law n. 47 of 2017, concerns the “Right to health and instruction”, the second subsection states that “In the case of unaccompanied minors, signing up for national health care is the responsibility of the person, even if temporarily, foster parent or the welcoming center”.

The third subsection of article 14 guarantees above all, the right to instruction for unaccompanied foreign minors, inasmuch as it allows all scholastic institutes of every order and degree to be

proactive in favoring the fulfillment of scholastic and training obligations (...) on the part of unaccompanied foreign minors, also through the organization of specific projects which, where possible, provide for the use and coordination of cultural mediators, and agreements which promote specific programs of apprenticeship.

Article 15 of law n. 47/2017, in addition guarantees the “Right of the unaccompanied foreign minors to be heard during legal proceedings”, thus safeguarding the emotional and psychological assistance of the unaccompanied foreign minors, at all stages of the proceedings, with the presence of a cultural mediator.

Therefore, the cultural mediator becomes the filter who facilitates communication between the minor and the host society, in a dimension which promotes the harmonious growth of multiculturalism considered as a resource and no longer as an enemy.

3. The other side of the coin: immigrants are not a “danger” but a “resource”

Above all, immigration is a demographic wealth for the Italian population, taking into account the low birth rate and the high rate of aging. The number of multicultural families whose members come from different cultures and customs is constantly on the rise; this is the result of both the constant growth of mixed marriages between Italians and people originating from non-European countries, and the considerable presence of minor children of foreign parents who, by birth or immigration as infants, live in Italy thus adopting its culture and customs, which often moves them away from the customs of their parents’ countries of origin.

Since the mid 1980s the adoption of foreign minors residing abroad had already surpassed the number of national adoptions to the point that today in Italy two thirds of the adoptions are international: this is the result of a procedure which fulfills the desire to become parents in a shorter time with respect to national procedures.

On the trail of the valorization of the presence of immigrants in Italy, a new citizenship law has been proposed, c.d. *ius soli*, which attributes citizenship to those who are born (*ius soli*) or study in Italy (*ius culturae*). On July 25, 2015 was

issued the consolidation act which collects the 24 bills concerning the modification of law n. 91/92. This bill introduces for all persons (and not only for stateless persons), the principle of *ius soli* strengthened for those who are born in Italy of foreign parents and of *ius culturae* for those minors who arrive in Italy before the age of twelve and have attended at least one five-year scholastic period; in addition, for the minors who arrive between the ages of 12 and 18 there is a residency requirement of at least 6 years. On October 13, 2015 the Chambers approved the new citizenship law (d.d.l. 2092), whose motivation is to valorize all those foreign families who, being totally integrated into the life and culture of the Country, actively contribute to Italian growth. After the approval of the Chambers, the reformed bill on citizenship was brought to the examination of the Senate Assembly on June 15.

In addition, the immigrants show a remarkable mobility and an openness to all types of employment, be it agricultural, industrial, construction or other services.

There are also immigrants who become entrepreneurs in Italy: according to statistical research, as of January 2016, there were 656.000 immigrant entrepreneurs and 550.717 immigrants heads of businesses, representing a total of 6,7% of the national Contributory Value equal to 96 billion euro.

Following this trend, the estimate of the annual Report of the Moressa Foundation¹³ on the economy of immigration reveals that in 2013, the social security contributions paid by foreigners who live and work in Italy reached a quota of 10.3 billion. This shows that the immigration “GDP” is worth 8.6% of national wealth, based on the fact that foreign workers pay the pension of 620 thousand Italian retirees a year, with an incidence on social contributions of 4.8%.

In conclusion, what has been said brings us to reflect on and consider migrations “as an opportunity” in a perspective which is no longer binary, which privileges “class, sex and race” as social power relationships but in a harmonic perspective of reciprocal interests; the interventions of the Italian legislators in fact, show an important inversion of perspective, above all towards the “unaccompanied foreign minors” who are above all a resource for a country which unfortunately, today is characterized by a higher mortality rate than birth rate.

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¹³ For further information see fondazioneleonemoressa.org.

Compulsory Vaccinations for Italian (and Foreign) Minors: legal and regulatory aspects

ALBERTO MARCHESE

Introduction

With the Circulars of the Ministry of Health of 14th and 16th August 2017, the entire regulatory discipline on the obligation of prophylactic vaccines as per Decree no. 73 of 7 June 2017 has been extended to include unaccompanied minors between the ages of zero and sixteen, being minors who are not Italian or European citizens who, for whatever reason, are to be found in the territory of the State, without the assistance and representation of their parents or other adults who are legally responsible for them.

Such circumstance therefore allows for an analysis of the recent Italian legislation in view of an international perspective that takes into account the incidence of new “imported” pathologies and which specifically concerns the theme of immigration and the refuge of others in an inclusive manner, as is correct in a modern and multicultural society.

1. New Italian legislation on compulsory vaccines

With the decree of Law 7 June 2017, no. 73,¹ *Urgent Provisions on Vaccine Prevention*, it is determined that vaccines will be compulsory (12 vaccinations before 16 years of age) - in accordance with that indicated in the calendar attached to the current *Piano Nazionale di Prevenzione Vaccinale* (PNPV - the National Plan for Preventive Vaccines) - which *condicio sine qua non* for the enrolment in crèches and subsequently in kindergartens, be they public or private.

¹ The updated text of the law decree can be consulted in the Official Gazette no. 182 of 05.08.2017.

The regulations being assessed foresee a series of measures aimed at extending and rendering effective the obligation borne by the parents to vaccinate their children.

As a rule, vaccination provides notable benefits not only for the person vaccinated but also in a mediated way, generating wider protection for non-vaccinated individuals (the so-called *herd immunity control system*).

There is no doubt that vaccines have profoundly changed the history of traditional medicine and are generally considered a fundamental tool for protecting from and the reduction of mortality.

In our country, the illnesses for which mass vaccinations have been conducted have all been nearly eliminated - as is the case with *diphtheria* and *poliomyelitis* or, in any case, considerably reduced - as per *tetanus* and *hepatitis B*. With regards to other diseases with a neonatal or infantile incidence, a rapid and steady decline has been achieved with *whooping cough*, *measles*, *rubella* and *mumps*.

These vaccines, along with those protecting against *meningococcus*, *pneumococcus*, *HPV* and *influenza* are included in the so-termed *minimum healthcare provisions*.

Over the years, vaccines have been developed with high efficacy in preventing rapid (and disastrous) infectious disease in clinical trials. This is the case with vaccines against *meningitis* and other invasive infections from *meningococcus C* and from *Streptococcus*; or, in any case, diseases which, although not involving significant complications in most cases, have a high incidence of epidemics none the less - think of *varicella*.

The Presidency of the Council itself affirmed that, although there is currently no national emergency, the objective of the measures is specifically to prevent the difficulties encountered in this context becoming true health emergencies today.

The strong media push that emphasised the measure being addressed has led to a more careful and serious reflection on the topic and, in particular, on the aspects of the harmful consequences arising from the obligation to submit to a compulsory vaccination *ex lege*. In this peculiar field of inquiry, offered in evidence first of all is the extreme difficulty of being able to reconcile different applications, all of which prove to be of fundamental importance, such as the public interest in the prevention of certain pathogens and the (subjective) right of the individual citizen not to be subject, against their will, to “non-enforceable obligatory treatment” (Panunzio, 1979),² if not under the law.³ However, the right of self-determination

² The qualification in terms of non-enforceable obligatory treatment - in accordance with the provisions of Article 9 of Legislative Decree no. 273 of 1994 - follows from the reading of those provisions of the decree that provide for the application of a pecuniary administrative sanction for the “refusal of vaccination”, that oscillates from 100 euro to 500 euro, on the basis of the number of vaccines not effectuated.

³ In the light of the cited legal reserve *ex* Article 32, section II, Const., according to which, “no-one can be obliged to receive a determined healthcare treatment if not by the provisions of the law”.

of the individual can only be sacrificed to protect collective health in order to protect the public interest.

With regard to newborns and foreign minorities, however, the focal point of the problem passes from the dualism of “personal freedom” and “public interest” to the role played by parents or guardians in the matter (or, in the case of foreign minors accompanied by assistance centres) who have to express their consent for the vaccination of their children. The vaccination of children, therefore, considered as compulsory, seems to be a manifestation of the fulfillment of the duty of social solidarity; so much so that Article 4-*bis* of the decree, coded as the “National Vaccine Register”, has provided for the establishment of a national registry where both vaccinated individuals and those to be vaccinated are registered.

There are, indeed, certain specific norms signifying the political and legislative will to address such problems by awarding a determined indemnity to those who have contracted a specific disease due to compulsory vaccination⁴ (Scognamiglio, 2009).

However, the excessive length of the bureaucratic timeframes and the overall paucity of the aforementioned indemnity do not allow for the protection mechanism to be considered as satisfactory.

On the contrary, it is necessary to give credit to the interpretative view that medical-healthcare activities in the field of compulsory vaccinations could never be classified as a dangerous activity and, thus, the provision pursuant to Article 2050 of the Italian Civil Code would never be invoked as a parameter in the claim for damages (Fusaro, 2013).

The peremptory nature of the assumption, however, does not deserve to be unquestioningly shared. In fact, the arguments put forward in support of the “sempiternal and beneficial usability” of the vaccines considered by the prophylaxis protocols imposed (or otherwise recommended) by the Ministry of Health are not so solid.

Indeed, to date, civil liability under Roman law tends to emerge as an objective-based mechanism of protection (Alpa, 2005), relegating the assessment of the subjective component to the subsidiary parameter in terms of guilt or gross negligence (Bianca, 1994).

As such, recourse of the complete usability of the protection mechanism outlined in Article 2050 of the Italian Civil Code can be sustained (Astone, 2012) also for medical-health activities.

It is no coincidence that the aforementioned rule is mandated as a parameter for the resolution of various and barbed controversies in the theme of iatrogenic damages, such as those related to infected blood transfusions, contributing to establishing the alleged responsibility of the government and monitoring agencies (Ponzanelli, 1990).

⁴ Compensation is due to the fact that the individual, in order to protect public health, undertakes a compulsory vaccination, but if they then suffered harm, the ordinance expresses the need to repair such damage individually.

The same rule on the suitability for indemnification for damage confirms, albeit indirectly, that prophylaxis of vaccines is (of course) a legitimate but dangerous activity and, as such, falls entirely within the scope of Article 2050 of the Italian Civil Code (Ponzanelli, 2012).

2. *Compulsory vaccinations as an urgent medical protocol*

Proper management of the medical risk requires detailed and appropriate organisation in terms of applying the most suitable prevention measures in order to avoid the proliferation of systemic endemic illnesses.

In this respect, a key and irreplaceable role is played by specific vaccines that provide a higher level of security in these contexts - such as school and refuge centres - where “forced contact” with other individuals leads to the rapid spread of a potential contagion being considered as more likely.

As mentioned above, in terms of the non-enforceable obligatory treatment of certain campaigns of prophylaxis vaccination such as that introduced by the recent regulatory option,⁵ the very nature poses obvious legal and ethical issues with particular regard to the possibility of imposing such vaccinations on minors and to foresee sanctions for their parents in the case of express (and unmotivated) refusal (Panunzio, 1979).

Compulsory vaccination means that, upon enrolment of the minor and/or unaccompanied minor aged zero to sixteen years, parents or guardians are obliged to present appropriate documentation proving the effectuation of the ten compulsory vaccinations pursuant to Article 1, first section of Law Decree no. 73/2017, both for the school structure and for childcare services. In addition, section 1-*quater* suggests the free administration of the following four (non-compulsory) vaccines: a) anti-meningococcal B; b) anti-meningococcal C; c) anti-pneumococcal; d) anti-rotavirus. To this end, it is incumbent on school directors to report to the local healthcare agency by 31st October of each year, “the classes in which there are more than two unvaccinated pupils present” (Article 4, section 2). However, it does not seem reasonable to subordinate this obligation to the presence of at least two non-vaccinated pupils, thus causing partial and non-total prophylaxis, since even a single unvaccinated pupil and carrier of the virus can provoke infections and risks of infection (Cacciola, Spatari *et al.*, 2005).

⁵ It should be recalled that prior to 1999, breaches of the obligations to vaccinate resulted in pecuniary administrative sanctions, in accordance with the legislation then in force, as provided for by Article 47 of Presidential Decree no. 1518 of 1967, refusal of admission to compulsory schooling and examinations in the case of failure to certify the pupil’s submission to compulsory vaccinations.

Article 3 of the law decree sets out, in the third section, that

for educative services for infants and primary schools, including non-commensurate private services, the submission of the documentation referred to in point 1 constitutes a requirement for access. For other degrees of education, the submission of the documentation referred to in point 1 does not constitute a requirement for access to school or to exams.

The documentation confirming vaccination must be submitted at the beginning of the scholastic year (for the 2017-2018 year, such must be presented by 10th September 2017) so that the regular monitoring and communication can be carried out by the school directors, ex Article 4, section 2, of Legislative Decree 73/2017.

As such, in the first case under the law, the administration of vaccines is a necessary condition for enrolment, whilst in the second case, failure to observe the obligation is a prerequisite for the application of a pecuniary administrative sanction,⁶ which is imposed on parents exercising their parental responsibility, or to relatives or custodians, to the amount ranging from “one hundred to five hundred euro”⁷ (Article 1, paragraph 4).

However, parents, guardians or custodians do not incur such sanction if they undertake, following contestation from the competent local healthcare agency,

within the terms indicated in the act of contestation, to administer the vaccine or the first dose of the vaccination cycle to the child, provided that the completion of the prescribed cycle for each compulsory vaccination takes place in accordance with the time schedules established by the vaccination schedule in relation to the age (Article 1, point 4).

It should be considered that the interest of education and that of health equally offer a dual viewpoint, both individual and collective, and therefore the vaccination requirement is functional in the prevention of the risk of diffusive contagion⁸ (Domenici *et al.* 2016).

In any case, for subjects carrying epidemic infectious diseases, removal from the school environment - for the time strictly necessary - must be considered compatible (and, therefore, weighted) with the right to education.

Specifically, the law decree provides that the obligation to vaccinate (from which are exonerated, above all, those who are immune to the contagion due to natural illness, as evidenced by the notification of the medical practitioner) may be omitted or deferred “only in the event of an established health hazard, in relation to specific clinical conditions documented by a general practitioner or pediatrician of free choice” (Article 1, point 3); and, therefore, children in this situation “are

⁶ For the assessment, the application and provision of the administrative sanction, the Law of 24th November 1981, no. 24, et seq., shall apply, where applicable (Article 4, paragraph I, of Legislative Decree no. 73 of 7 June 2017).

⁷ In the preamble, however, the planned sanction ranged from “five hundred euro to seven thousand five hundred euro”.

⁸ In the specific case, the so-called *best interest of the child* should be assessed, which - as pointed out in the Introduction - currently also refers to foreign unaccompanied minors.

usually included in classes in which only vaccinated or immunized minors are present” (Article 4, point 1).

The same Court of Justice clarified that the fulfillment of the obligation to vaccinate must be seen above all as a means of safeguarding and protecting the interests of the child⁹ (Fargione, 2016).

On the other hand, it has long been recognized that the application of Article 333 and 336 of the Italian Civil Code allows the actuation of the vaccination of the child even against the will of one or both parents, as the refusal to practice vaccination would consist in the parents behaving in a manner that is prejudicial to the child, in terms of safeguarding “good health”.

Following on from such orientation, and in any case contextualizing, is the provision of the decree (Article 4, point 2), which foresees reporting to the healthcare provider of the parent (or the person exercising parental responsibility for the child) who violates the obligation to vaccinate.

As is noted, the concrete content of the measures that the Juvenile Court may adopt pursuant to Article 333 and 336 of the Italian Civil Code is not predetermined *ex lege*, due to being remitted to the prudent discretion of the judiciary.

This concerns a somewhat vast range of possible solutions aimed at ensuring the protection of the child against parental breaches that are not so severe as to warrant the relinquishment of parental responsibility and which must be kept in mind in the order of: 1) the interest of the child; 2) the extent of the injury suffered by the latter; 3) the very decision-making autonomy of parents.¹⁰

The provisions under consideration demonstrate the extreme criticality of the problem that cannot be resolved solely through the imposition of charges or penalties, having first and foremost a deeper and entrenched ideological and cultural matrix. Under consideration is the present conception of the protection of public health.

In particular, with reference to the matter of safety, the school leadership or the manager of the regional vocational training centre will be required to diligently effectuate a check of all documents submitted at the beginning of the school year and to report to the local healthcare authority regarding any presence of unvaccinated pupils, even if only upon there being “more than two unvaccinated pupils” in the classes.

⁹ Cf., Civ. Cass., no. 5877 of 2004 in *CED Cass.*

¹⁰ Cf. Civ. Cass., no. 1653 of 1996 in *CED Cass.*; Civ. Cass., no. 6147 of 1994 in *CED Cass.*

Thus, the position of school leadership becomes a so-called “duty of care”¹¹ (Gargani, 2016) on which the parents of other children (being properly vaccinated or immunised) can legitimately entrust, since in the case of contagion of their children, once the existence of an etiological connection between the contagion and the presence of unvaccinated pupils has been verified, it will be for the school leadership to demonstrate that everything possible had been done to prevent and avoid such an adverse event (Morgante, 2016).

3. *The Regulation of Consent on Compulsory Vaccinations*

In the face of the fairness and the shared need for vaccination campaigns that preserve certain “delicate segments” from the risk of endemic contagion, there is, on the other hand, the fundamental problem concerning the exact latitudinal applicability of the regulations that allow a system of collective prophylaxis that is imposed *ex lege* to be considered compatible with the principle of free consent.

In fact, every medical act finds its assumptions of legitimacy in the free and informed consent of the patient, who, in turn, finds legal backing in the combined provisions of Article 13 and 32 Const. with Article 5 of the Italian Civil Code.

By this logic, it can be understood why preventive safety measures (the subordination of school enrolment to the presentation of vaccination documentation) are also implemented against the will of the pupil’s parents.

Precisely in such cases, the person on whom the duty of care falls correlated with the protection of the health of others is obligated to cite the person who refuses the vaccination.

From a practical point of view, the justifying reason for such rigorous regulations can be found in the consideration for which it proves necessary to protect the rights due to their inalienable and constitutionally-guaranteed nature.

An example is the right to health, where is clear that the consent of the patient is the central component in protecting their sole rights (subjectively and objectively) offered as being not only inalienable for them (even objectively), which is to say that such rights also satisfy the super-individual interests recognised by the ordinance, in addition to the individual interest of their right-bearer.

4. *Self-determination of the Individual in Choosing to Vaccinate*

The option to refuse compulsory vaccination, nonetheless, is evaluated in parallel with the possibility that certain side effects may arise from prophylactic

¹¹ On the configurability of the aforementioned “duty of care” borne by the school leadership, cf. Cass. pen., section IV, 21 January 2016, no. 2536 and Cass. pen., section IV, 1st September 2014, no. 36476, both consultable in *CED Cass.*

serum exposure, which, by evoking a potential risk, would legitimise the individual patient to request a personal exemption.

As clarified, the regulation that imposes a certain compulsory health treatment is not incompatible with the provisions of Article 32 Const. whenever prophylaxis healthcare is directed not only to improve (or preserve) the health of the subject but also that of other subjects, hence it is this additional purpose, linked to reasons of public health, that justifies the limitation of the sphere of personal self-determination. Here again, compatibility exists entirely when there is a reasonable expectation that the vaccine is not capable of adversely affecting the health of the subject, except for those consequences which, because of their short and modest duration, are considered in any case normal and, as such, tolerable.

As mentioned, in the event that damage to the health is actually provoked (Giardina, 1990) in the person subject to the prophylactic vaccination, the payment of “just indemnity” is expected to be awarded, irrespective of the ancillary claims of protection which would still apply whenever the implementation of the legal regulation or the material execution of the treatment are not implemented with the appropriate caution that the current state of the medical and scientific knowledge impose (Bertoncini, 2007; Cappellaro, 2013).

This is the case for vaccinations that are usually imposed, in that the relationship between costs (of the side effects) and benefits (clinical) appears to be more than beneficial; whilst the causation of permanent impairment, correlated to temporary disability, does not logically encounter particular obstacles in regards to grounds for compensation.

Therefore, in order to be able to talk about effective exemptions from vaccination, the issue of the side effects that may result from thus cannot be avoided.

In the case of diseases such as hepatitis and meningitis, particular attention is paid to the possibility of a refusal of the parents¹² of a minor patient, whose dissent is based on ethical, religious or purely intellectual reasons.

In such contexts - sometimes characterized by a strong *deficit* in scientific knowledge and a high rate of subculture - for the purpose of exemption from prophylaxis, the origin derives from the omissive attitude of a parent who does not submit his or her child to vaccination in order to avoid the hypothetical risk of a pathogenesis associated with the side effects of vaccine serum.

The regulation, in emphasizing a positive aspect of the principle of self-preservation *sub specie* of “state of necessity” determines that “exemption from punishment shall apply to anyone forced to commit an offence in order to protect themselves or others from the risk of serious personal harm [...]” (Cassano, 2016).

¹² Our Constitutional Charter determines, in Article 30, “It is the duty and right of parents to support, raise and educate their children.” In cases of the parents’ incapacity, the norm continues, “the law provides for the fulfilment of their duties.”

The parent's duty to protect the health of the child, being the source of the justification of the violation, can never be resolved in the denial, for personal convictions, of the existence of the obligation or a generic fear of future harm to the child, but will have to be concretised in the prompt presentation of specific medical-scientific reasons for which the use of vaccination is advised against in the individual case concerned.¹³

In this context, the essential and indispensable role of the healthcare personnel is to provide the patient with the most complete information in this regard.

This postulates the use of a series of technical information that is able, in light of the acquired scientific knowledge, to pinpoint the potential complications of vaccination with high precision and determine which diagnostic, prior to therapeutic tools, should be activated in order to prevent the risk of indiscriminate side effects.

The feasibility *standards* should take into account the relationship between costs and benefits by establishing a set of selective criteria for the effectiveness of certain vaccinations.

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The New Medicine in the Mediterranean area: legal and regulatory profiles

ALBERTO MARCHESE

1. Migratory flows and therapeutic protocols

The exponential increase in migratory flows poses the problem of revising therapeutic protocols from an ethical and legal standpoint. In a multicultural context, doctor and patient can easily belong to very different social and cultural environments (Berlin and Fowkes, 1983).

Immigration has been and remains an important force shaping Mediterranean demography and identity.

Health characteristics associated with the movement of large numbers of people have current and future implications for migrants, health practitioners and health systems (Betancourt *et al.*, 2005).

Currently, immigration represents two-thirds of Mediterranean's population growth, and immigrants make up more than 20% of the national populations. Both of these metrics are expected to increase. Over time there is a decline in the health of immigrants¹.

Immigrants and children born to new immigrants represent growing cohorts; in some metropolitan regions of Mediterranean's area, they represent the majority of the patient population.

This phenomenon gives rise to "complex therapeutic relationships", within which health care providers know that patients do not always share scientific

¹ Persons of migrant background are a highly heterogeneous group. However, delayed and conflicted responses to social inclusion have resulted in clear deficits in the health care system, with few serious attempts to assess migrants' profiles and needs.

references and some key concepts such as illness, health, diagnosis and prognosis, because of their culture of origin (Carrasquillo *et al.*, 2000).

There is no natural “social contract” in this area between those who suffer and those who should provide care (Kleinman, 1995).

The doctor must therefore try out innovative and unconventional approaches.

Because the health characteristics of some migrant populations vary according to their origin and experience, improved understanding of the scope and nature of the immigration process will help practitioners who will be increasingly involved in the care of immigrant populations, including prevention, early detection of disease and treatment (Noonan and Evans, 2003).

Ethnographic studies and cultural critiques of medical and psychiatric theory and practice have shown how notions of health and illness are deeply rooted in specific cultural concepts of the person characteristic of Western individualism (Taylor, 1989; Gaines, 1992). These characteristics of individualism include an emphasis on the autonomy of the individual as an independent moral agent, the primacy of self-direction, free choice, and freedom of expression, and the notion that the central values in life have to do with individual self-realization. The sometimes one-sided emphasis on autonomy in liberal political theory, moral discourse, and medical ethics reflects this individualistic ethos (Tauber, 2001).

As such, an articulated, gnosiological and multidisciplinary reflection is required to address the therapeutic-relational issues signaled, considering them from different standpoints.

2. Medical decision-making and cultural concepts

There are intuitive levels of misunderstanding, some of which are very easy to imagine, such as those related to linguistic and religious diversity.

Knowledge about self-perceived health can help us understand the health status and needs among migrants and ethnic minorities in the European Union (EU) which is essential to improve equity and integration. In regard to self-perceived health, most migrants and ethnic minority groups (Cooper *et al.*, 2004) appeared to be disadvantaged as compared to the majority population even after controlling for age, gender, and socioeconomic factors. Policies to improve social and health status, contextual factors, and access to healthcare among migrants and ethnic minorities are essential to reduce ethnic inequalities in health (Levine *et al.*, 2011).

The encounter with the “other” creates dependent “relational short circuits”, as well as specific cultural diversity (e.g. rare or little known illnesses) and a profound discontinuity of the organizational models of Western medicine (Boulware *et al.*, 2003).

In fact,

some forms of cultural difference demand recognition for more overtly political reasons because they are associated with health disparities that affect whole groups of people defined by culture, race or ethnicity. These disparities reflect histories of racism, discrimination, violence, and exclusion that continue to maintain structures of inequality that are major social determinants of health and illness. Finally, some forms of radical difference or alterity demand attention because they identify individuals or groups as profoundly and disturbingly “Other” threatening to derail our routine practices by our emotional reaction to the unfamiliar, strange, or “uncanny”(Kirmayer, 2011).

At first, it is easy to perceive foreigners as if they were potential “pathogenic agents”, the result of a disadvantaged life in an unhealthy environment, treated inadequately or not in compliance with the canons of modern medicine (Satcher *et al.*, 2005).

The paradoxical ambiguity of a medical operator who wants to provide aid but is keen not to waste time is contrasted with the attitude of the migrant who generates relational conflict (Turner, 2001). The immigrant has not yet severed all ties with their past, but neither have they metabolized the culture of the host country².

The receiving society imposes considerable pressures of a economic and social nature, which lead to the migrant being alternately or cumulatively identified as a poor wretch, a slacker or a third world delinquent (Satcher, 2001).

The health care worker must adopt a *multiculturally compatible and effective approach*, and should be as open as possible to varying their clinical and scientific contribution, linking their work to that of other individuals capable of bridging the existing situational *gap* (Sargent *et al.*, 2005).

Anthropological and sociological approaches to social analysis can avoid the most egregious weaknesses of approaches to bioethics that presume the existence of a common morality.

These more ethnographically attuned studies of moral orders will not necessarily disavow all claims to a common morality or to minimal standards necessary for shared social institutions and legal frameworks (Prudent *et al.*, 2005).

Commonsense’ moral philosophies of medical ethics must recognize the multiplicity of modes of practical moral reasoning. The existing models of moral reasoning in bioethics simply do not face the challenges that exist in highly pluralistic social settings. Bioethics as a discipline will take an important step when it stops presuming the existence of a stable, settled, order and begins to acknowledge the multiplicity of moral worlds³ (Turner, 2001).

² Stronger identification with host than heritage culture, fluency in host country language, psychological attributions of distress, higher educational levels, higher socioeconomic status, female gender, and older age are associated with more favourable attitudes toward help-seeking in some migrant groups. Three major themes emerged: logistical barriers, cultural mismatch between service providers and participants, and preferences for other sources of assistance (Dias *et al.*, 2010).

³ Current approaches in bioethics largely overlook the multicultural social environment within which most contemporary ethical issues unfold. For example, principles argue that the “common morality” of “society” supports four basic ethical principles. These principles, and the common

3. *The role of intercultural mediation*

The new professionals who can facilitate the therapeutic relationship are indispensable. So-called “intercultural mediation” is not a simple linguistic translation but real cultural translation, where the mediator is called on to know, understand and explain the patient’s sensations to the doctor⁴ (van Ryn and Burke, 2000).

Medicine is an important context in which to consider the issues of pluralism and diversity in civil society for several reasons. Like other domains of practical knowledge, medicine focuses on specific cases that demand to translate abstract or general principles, procedures, values, and intuitions into explicit choices and actions. In so doing, we are forced to address basic areas of difference or disagreement between value systems and negotiate some common understanding and course of action. Through the expression of attentiveness, concern and commitment to appropriate and effective helpful action, the clinical encounter provides a site of recognition of the other (Kirmayer, 2011; Tauber, 2001).

The most common term used in this effort is “cultural competence,” essentially defined as a respectful knowledge of and attitude toward people from different cultures that enables health professionals who work with people from another culture to develop and use standard policies and practices that will increase the quality and outcome of their health care (Kirmayer, 2011).

With cultural competence as the centerpiece, social and behavioral scientists have started consulting companies to train health care professionals working in private and public health care settings: hospitals, community clinics, managed health care plans.

With funding from the European Commission, a network of 67 pilot hospitals from European Union member states has been implementing and evaluating the effectiveness of three health care models for migrants and minorities. The models are: the improvement of interpreting in clinical communication, the creation and distribution of migrant-friendly information and training in mother and child care, and staff training in cultural competence (Smedley *et al.*, 2003).

morality more generally, are supposed to be a matter of shared “common sense.” Defenders of case-based approaches to moral reasoning similarly assume that moral reasoning proceeds on the basis of common moral intuitions. At present, mainstream bioethics fails to attend to the particular moral worlds of patients and their family members. A more anthropologically informed understanding of the ethical issues that emerge within health care facilities will need to better recognize the role of culture and religion in shaping modes of moral deliberation (Casey *et al.*, 2004).

⁴ Refugees and asylum seekers often struggle to use general practice services in resettlement countries. The difficulties refugees and asylum seekers experience accessing and using general practice services could be addressed by providing practical support for patients to register, make appointments, and attend services, and through using interpreters (Weissman *et al.*, 2005).

4. *Legal issues and status of the migrant*

From a strictly legal point of view, protection of every human being's health responds to an intimate need for human solidarity and, at the same time, to a logic of public health-related prevention.

Nobody can be forced to undergo any health treatment, except under the provisions of the law. The law cannot, under any circumstances, violate the limits imposed by the respect of human dignity⁵.

But the actual performance of the health service is tied to the *status* of the migrant and, therefore, to their original condition (Paasche-Orlow *et al.*, 2005).

The so-called *residency permit* thus stands out as the only document that allows a non-EU foreigner to stay in the country. The requirements for entering legally and the subsequent issuing of the permit are set by the laws of the individual nations.

In the absence of this documentation, the immigrant veers towards a state of unlawfulness and may become an actual illegal immigrant, i.e. an individual who has entered the state by evading border controls, or a person who has not applied for a residence permit after entering legally or who has not renewed their permit after it expired.

Then there is the so-called *residence contract* that links the presence of a regular employment relationship to their stay within the country. Employers with an interest in hiring a foreign national must, in fact, submit a request for permission when this person enters, pursuant to the quotas set by the ministerial decrees.

The employer applies for a limited work permit, not the employee. The employer submits to the Directorate of Immigration her/his application for a limited work permit, along with the prospective employee's application for a residence permit. The Directorate of Immigration then sends the work permit application to the Directorate of Labour, which assesses whether every condition is fulfilled for issuing a limited work permit.

These documents must accompany the application for a limited work permit:

-a) a written employment contract between the employer and the person for whom the work permit is requested. Wages must comply with current wage contracts. The minimum wage is dictated by law.

-b) proof of medical insurance, which the employer must provide for the individual for whom the limited work permit is requested. An adequate medical certificate from a doctor, stating the medical condition of the individual for whom the limited work permit is requested. Medical certificates must be in English.

Applications for extensions on limited work permits must arrive at the Directorate of Labour no less than one month before the current permit's expiry date.

⁵ Understanding immigrant women's experiences of maternity care is critical if receiving country care systems are to respond appropriately to increasing global migration.

The employer sends her/his application for an extension of the work permit, along with the foreign employee's application for an extension of the residence permit, to the Directorate of Immigration. The Directorate of Immigration then sends the application for extending the limited work permit to the Directorate of Labour.

The employer is responsible for sending applications for limited work permits early enough to the Directorate of Immigration.

Limited work permits are usually granted for one-year periods, although never past the validity of the residence permit.

Then, there is the possibility of entry for reasons not related to work thanks to special visas for study, business and tourism purposes, and even for religious reasons, family reunions or medical therapies and diagnostic procedures (Paasche-Orlow *et al.*, 2005).

With reference to this latter aspect, the visa for medical treatment is specifically required by foreign citizens who need to undergo a particular treatment.

In this case, it is necessary to exhibit an appropriate declaration of willingness on the part of the healthcare facility (the so-called host), demonstrating that they are prepared to carry out the activity in question.

Conversely, if an immigrant citizen contracts an illness overseas, it is possible to extend their residence permit for health reasons.

According to the provisions of EU legislations, only foreigners legally residing are required to enrol with the National Health Service on equal terms with residents. This registration must be made in the relevant health district, which is determined based on place of residence or abode.

Foreigners without a residence permit are required to pay the actual amount for medical services, however.

Under the current law, the asylum seekers present in identification centres are in fact equated with illegal aliens, and therefore only have the right to emergency care that cannot be postponed and is essential and ongoing.

The changes introduced by the new regulations on the asylum application procedure exclude asylum seekers held at identification centres from being issued a residence permit⁶.

Regardless of the subjective condition in which the foreigner pays for the provision of individual health benefits, they are nevertheless dependent on a unique identification code with the abbreviation S.T.P. (Straniero Temporaneamente Presente - Temporarily Present Foreigner), which is issued by the health service responsible for the area.

⁶ Under the 1951 United Nations Convention, a refugee can be a "convention refugee" who has left his home country and has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or a membership in a particular social group. Under the same convention, a refugee can also be a person "in need of protection" whose removal to his home country would subject him personally to a danger of torture or to a risk to his life or a risk of cruel and unusual treatment or punishment.

This code is not an identification document but serves the purpose of facilitating the foreigner's access to health services, constituting the reference point for the overview of services carried out.

One particularly delicate aspect of the legislation on the provision of health services to foreigners is the possibility of services being co-managed by voluntary associations. These services must in fact be considered as fully included in the National Health Service activities, also with regards to quality *standards* (Schilder *et al.*, 2001).

To ensure privacy, it is not necessary to present any identification to be issued the S.T.P. card. A spontaneous declaration attesting to the individual's personal details is sufficient.

The access to clinics dedicated to foreign (illegal) subjects does not include any type of reporting to the judicial authorities.

Another viewpoint worthy of note is that concerning the delivery of ongoing care. In this instance, the foreigner undergoing ongoing care can use a provisional stay permit that ensures continuity of the treatment.

In the event that measures are taken to deport a foreigner suffering from a serious disease, the foreigner has the right to appeal to the judge.

For EU citizens, they are no entry visas in accordance with the principles of freedom of movement and freedom of establishment. However, deportation measures may be taken against these people (*ad personam*) for reasons of public order.

5. Conclusions

These brief notes summarising the legislative framework for the medical treatment of foreign subjects are designed to maintain a high level of attention on the protection of migrants, an area where divergent perspectives of a political, social, anthropological and, of course, legal nature are necessarily interwoven.

A new level of awareness is needed in order to be fully aware that every medical procedure lends itself to a complex and multidimensional interpretation, *ex ante* and *ex post*. The relationship between doctor and immigrant must be assessed from a pluralist rather than a one-dimensional perspective.

We must engage specific epidemiological observers to assess the phenomenon of migration as a whole, in short, medium and long term perspectives, encouraging knowledge-based research and field studies on the primary illnesses affecting foreigners.

An integrated approach system must be created in relation to migrant patients, assessing their cultural diversity in linguistic, ethnic, religious and health terms. Each facility must be equipped with specialised personnel to provide the most accurate information in relation to both the regulatory and medical contexts.

In other words, this means creating conditions that ensure that the right to health can be enjoyed by as many people as possible, starting with the people who demonstrate the greatest need.

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Part 3

International organized crime

Euro-Mediterranean relations and organized crime: the effects of the phenomenon in civil law legislation

ALBERTO MARCHESE

1. A literal and legal definition of the phenomenon

To get started, is required a legal definition of an “unlawful and illegal contract”.

“A contract is illegal if it involves doing something that is a criminal act or a civil wrong, or against the public good”.

For example, it is an offence to sell a firearm to a person not licensed to hold one, so a contract to sell a firearm in these circumstances is illegal (Black, 1991).

A contract whose purpose is to get the party to it to break another *legally binding* contract that the party has made already is also illegal.

Moreover, a contract which otherwise would be legal is illegal if its subject matter is to be used for an unlawful purpose.

So, if a firearm dealer were to agree to sell a firearm to a person licensed to hold a firearm knowing that the buyer intends to use it to kill someone, that contract would be illegal (Block *et al.*, 2002).

Courts will not *enforce* an illegal contract.

Money paid or property transferred under an illegal contract cannot normally be recovered. There are exceptions however. For example, where a contract is made illegal by a *statute* passed for the protection of a class of people, a member of that class can get back money paid or property transferred by her or him under the contract”.

The requirement of illegality is, however, also declining from a subjective point of view.

2. Mafia and terrorism in the capital maker

Mafia organizations are more of a threat than terrorist groups because they modify democracies from within by introducing their illicit earnings into the legal economy. Their businesses defeat the competition because, by counting on these illegal parallel markets, they can lower their prices. Mafia assets also finance the banking, construction and transportation sectors of the economy (Saviano, 2014).

When we think about mafia organizations, we are inclined to see only their illicit activities: drug trafficking, weapons and racketeering (Jamieson, 1994; Maguire, 1993).

But this is only the surface; behind these lies an enormous and illegally amassed economic power, which is camouflaged and laundered until it becomes legal.

As difficult as it is to track the routes of drugs, it is even harder to follow a money trail in the era of online banking and cyberfinance.

To get an idea about the economic power of mafia organizations, consider that in 2009 the executive director of the United Nations Office on Drugs and Crime revealed that money from organized crime made up the only liquid investment capital available to some banks seeking to avoid failure during the 2008 crisis. Between 2007 and 2009, banks in the United States and Europe lost more than one trillion dollars on bad loans and toxic assets. Liquidity had become the main problem of the banking system (Saviano, 2014; Mutschke, 2010).

As a result, banks loosened their protections against money laundering and opened up their safes to the mafia's dirty money, which was primarily from drug trafficking. These funds were then laundered and absorbed into the legal economic system. European countries have very few protections against the aggression of the mafia's assets. Today mafia organizations not only launder their money in tax havens, but everywhere.

It is a mistake to talk about "European mafias" or "mafias in Europe" because the mafia is the most globalized multinational corporation there is. Drug trafficking, its biggest revenue maker, requires a network that involves diverse countries and organizations all around the world. Until now, repression has been the only method used to fight it. However, it is inconceivable that the mafia's impact on legal markets and democratic stability is not the primary concern of world leaders (Saviano, 2014; Bossard, 1990; Dishman, 2001).

It is also inconceivable that moves toward the legalization of drugs and improvements in anti-money laundering laws have not been made. Not to mention the fact that terrorists and mafia organizations often act in synergy.

The strength of criminal organizations is the lack of attention they receive from governments and their ability to garner social consensus – in cases where the state is absent, the mafia "offers services" to citizens. Their winning formula is simple: an extreme tendency toward economic evolution combined with a minimal tendency toward cultural evolution.

3. *The effects of phenomenon in civil law legislation*

With reference to civil law contracts, one of the main objectives for lawyers in today's society is to predict the changes that may occur over time so that their clients can be protected from these changes. The increase and magnitude of mafia and terrorism in the last years were largely unanticipated.

This phenomenon has led to the introduction of certain specific contractual clauses, such as the force majeure clause.

According to the traditional doctrine of force majeure in most civil law systems, the parties need not uphold their initial rights and obligations under the contract, when a circumstance occurs that is outside the party's control, and makes it impossible to follow through with the initial contract (Evans *et al.*, 2002).

“Force majeure serves as a limit to liability not based on fault”.

The situation must furthermore have been unforeseen by the parties. The duties and obligations of the parties are only suspended for the duration of the situation, and notice must be given without delay (Marchese, 2017).

A force majeure clause must consist of four elements:

- 1) a definition of causes or relevant events;
- 2) a requirement that performance be prevented;
- 3) a requirement of a causal link between the cause and the prevention;
- 4) consequences that the three prerequisites being fulfilled.

When it comes to acts of terror, the first element must answer what terror means in this contract. The second concern is regarding the extent of the prevention. Then, the clause should state what requirements there should be between the act and the impediment. Finally, the clause must mention what the exemption will lead to.

Furthermore, a good clause should stipulate what the meaning of ‘foresee ability’ is, how the cause and its consequences should be avoided, and the procedural matters the party claiming force majeure should follow (Marchese, 2017).

Already today, it is possible to see some changes in this area pre- and post the 11th September attacks. Contracts made before the attacks did not usually allow for non-performance, as a result of an impediment from an act of terrorism.

It is necessary primarily look at terrorism and Mafia as force majeure from a general and international perspective.

Acknowledgement of the differences in the legal doctrine of force majeure is essential when it comes to choice of law and forum in international contracts (Beare, 2004; Booth, 1991).

In fact, the parties must not underestimate the importance of securing their positions when terrorism may affect their contract.

Which actions constitute terrorism, and what the consequences of an act of terrorism will have on the contractual relationship, are questions that should be addressed frequently on the international level, when contracts are created (Ward, 1995).

Most international contracts are to some extent connected with more than one legal system.

This fact can create a conflict of laws within the relationship. As a result of the parties' autonomy, these conflicts can be partly eliminated by the terms agreed on by the parties, by their choice of forum, and by their choice of the applicable law.

According to principles of the international sale of goods, the main rule is that the parties are free to choose the governing law of their contract (Ehrenfeld, 1990).

Should the agreement lack such a clause, the national law of the seller should be considered as the proper law, and therefore govern the contract.

When it comes to the question of choice of law, the Roma Convention of 1980 is the leading convention in Europe. According to Article 3 of the Convention, the main rule is that this field is subject to the parties' autonomy. In the absence of such an agreement by the parties, the governing law will, according to Article 4, be decided in accordance with the principle of closest connection.

4. The prevention legislation in the Italian law: the Anti-mafia Code

The details of the Anti-Mafia preventative system have made it a particularly effective way of protecting civil society's security requirements, but at the same time, they describe a model whose legality is still being discussed. In this regard, it is appropriate to refer to Judgment no. 76 of 1970, in which the Constitutional Court, by adjusting the range, declared Art. 4, paragraph 2, of Law 1423 of 1956 unlawful: "in so far as it fails to provide for mandatory support for the defendant", rendering provision of the latter for both the initial hearing, and at the appeal obligatory (Beare, 2004).

There have also been a large number of Judgments from the European Court of Human Rights, which, while excluding the criminal nature of a preventative confiscation, have asserted that Article 6, paragraph 1 of the Convention, which guarantees a "fair trial" for "determining [...] civil rights and duties", must also operate in proceedings that apply a preventative measures about property, as such procedures may involve a restriction of the right to property (such as C.E.D.U. ruling, dated 22 February 1994, Raimondo vs./Italy).

The Court of Strasbourg, moving from the assertion that publicising the hearing is intended as a defence “against secret justice that escapes public scrutiny,” censured the Italian preventative proceedings, and pointed out that the proceedings in the Chamber of Advocates relating to the application of preventive measures, expressly provided for by Art. 4 of Law no. 1423 of 1956, run contrary to the “fair process” prescribed by Art. 6, paragraph 1 of the European Convention on Human Rights, and have considered it essential that those who are subject to their jurisdiction who are involved in a court case to implement preventive measures should at least be offered the ability to seek a public hearing in front of the special courts and the courts of appeal.

Not surprisingly, the recent Italian Legislative Decree September 6, 2011, no. 159, hereinafter referred to as the Antimafia Code, in Article. 7, provides that the procedure is to be held at a public hearing if the person involved requests this (Marchese, 2017).

In attempting to unveil the innumerable forms of camouflage used by organised criminals, the legislation on Preventative measures stipulates that the investigations referred to in Art. 2 *bis*, paragraph 1, Law no. 575, 1965 (now Article 19 of the Anti-Mafia Code), must also be complied with in respect of subjects other than those indicted, but reclassifies them in various ways, extending considerably the operational scope of the preliminary phase of investigations. In particular, Art. 2 *bis*, paragraph 3, of Law no. 575 of 1965 (now Article 19, paragraph 3, Anti-Mafia Code) expressly refers to spouses, children, people who have been cohabitants in the previous five years, as well as natural or legal persons, companies, consortia or associations, to whom the suspect can dispose of assets, wholly or partially, directly or indirectly.

Where investigations have detected the availability, even indirectly, of assets whose value is disproportionate to the declared income or to the economic activity carried out by one of these parties, or that the assets themselves should be considered, on the basis of sufficient evidence, to be the fruits or reuse of illegal activities, the court can, even *ex officio*, with a justified decree, issue a seizure warrant and, subsequently, a confiscation order (Article 2-*ter* Law no. 575 of 1965, now Art. 20 of the Anti-Mafia Code).

The direct or indirect availability of unlawful assets, in the face of suspected Mafia offences therefore, makes seizure legitimate, although the item itself may formally belong to someone else. The preoccupation with overcoming potential mechanisms of elusion that individuals can give life to in the exercise of their private autonomy, and the need to pursue assets of unlawful origin aggressively, have led the legislator to identify, as a prerequisite for applying the safeguarding measures, one concept, which is that of “availability”, not only the original, but “from an almost infinite semantic spectrum” (Marchese, 2017).

The need to counter fictitious trusts and/or interpositions in asset trusteeship has led to the instrument of state intervention being refined, via the institution of effective *availability* which, in contrast to formal *ownership*, legitimizes the ablation of assets which, even if they formally belong to the third party, are subject to the power of destination, enjoyment and use by the suspects.

If ownership of the assets by the third party is fed by their form and appearance, the availability of the assets by the suspect is characterized by the effective relationship of the subject with the *res*, even if their availability is indirect.

The combination of ownership/availability even allows the shield of a legal personality to be overcome, in other quasi-sacral domains, and allows the confiscation of company assets, where the Mafia integrally controls shareholdings or company assets.

The concept of “availability” therefore ends with an understanding of a range of diversified cases, which may go from the right of ownership *stricto sensu* to fictitious trust situations, to a third subject, for example, via a sham contract, reaching the extreme boundary of mere situations of fact, based on situations of temptation, resulting from intimidation, in which we find a third party as the formal owner of the goods rather than the Mafia suspect. Just in relation to situations of mere fact, the law observes that the concept of availability cannot describe any de facto relationship between the accused and the assets in the formal ownership of a third party, however, where necessary, according to the canon apparent in Art. 240 of the Penal Code, by applying the constitutional principle referred to in Art. 27 Cost, that the assets are attributable to illegal Mafia assets.

With regard to the test of interception, it should be noted that this must be supplied by the public prosecutor, and must be a deep test, and the notion of testing purely circumstantial evidence against someone who is not a recipient of the Preventative measure, but suffers its effects, is not acceptable (Marchese, 2017).

On the other hand, the law continues to point out that presumptions against these individuals should only operate on the basis of investigations, and the need for an adequate level of evidence of the requisite availability for the purposes of seizure and confiscation is upheld, since using presumptions about perceived risk is not permitted. In this regard, in fact, the Supreme Court had specified that the “presumptions” in question have to be read in conjunction with the asserted absence of economic resources available to third parties, symptomatic of the fictitiousness of the trusts, and hence the criteria interpreted by the law involve an unlawful inversion of the burden of proof onto the third parties (Saviano, 2014).

Spouses, cohabitants for the last five years, and descendants should only be referred to as those whom investigations should be conducted into, based on an investigational protocol that aims at acquiring all of the items to which indirect availability should be prevented.

The law, almost unanimously, moves from an assumption that the third party is by definition a subject alien to the criminal activities of the defendant, and argues that the term “result” expresses the legislator’s desire to give third parties a full guarantee, and refers to a sufficiently high level of proof, as compared to ‘proof,’ albeit in that in knowing about the matter, the *standard* is all circumstantial, and that it may be more correct to talk about “circumstantial evidence”.

It could be worth looking a little more closely at the impact of such a provision when it is not limited to ‘transfers’, which, if they have occurred within the suspected two-years, may also be presumed to be circumventing future offers, but also includes ‘trust registrations’.

The probative difficulties for third parties become even more apparent when dealing with trust registrations or trustee transfers, which are achieved by linking two negotiations, an external one, with effect to third parties, and the other of an internal and mandatory nature, with the aim of modifying the final outcome for the first negotiation, for which the trustee is required to transfer the assets back to the trust or to a third party.

In this case, the alleged elusive purpose of the intermediary link can only be overcome by demonstrating that the proposed trustee was forced to perform such an operation and had nothing to do with the purpose of eluding the ‘applications of the ablative provisions.

In either case, to prove that the third party formally owns the assets, there must be evidence, for the most part, that the items are outside their own sphere of interest, rather than proof they are within the subjective sphere of the mafia defendant.

By this, it is felt that it is possible to assert that in legal (and not only legal) terms, the “value” relationship has been reinterpreted, which at the present time runs on the constitutional principles of criminal certainty and those, equally constitutional, of business and social functions, of their own and the company’s.

It is important to analyze the relationship (historical, traditional and still in motion) that must be established between the first principles of procedural and substantive guarantee, despite the fact that these other expressions concern fundamental institutions for public and private economic rights (Saviano, 2014).

Conclusion

One of the questions that will often arise for the courts in the future, is whether terrorism should be seen as an act of war. The impediment of an act of war is fairly common in international clauses, but the different tribunals have been reluctant to expand the coverage of this type of provision.

There is no doubt that the introduction of mafia and terrorism into the world of force majeure in international contracts creates many questions. In most cases, the question of whether an act of terror or an act of mafia will result in changes to the rights and obligations of the contract, must be decided in each individual case (Blum, 1998).

To conclude, the most important issue to emphasise is that lawyers the world over must try to predict the unpredictable when clauses made to solve these problems in the future are drafted and agreed upon.

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The book provides an interesting and new analysis about the legal systems of the Mediterranean, addressing several topics: personal and cultural identity, with contributions about the relation between identity, religious freedom and civil order, so difficult in the present moment, and the dignity of transsexual people under Italian law; the unaccompanied foreign minors, a very difficult challenge posed today by the migratory phenomena, which is examined under several points of view, including the medical aspects and the health care; the international organized crime, with special attention to its effects in the civil law regulations.

The aim of the book, therefore, it is not to provide an exhaustive knowledge of the legal frameworks of the Mediterranean, but to examine some little known aspects and provide a new and fresh contribution to research.

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