Self-determination and Social Order

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Summary

In this essay I will try to demonstrate that the principle of self-determination is based on a formal and individualistic view of liberty rights. I also propose a different perspective that takes into account the relationships rather than the individual. I will show how this result can only be achieved through a different ascription of rights to individuals: in particular, I will try to demonstrate 1) that any social practices express specific values, 2) that these values are the result of historical and cultural circumstances, 3) that they are subject to an ongoing public debate, and finally 4) that only if the individual praxis is consistent with these values can it lead to recognition of rights.

I. Introduction

What do we mean when we say that a person is free to do something, such as when we say that someone is free to believe in a certain religion, or to go to the cinema or theater, or to play the piano? In fact, these statements can mean either that a person has the right to engage himself in these or other activities, whether that he is actually able to do so[1]. In a more accurate way we can say that, if someone is free to profess a religion, it means that nobody, not even the State, can stop him. Indeed, the more developed the welfare state is, the more it will have the duty to make him able to implement his choices.

In particular, individual freedom can be understood in a merely factual perspective, as absence of constraints or impediments, or in a legal perspective, as a subjective right; in this case, it becomes a will guaranteed by law[2].

This problem, in contemporary societies, has a particular relevance. More precisely, the problem of understanding what we mean when we say that someone has a right to do something can also be reformulated as follows: what are the boundaries of the principle of self-determination?

I will try to show that this principle, often accepted uncritically, is more complex than one might think, and not very compatible with the requirements of order and integration typical of modern societies.

The principle of self-determination is, from a theoretical point of view, quite simple: in fact it means that the individual, as a person who owns a fundamental right of freedom, must be able to determine all the choices that do not involve damage to others, and that the state cannot interfere with the exercise of that freedom. In other words, subjective freedom implies that the individual must be able to choose how and how much to exercise it, unless this liberty causes harm to others, and that the law can only respect – if we assume a liberal and democratic perspective – that autonomy of choice.

1 See *A. Sen, M. Nussbaum (ed.)*, The quality of Life (Oxford 1993 and 2004), 30–53.

2 *F.C. von Savigny*, System des heutigen Römischen Rechts (Aalen 1981), Volume 1. See also *R. Dworkin*, Taking Rights Seriously (London 1977), chapter 1.

From the moral point of view the principle of self-determination is virtually flawless. Since the moral perspectives are largely different from each other, it is possible to believe – for example – that life is not fully available to the subject, or that the body may not be subject to disposition, in the name of the principle (theological or otherwise) that the individual does not have full availability of his existence or his body[3]. At the same time, it is plausible to consider that each individual has full ownership on his body and his life[4], and that no one else, not even the State, can interfere with the exercise of that ownership, in whatever way it manifests itself.

From this point of view it is important to focus on three aspects:

– It is undoubtedly true that the moral debate is characterized by the presence of plausible arguments both for and against the principle of self-determination, according to the general moral perspective we assume. More precisely, it is an observable fact that there are several arguments in support of the goodness of different levels of individual self-determination, due to the extension of the ownership of a subject over his existence, and especially over his body;
– In a non-cognitivist perspective the issue, although important in the abstract, is undecideable: moral arguments are not expressive of truth, but only of subjective preferences, and therefore they are all equally legitimate, albeit more or less convincing. Most of all, you cannot make any comparison between moral arguments, in the same way you cannot compare subjective preferences, having to simply accept and respect them. Now, regardless whether we do not agree with cognitivism as a philosophical perspective, it is undeniable that it has been, in fact, understood in contemporary culture as a sort of an unquestionable dogma, and that it rests largely on the theory (and rhetoric) of tolerance, and that it is a cardinal principle of pluralistic societies;
– Although the question was well founded, it would not be relevant at law, or rather should not be. The separation of law and morality, which in modernity is constructed as indifference of one another, requires that moral convictions should not always result in legal rules, even more so when you register (and certainly the case with self-determination is such) a disagreement between the moral communities in society.

II. Anthropological foundation of self-determination

From a conceptual point of view, moreover, the principle of self-determination is based on a specific anthropology that builds the idea of human dignity on autonomy; and autonomy is what we invoke when we want to be the only ones to responsibly plan (and live) our lives[5]. Similarly, our life is worth living because it is the result of a conscious choice, a project

3 Pastoral Constitution on the Church in the modern world Gaudium et Spes, n. 51: "For God, the Lord of life, has conferred on men the surpassing ministry of safeguarding life in a manner which is worthy of man. Therefore from the moment of his conception life must be guarded with the greatest care".

4 *J.S. Mill*, On Liberty (1859), chapter 1, in: id., Collected Works (London 1969): "the sole end to which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection… His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right… Over himself, over his own body and mind, the individuali s sovereign".

5 *S. Veca*, Dell'incertezza. Tre meditazioni filosofiche (Milano 1997).

which the author is only the subject himself: if a life (but even a simple fragment of life or a particular experience) is the result of another's choice, even if it is objectively good in a utilitarian perspective, it is worthless because it is unrecognizable as his own life, that is not attributable to a personal plan.

If then a non-totally projected life (or a fragment of it) is a worthless life, the link between dignity and autonomy is so strong that in a democratic context each person must have an equal right to have his particular choices recognized: because they are the manifestations of his autonomy. Therefore, if everyone has an equal right to be able to choose how to direct his existence, every obstacle to the implementation of these choices will involve a violation of personal dignity.

In that perspective rights are precisely a defense of the subjective autonomy. Rights are a bulwark against any unjustified injury of self-determination, it is what allows each person to plan his life. If I want to choose myself, I want that to be the author of my life, because this is the essential condition for finding it fully worthy. The recognition of rights allows me to live together with other people without worry they may interfere with my life choices.

Imagine, for example, that Tom would like to read only Japanese comics. If someone compels him to read Russian novels, or to know Jane Austen's works, this would be a violation of his autonomy, though certainly we can judge such readings to better his intellectual growth. And the fundamental rights (e.g. liberty of thought) ensure the choice of Tom, even if we think it is stupid or a bad choice for his cultural growth.

III. Self-determination: a formalistic approach to liberty

If we accept this approach, the right of liberty that the law recognizes to a single man must be understood in strictly formal terms. If liberty is itself a right which is the prerequisite for a worthy life, and precisely for a life lived in autonomy, the recognition of this right should be regardless of its content. This means that there is no value judgment in relation to the ways in which liberty is realized. In other words, only the individual can judge the particular ways he has chosen to realize his freedom. And most of all, these choices have no need to be judged good to be recognized and protected by law, since their justification is already in the personal choice. If Tom decides to exercise his right to choose what to read by only reading comic books, since this choice does not injure the rights of another, it is worthy to be protected by law.

We can therefore say that the recognition of a general right to liberty, and the absence of verifiable injury to the symmetrical rights of another, necessarily determine that a specific fundamental right is recognized to the person. In fact, since the contents of freedom are all internal to the subjective who will choose them, and because freedom is recognized as a right regardless of its contents (unless they do not infringe other people's liberty), the rights enjoyed by the subject for the protection of his self-determination should be virtually endless. There is no list of rights, as extended, which can predict all the ways in which individuals will exercise their right of self-determination.

See for example, R. Dworkin's theory of rights. Even though in his perspective the emphasis has shifted from liberty in a general sense to particular liberties, the basic paradigm is always centered on the individual: the rights pertain to the subject against the state, to the minority against the majority, in a vertical relationship who binds the individual to the power, and provides him, in different degrees, with a set of legal rights to protect himself against such power. Some rights may be considered essential, namely to ensure some liber-

ties that only in exceptional cases can be compressed, and with strong reason, while others must be balanced with the interests of the community as a whole. But they both are conceived as subjective possibility guaranteed by law, and the person has and exercises them within the boundaries of the law[6].

IV. Origins of the individualistic approach to liberty

This individualistic approach to rights in general, and to the right of liberty in particular, is based on the epistemological assumption – to put it succinctly – that only the individual is real. More precisely, this approach is based on the idea that the individual is the only original reality, and the law and the State are some artificial and derivative institutions. Individual rights are therefore a way to establish this relationship and to derive the second from the first. They are the legal recognition of an individual's power, independent of his social or co-existential character. Liberty implies (like any other rights) the legalization of a power, whose limits are exceptional.

This perspective has its genesis far beyond liberalism. According to a theory supported by many scholars[7], its origin has been traced back to nominalism. It is with nominalism in fact – and particularly with the philosophy of William of Ockham – that the idea that nothing exists above and beyond the individual takes shape, and that only individuals are real substances, only individuals can be known, only individuals exist in an authentic way[8]. What is not an individual substance, and therefore, universal categories (the citizen, the man, the society, and so on), is not real, but only a linguistic tool, a sign to build sets of individual substances, combining individual phenomena on the basis of similarities or common characteristics. Put succinctly, being can only be said of individual substances, and not of sets of them or of their relationship (only Tom, or Dick, exist in a true sense, but not the human being, that is just a name which connotes a number of subjects). The being does not belong to the universals, in the sense that it is not predicable of them.

This approach has a hugely significant relapse on the law, as well as a theological and philosophical importance. Nominalism – according to M. Villey – implies the abandonment of a typical natural law perspective, that is, any paradigms constructing the law as "the observation of nature and the order in which it occurs". Nominalism, on the contrary, leads to thinking about all things from the individual substance.

This perspective produces a shift of legal theory to the determination of the individual faculties, of his powers and, particularly, of his rights[9]. The whole structure of law, in other words, is now reconstructed from the individual either by postulating a series of individual rights, namely the existence of a dimension within which the subjective will assume a legal

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6 See *R. Dworkin*, Taking Rights Seriously, 188: "In most cases when we say that someone has 'right' to do something, we imply that it would be wrong to interfere with his doing it".

7 *M. Villey,* La formation de la pensée juridique moderne (Paris 2006). See also *M. Villey,* La genèse du droit subjectif chez Guillaume d'Occam, Archives de Philosophie du droit IX (1964) 97; *H. Coing*, Zur Geschichte des Begriffs 'Subjektives Recht', in: *H. Coing, F.H. Lawson, K Gronfors (ed.)*, Das subjektive Recht und der Rechtsschutz der Persönlichkeit (Frankfurt am Main/Berlin 1959), 7ff.; *G. De Lagarde*, Alle origini dello spirito laico (Brescia s.d.), vol. II.

8 In a critical perspective, see *B. Tiernay,* The idea of natural rights. Studies on Natural Rights, Natural Law, and Church Law (Atlanta 1997), 1150–1625.

9 See *P. Grossi*, L'ordine giuridico medievale (Bari 2007), for a complete analysis of the medieval juridical order.

character, by bringing back the entire law structure to the individual's will. The individual is in fact, at the same time, the recipient and the producer of law. More clearly, and in that perspective, the rights arise from an overlap between the individual power and the legal recognition of it, and they are essentially a legalization of the subjective powers.

For Villey, as we know, this idea is either alien to the classical world – and the Roman world in particular – both to the tradition of jus-naturalism, at least until the revolution that occurred precisely with the rise of Ockham's nominalism. In the classical view of natural law in fact, the *jus* is not in any way an individual power recognized by law, but an objective relationship (what is meant by the term *id quod est justum*), a certain attitude in relationships, within which we can identify what rightly belongs to each. *Jus*, much more than a sphere in which the subjective will can be exercised freely, designates the objective order which can be found in a relationship, and therefore represents the allocation, among all the people involved, what it is for each.

Therefore, if one can speak of someone's *jus*, it is just because such expression is used to indicate the part that belongs to that person within a relationship, which status has been legally recognized. Ultimately, it is not the power of a single person to have legal value, but the entire relationship in which the person is engaged, and which is involved. Only secondarily, and, consequently, what belongs to each of the subjects involved have legal status, and is protected, only as a consequence of the fact that *the entire relationship* was considered legally significant.

In this perspective, then, no legal status is attributed to the subjective will, by determining the constraints necessary for integration into the community, but we must understand the objective legal relevance of a particular relationship between subjects. Only in this way can we give to each what it is for, due to this relevance. The individual's right, therefore, is only the reflection, and the consequence, of his participation in a relationship recognized as legally significant. This also means – in contrast to what happens if the law is constructed from the individual – that the framework within which a subjective right is exercised under the law was *originally* limited. This right was in fact created by (and in consequence of) a division, of what it is for each, between the people involved in a particular relationship.

This perspective is opposed to the individualistic paradigm. In an individualistic perspective the individual has a right to originally unlimited freedom, and such right may be limited only to protect an equal right of another person or to implement the basic needs of the community. The determination of the subjective right's boundaries is logically secondary and subsequent to the recognition of that right.

But if what is legally significant is primarily the relation, and if the determination of the individual's rights is only the consequence of this, the framework within which the person can exercise his freedom is limited in principle. In this perspective, the person has no right originally, but only as a result of a division between the people involved in a relationship that is legally relevant.

In a certain sense, this theory is constructed by opposing a classical natural law theory, according to which the *jus* is a natural and objective standard, and considers the people holding rights derived from being included in different structures (the cosmic order, first, but also the order of the *polis*, the family, a specific relationship such an agreement), to an individualistic subjectivism (although it may continue to appear in the typical forms of natural law) which postulates the priority of the individual and his inherent rights to every natural and social order.

Villey's perspective, as any reduction of the complexity of reality into a schema, is oversimplifying, and so was considered by many, who have accused her of being "... schematic, logically inconsistent and, in fact, with no correspondence in texts"[10]. But it still has the advantage, by distinguishing a theory of the inherent rights from a theory of the objective law, to give an effective representation of ethical and political sensitivity among medieval scholars (or the age of the first flourishing of the subjective right theory). Moreover, this theory can highlight a real difference of perspective, between the idea of rights as a way of building justice, and the idea of rights as consequence of liberty, and as the sole guarantee to achieve justice[11].

I believe that the merits of Villey's theory go beyond historical and philological accuracy, and is the fruitfulness of his scheme, in order to understand the meaning of individual rights. In other words, although the development of the individual right can be described in a different way, the idea that behind the liberal conception of rights there is a basically individualistic approach, and that this approach makes unlimited in principle the area within each can exercise his freedom, it seems basically acceptable.

If the law is constructed giving a priority to the individual right, and recognizing a legal status to certain individual qualities (personal liberty, liberty of thought, personal sovereignty over his own body and his property, and so on), this sphere tends to expand and become unlimited. The relationships become in fact a consequence of the implementation by the individuals of their faculties (eg., the right to dispose of something by selling it, implementing a contractual relationship with the person who buys it, is the consequence of my property right), and assume legal relevance due to the exercise by the individual of their faculties.

The contents of these relationships, therefore, and the content that anyone can give to his own right, will depend primarily on the individual will (the principle of self-determination), and only secondarily by the presence of any collective interests, which are in conflict with the subjective will. For example, if I am a landowner I can do whatever I want with my land, since I can abandon it or can I put it to good use, I can sell it or give it away, but I may be forced to cede it to the State for public utility reasons. Similarly, I can exercise my freedom by listening to music or sports, or even doing nothing, but I cannot decide to spend my time defaming others, and it may also happen that the State asks me to go fight a war, if necessary. In all these cases, as shown, the content that I can give to my liberty right is limited, but only as an exception to a general recognition of the liberty itself.

In conclusion, the claim of originality of individual rights, or the juridical status of individual liberty, and the priority (logical, but also axiological) of the subject and of his rights on the order of relations, has as a direct consequence on the impossible limitation of subjective freedom, except that of self-determination, or the presence of symmetric rights on another, or special needs – particularly relevant – of the community (although, in a democratic perspective, they are always the result of a political subjective choice).

10 *G. Fassò*, La legge della ragione (Milano 1999), 169. See, on that debate, *C. Donahue Jr.*, Jus in the subjective sense in Roman Law. Reflections on Villey and Tiernay, in: *D. Maffei* (a cura di), A Ennio Cortese (Roma 2001), 501; see also *G. Pugliese*, 'Res corporales' 'res incorporales' e il problema del diritto soggettivo, in Aa. Vv., Studi in onore di V. Arangio Ruiz, (Napoli 1953), vol. III, 223ff.

11 *G. Zagrebelsky*, Il diritto mite (Torino 1992), 110–111.

V. A relational perspective of rights: the role of social order

Now we will try to see if we can think about rights from a different perspective. I will try to demonstrate that it is possible to describe rights in a non-individualistic perspective, and that if rights are conceived in this way, even freedom can be thought in a non-formalistic way. In other words, if rights (and therefore freedom) are conceived in a different perspective, which we can call *relational*, the content that the people give up their freedom becomes relevant from the legal point of view. In that perspective, we should consider the relevance of the existence of a social order; our rights, in fact, have to be considered always as a part of a complexity and not as isolated prerogatives. Therefore I will try to point out, especially with reference to Hayek and MacIntyre's thought, how a social order can be described and conceived.

First, I believe that social order can be understood as a balance between the constitutive unpredictability of social reality, and the necessary predictability of stable social relations. As MacIntyre notes[12], what allows us to plan our lives, in spite of the unpredictability of life, is the greater or lesser degree of social structure predictability. They precisely allow us to engage in long-term projects. In other words, the way we realize our long-term projects is to make predictable most of the conditions that characterize our social and natural environment. Although, at the same time, the social and natural unpredictability are what ensure existential authenticity to our lives and our projects. For example, it would not make sense for me to invest in the stock market if the financial market was completely unregulated, but at the same time it would not make sense to invest if the results were totally secure and guaranteed.

An excessive unpredictability, however, would be a factor of social disorder. It interferes with the inter-subjective links and with the ability of power to achieve its goals – whatever they are – and must somehow be embanked and restricted. I speak of containment and restraint, not of elimination, because the vagueness of the future is a fundamental element of human existence and social life. This is what Machiavelli called "Fortuna" and indicates the complexity of objective and contingent factors that are between the person who acts and the achievement of his goals[13]. And this is something that – because it coincides with the complexity of reality, understood in a diachronic sense – can only be restricted, but never removed[14].

However, social order cannot only balance the existential uncertainty with the need of certainty in relations, but should also make possible the integration between people. This is why it cannot be merely formal. To talk about a social order, in fact, it is necessary that the structure of relations achieves two results: some stability, and an integration between people.

12 *A. MacIntyre*, After virtue. A study in moral theory (New York 2007), chapter 8.

13 See *N. Machiavelli*, Discorsi sopra la prima Deca di Tito Livio (Torino 1993), II, § 29: "Se e' si considererà bene come procedono le cose umane, si vedrà molte volte nascere cose e venire accidenti, a' quali i cieli al tutto non hanno voluto che si provvegga", and "se alcuno fusse che vi potesse ostare, o la lo ammazza o la lo priva di tutte le facultà da potere operare alcuno bene".

14 *N. Machiavelli*, Discorsi sopra la prima Deca di Tito Livio, 351 (II, § 29): "E quando, questo che io dico, intervenne a Roma, dove era tanta virtù, tanta religione e tanto ordine; non è maraviglia che gli intervenga molto più spesso in una città o in una provincia che manchi delle cose sopraddette". See also ibid., III, § 31 on the relationship between individual virtue and the Fortuna; N. Machiavelli, Il Principe, XXV: "Molti hanno avuto e hanno opinione che le cose del mondo sieno in modo governate dalla fortuna e da Dio, che gli uomini con la prudenzia loro non possono correggerle... A che pensando, io, qualche volta, mi sono in qualche parte inclinato nella opinione loro".

There is no true order without stability, because some permanence in time is an essential: revolutions and wars are indeed a source of disorder, because in them the system of relations is constantly changed. But the order is not a *social* order if it does not achieve some kind of integration between people. An airport, for example, is certainly an ordered place, but it does not produce any kind of *social* order, but only a *functional* order. A society is not an airport, and this is because the links between people are not merely formal. Community members are bound together by something deeper than mere coordination, they are united by something that makes their existential choices compatible one to the other, and comply with the relational models that society has institutionalized.

Second, in that perspective it is possible to assume that social order is the result of a communicative relationship between the subjects to which it relates. In fact, the structure of social relations is not the result of a political decision or an enforcement of an organization – what Hayek means by the term *taxis* – but from the way in which these relations are structured in time – what Hayek means by the term *cosmos*[15]. In other words, during time, social relations have assumed a particular form, and thus some practices have been consolidated with a specific and identifiable sense.

I will now try to clarify this point: not every kind of human action should be considered a practice, but only if it is manifested as a "coherent and complex form of socially established and cooperative activity". In other words, a practice is a cooperative human activity, relatively stable, in which people conform their behavior to specific models and skills which are required for that practice. For example, we all have a vague idea of what painting is, or what is a medical activity, because both of these models of human action are settled as social practices. And depending on how these practices appear, we can distinguish between a painter (and it does not matter that he is a good painter) and a decorator, a doctor and a magician.

Obviously, what the painting or what medical practice is, is not the result of a decision. As Hayek noted, society (which can be understood as the totality of personal relationships) is composed of a number of facts, data and characteristics that no sovereign could ever know. There is always the possibility that a varying number of these elements is out of control. So, any social structure is the result of a continuous adaptation to facts that no one will ever know in their complexity, and even facts that are not knowable in principle.

Now, the institutions that protect a certain regularity in behaviors play a role according to subjective impossibility to know all the circumstances, although such knowledge would be theoretically required to act with perfect rationality in a Cartesian sense. But they, as well as social rules, must be interpreted as the result of an evolutionary process of a gradual emergence that had, historically, some success. In other words, the social order consists of social rules that are not the historical realization of a political decision, that seeks to direct social relations towards a certain Good, but it is a *set of successful habits*.

Third, if the structure of social relations is not the result of a decision or a mere organization, it is the result of a history and a tradition. And a tradition is not a set of merely functional practices, but it is a set of practices whose meaning is the basis for *individual identification and integration*. Everyone's history has been indelibly marked by the tangle of

15 *C.F. von Hayek*, Law, legislation and liberty : A new statement of the liberal principles of justice and political economy (London 1973).

relationships in which we are engaged, and by connections with a community that gives us the essential references to build our identity: historical identity and social identity coincide[16]. This means that social relations are settled in a historical context that conveys certain values, and that qualifies social practices in an axiological sense.

Each of us participates in what we might call a relational history, that is a system of interpersonal relationships characterized by a diachronic development. It is not only the current set of relationships that determines personal identity, or the set of values that are part of our horizon, but the history of that particular community which the person belongs to and which is referred to.

In other words, the order of practices is the result of an historical development, and this development is what allows us to perceive these practices, and the values that are internal to them, as something that is also good for us. For this reason, the set of social practices has the effect of enabling social inclusion. People in fact integrate with each other in a system of relationships *if* they perceive it as a good for themselves, and at the same time as a good in itself.

In contemporary Italian society, for example, a different order from what occurs in Iranian society, or in the Polynesian is manifested, and that order is what makes me feel Italian – at least in so far as I recognize myself in it, and I think it is positive. We can consider that particular social practice we call marriage: in contemporary Italian society that practice is structured according to the value of equality between husband and wife – in contrast to what happens in other societies. This value is *internal* to the practice of "marriage" because of the historical development of Italian society: first Christianism, then feminism and '68, pushed Italian society to structure the practice of marriage according to this particular value. And since I think it is a value in itself (I think it's good that in Italy spouses have equal rights) and a value for me (I think it's good that my wife and I enjoy the same rights), the practice of marriage is one of those that allows the integration between myself and other people. This practice and its internal values are – in short – an element of Italian contemporary social order, an element of stability and integration.

Finally, the most interesting aspect, in my opinion, is that such a tradition to which the person participates, and contributes to determine the structure of the practices to which he refers in his life, is the object of an ongoing public discussion. The values that constitute the shared horizon of a given community, and that the subject endorses as participates in that particular community, are not the result of a process of accumulation, or of an historical sedimentation, but are the object of a continuous and ongoing public discussion, in a self-reflective process that the community takes upon itself.

This communitarian self-reflection implies that the values internal to social practices cannot be understood neither in a perspective of absolute stability, as if they were subtracted from time, nor in a perspective of absolute contingency, as if the way in which they are were determined only by the random course of history.

16 In that perspective see *Ch. Taylor*, Sources of the Self (Cambridge 1989), 51ff.; *MacIntyre*, After virtue, chapter 15; *P. Ricoeur*, The human experience of time and narrative, Research in Phenomenology 9/25 (1979) 17–34; Narrative time, in *W. J. T. Mitchell (ed.)*, On Narrative (Chicago: University of Chicago Press, 1981), 165–186; samples of different approaches to narrative identity can be found in *Th. R. Sarbin (ed.)*, Narrative Psychology: The Storied Nature of Human Conduct (New York 1986).

It is true that the way in which social practices are understood and experienced (from the family to work, from sports to trade, etc ...) is subject to historical development and to the times changing. A practice stops to evolve in history only when it stops to be practiced (eg, the *suttee*, as a practice no longer implemented, was crystallized in a definite form forever). However, the diachronic evolution of the practices is possible only because they show a structure that time makes more or less evident. History is not the place where practices take different forms without any logic, but the place in which they are implemented in forms more or less corresponding to their internal structure.

For example, the social practice called marriage, in the history of our specific relational context, is referred to a particular structure of relations, characterized by monogamy and stability. The way in which marriage is understood in our context is in fact related, inter alia, to these two structural characteristics, and this is not the result of an authoritative decision, but it is because this structure has been gradually consolidated in history. Due to this structure of marriage, the values of equality and fidelity – for example – are seen as inherent in it, what allows the full flourishing of the marriage. These values represent what, in our societies, most nearly expresses the structure of marriage. It is on these values, in fact, that public debate is focused. In other words, public debate has to determine, and constantly re-think, what values correspond more to the structure of marriage, as it has been consolidated in the time. And public debate also has the task, therefore, to determine whether the structure of marriage can change, and if it can be compatible with relationships that do not show the same values. For example, considering the sense of marriage means to ask whether polygamy is a practice consistent with the meaning of marriage practice. If the Italian or French societies, one day, consider polygamy acceptable, that will mean that the meaning of marriage practice – as a result of a self-reflective activity that these societies have made – will be different from what it is today. If that does not happen, it is because monogamy is still considered an essential element of marriage.

The fact that public discussion can lead to results that the individual does not agree with, arises because subjective identity, while conditioned by the tradition, is not resolved with it. But it does not mean that the result is irrelevant, either generally or for the individual who opposes it. In general, the fact that there are some disagreements about the understanding of the practices is the public debate's physiology, not its pathology. It is because of this disagreement, as well as other factual circumstances, that self-reflection on practices remains vital. From the individual point of view, then, if the structure of a particular practice, as it is currently understood, does not fit with the personal vision, it does not imply any fragmentation of the social bond: the person will be pushed to participate in the public debate and to activate it, the more strongly the greater the interest he has for that particular practice.

This approach implies that the values are the texture of a common horizon in which the person is inserted, and this horizon is the object of an ongoing public discussion that takes place in history. We can therefore say that: 1) The public system of values comes from an objective consideration of the practices which these values are relative to. 2) These values are not relative to the specific form of power in a particular historical moment: it can influence but cannot fully determine them, because the values are mainly the result of the way in which the practice has evolved in history. 3) The values are not a matter of subjective choices, but the main focus of public debate.

VI. Social order and self-determination

Social order, therefore, can be identified with those values that express the sense of social practices. And above all, it may limit subjective self-determination, if the person claims to give a content to his freedom that is inconsistent with it: but how may an order so conceived limit a formal interpretation of liberty rights?

In my perspective, subjective liberty generates rights only if: a) it takes place within a relationship that the law considers in itself positively, and b) if the subjects involved act consistently with the social meaning of that practice. If not, the subjective freedom produces legally irrelevant activities, or illegal activities.

There are three hypotheses arising from the way you combine these three elements: the law, the social practice, and what – in a particular context – has been considered its internal sense.

First, it may be that the subjective praxis is consistent with the sense of a practice, and that this practice is positively evaluated by the law. This is the most typical case, which occurs for example in a normal contractual relationship: Tom decides to sell his car, and Dick decides to buy it by paying a certain amount. In this case, Tom has determined his freedom in a practice that the law considers worthy of protection, and – if the car was his own car, and he delivered it to Dick – in a manner consistent with the sense of the practice "sale". Therefore, in this case, Tom and Dick have a right in the strongest sense; in other words, their praxis determines the recognition of some rights.

Secondly, it may happen that the subjective praxis is consistent with the sense of a practice, but that this practice is negatively evaluated by the law. This is what happens in those cases that are normally covered by criminal law. For example, if Dick decides to steal the car of Tom, his liberty of action is determined in a practice – theft – that the law considers in itself bad. Even in this case, freedom has a legal relevance, but in a negative sense: the praxis is illegal.

Thirdly, the subjective praxis cannot be coherent to the sense of a practice, but this practice is, in itself, positively evaluated by the law. We can imagine the case: Tom wants to get married. In itself, the practice of "marriage" is legally positive. However, Tom wants to marry two or three women simultaneously. And, because monogamy is – in Italy, where Tom lives – an internal value to the practice of "marriage", his determination will not produce for him any rights (Tom doesn't have the right to marry his two or three partners). This does not mean that Tom cannot have three love affairs at the same time, or even more. Tom and his partners may also live together, if they agree, but their sexual liberty will not lead to the recognition of rights for any of them. Tom and his three partners will be practically free to live as they want, but they do not have the right to do so as part of a marriage relationship.

But you could say: really Tom has a right to live his polygamous relationship because no one has the power to stop him. If there is no legitimate way to prevent Tom from having three lovers, this means that Tom has a right in a strong sense to live this choice, and that he has a right to be engaged in sexual relations with as many people as he likes (but not a violent sexuality). In truth, this objection does not imply the rejection of the relational perspective that I am exposing. In fact, in the relational perspective neither Tom nor anyone else has an authentic personal right to have sexual relations. Simply, every human being has the chance to have sexual relations.

Only when two people decide to have a specific sexual relationship, does this determine the allocation of rights to each of them. In other words, when you are facing a specific sexual relationship, the law assesses whether such a relation is in itself worthy of protection: and such assessment depends on the values internal to the practice "sexual relationship". In the European context, the values internal to this practice are reduced to one: the freedom in the sense of absence of constraint. Thus, if a sexual relationship is fully free, and if it occurs between consenting adults, it determines the recognition of rights for each of them. If it is not free, it does not determine the recognition of rights because it is inconsistent with the meaning of that practice. The difference with the individualistic perspective is clear: in such a perspective, the individual has a personal right to freely exercise his sexuality, except if it infringes the others' freedom. In the relational perspective, individuals have a right only if their action is consistent with the values internal to the referred practice.

However, this argument does not imply a right to marry, because the practice of reference is entirely different.

Similarly, imagine that Tom wants to marry, and that he wants to treat his wife like a slave. Imagine also that Tom is able to find a woman willing to serve him, as well as to become his wife. They can also manage their lives in this way, but they will never have the right to do so. Since the equality between the spouses is an intrinsic value to the practice "marriage" (in Italy, where Tom lives), the freedom to enslave or to treat someone like a servant will never be recognized as a right. Their freedom is extraneous to the law and thus not protected: if Tom's wife, after some time, does not want to play the part of the slave, she will be free to do so, and Tom cannot complain that the agreements between them were different.

Now we can imagine more complex situations: for example, we can assume that Tom wants to marry Caius, whom he loves. Now, we must ask whether heterosexuality is a structural feature of the practice "marriage": the answer depends, in this case, on the historical and social context in which we are. If Tom and Caius live in Italy, we have to say yes, because the Italian law considers sexual difference as an essential feature of this practice. Their factual freedom – in the sense that they are free to live their relationship – does not lead to the recognition of a right to marry, in a strong sense. But if they live in Spain, the answer would be completely different.

It may be that the way the practice of marriage is interpreted in my community does not satisfy me. In other words, it is possible that some Italian person does not like the idea that sexual difference is a characteristic of marriage. But as long as the public debate does not contribute to change the way that practice is interpreted, the only thing they can do is actively participate in the discussion, encouraging a cultural change. If their arguments are convincing, they can determine a change in way that practices are interpreted, exactly as has happened many times in history. If not, it means that their arguments were not strong enough.

We may now think of a different case. Imagine that Tom, seriously ill, and wishes to die, and that he cannot or will not kill himself. Can we say that he has the right to die? Or that Tom has the right to decide when and how to die? Does the principle of self-determination, in other words, mean that Tom has the right to ask to be killed?

In a purely liberal perspective, we should say yes. Indeed, when Tom asks to die although he is not able or not willing to kill himself, he is simply determining his freedom. We must recognize that Tom is exercising his right to live in a totally independent way, and in a way that does not harm the rights of another. We must then ask why, in this situation, we should not recognize that Tom has an authentic right to die.

If we refer to the criterion of social order, our argument should be the following: 1) Tom asks to be exposed to a specific medical treatment. Therefore, the social practice related is the practice of medicine. 2) The medical practice is positively considered by the law, and in fact, the physicians and patients have mutual rights and obligations. 3) In the Western social context, the values which are considered intrinsic to medical practice are at least two: the principle of beneficence and the principle of therapeutic alliance. The first principle is characteristic of medical practice as exists in the Hippocratic Oath, both in its classical version (*I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone*) and in the modern one (*I will apply, for the benefit of the sick, all measures [that] are required, avoiding those twin traps of overtreatment and therapeutic nihilism*). The second principle implies the rejection of medical paternalism – which reduces the patient to a mere object, in a totally subordinate condition to the physician. But this principle also implies the rejection of a purely contractual model, in which the patient's will is absolute, and the physician merely a performer. In other words, the principle of therapeutic alliance can fully appreciate the centrality of trust in the relationship between patient and physician, applying for both the Kantian principle: Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.

The decision of a patient not to undergo treatment, if it is essential to his survival, contrasts – in a different degree – in both of those dimensions. It infringes the principle of the therapeutic alliance, because the decision to avoid therapy makes the patient's will absolute, just as it makes the physician a very marginal figure, and contrasts with the principle of beneficence, at least insofar as this principle is understood from a purely objective and not subjective perspective.

The consideration of the discrepancy between the praxis of the individual and the general sense of the practice means that such a practice cannot be considered based on a right, but should be viewed as the irrepressible implementation of a mere practical liberty, not legally sanctioned.

The subjective praxis is placed in a legally irrelevant area. There are no rights protected by the law, nor are the choices of the individual judged worthy and deserving of protection. The individual praxis, in these cases, may be implemented only insofar as it permits the concrete possibilities of the subject: he cannot ask other people to act in his place or to conform to his will. Certainly, a patient cannot be forced to undergo a certain treatment, but this is only because the practice of medicine – due to its structure – is incoercible.