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What Can We Do? A Philosophical Analysis of Individual Self-determination

1. Introduction

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, shall be able to determine itself in any 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.

Thus, 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 theatre, or to play the piano, we mean either that this person has the right to engage itself in these or other activities, and that it 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 that perspective, individual freedom is usually understood as absence of constraints or impediments, and in a legal perspective as a subjective right; in this case, it becomes a will guaranteed by law[2].

The principle of self-determination arises from that intuitive consideration: we are not simply free to decide what to do with our lives, but we have the right to plan our lives as we prefer. No one should say us how to live, or what to do, because we should be the authors of our lives.

However this principle, often accepted uncritically, is more complex than one might think, and not very compatible with the requirements of order

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1 See: The quality of Life / Ed. by Sen A., Nussbaum M. – Oxford, 1993 and 2004. – pp. 30-53.

2 Von Savigny F. C. System Des Heutigen Römischen Rechts. – Aalen, 1981. – Volume 1. See also: Dworkin R. Taking rights seriously. – London, 1977.

and integration typical of modern societies. 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?

To answer that question, we can consider the principle of self-determination from a moral point of view. Since the moral perspectives are largely different from each other, it is possible to believe – for example in a Christian-catholic perspective - that life is not fully available to the subject, or that our personal body may not be subject to disposition, in the name of the principle (theological or otherwise) that the individual should not have full availability of his existence or of 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:

1) 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;
2) in a non-cognitivist perspective the issue, although important in the abstract, is undecidable: 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

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 "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" (Mill J.S. On Liberty // Mill J.S. Collected Works. – London, 1969).

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 unquestionable dogma, and that it rests largely on the theory (and rhetoric) of tolerance, and that it is a cardinal principle of pluralistic societies;

3) 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.

The problem that we discuss can therefore be formulated as: what does self-determination mean? We are free to do, with our lives, whatever we want and whatever does not harm others? And what does it mean to be free to do anything? Does it means that we have the right to do so, or that we can do it if we are able to do so? In particular, in the perspective of philosophy of law, we must ask ourselves: this individual liberty to do what one wants with its life must be protected by law, or not? There are any reasons that justify an active intervention by the state to protect individuals against their will? Can the law prevent one person from doing something that hurts only it and its life?

2. What is the foundation of the principle of self-determination?

Why we consider our lives good and worthy of value? Probably many of us will answer: because we decided to live in that way! For example, we consider that being Christians, or Muslims, are both good choices, and choices worthy of value, but only if these choices were free. To believe in God, or in Krishna, has to be a free personal choice: no one of us would accept to believe in a specific god, if we were forced to do so. To believe in God, in that case, would be a violation of my dignity, not because this faith was false, or someway bad, but because it was an imposition.

From a conceptual point of view, thus, the principle of self-determination is based on a specific anthropology, and on the idea that human dignity means essentially "autonomy". 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 which the author is the subject himself: if a life (but even a simple fragment of life or a particular experience) is the result of other people's choices, even if it is objectively good in an utilitarian or in a particular moral perspective, it is worthless because it is unrecognizable as its own life. It would be unrecognizable as 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 plan its life: these plans are in fact manifestations of its autonomy. Therefore, if everyone has an equal right to choose how to live and how to direct its existence, any 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 a man (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 better for his intellectual growth. 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.

3. *A formalistic approach to liberty*

If we accept this approach, the right of liberty that the law recognizes to a single man is understood in strictly formal terms. Liberty becomes itself a right: I have in fact a right to do anything I choose, if my choice does not harm anyone else, and nobody can interfere with my plans.

If liberty 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 judgement 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

5 Veca S. Dell'incertezza. Tre meditazioni filosofiche. – Milano, 1997.

choices have no need to be judged good to be recognized and protected by law, since their justification is already internal to 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 rights of other people, 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 liberties 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].

Conclusively, it is possible to say that self-determination principle is based on an individualistic and libertarian perspective. I belong to myself, and nor the state nor any religious community can justify a sacrifice of my personal right to plan my life, even if my decisions are bad. Adultery, prostitution, masochism, could be negatively judged by many of us, or by many of those belong to any particular religious community, but no one can interfere with my right to do what I like in my life. If I want to practice prostitution, for example, the state can't deny me the right to do what I want with my own body, provided I don't harm others. I own my body, I own my life, so I have the right to do with them what I want (I'm not simply free to do so), thus nobody, nor the state, can interfere with this liberty.

6 "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" (Dworkin R. Taking rights seriously. – p. 188).

4. Nominalistic roots of libertarianism

This approach is incredibly fascinating. It holds that people are full self-owner, and that they were more than today in a hypothetical initial situation. Thus, in that initial situation (one can think to a natural condition) people have a fundamental right to use its body and its properties, and to claim that others don't use them. Of course, self ownership is a guarantee of a certain liberty of action, but one can also decide to renounce to that liberty: exactly in the same way one can decide to sell, or to gift, or to land, its properties.

Law should only protect this liberty, but should not impose any specific way of living. Law, in that perspective, should not punish anyone for riding without a helmet, or being adultery, or smoking, or taking drugs, or having sexual relations with prostitutes.

Each individual has a liberty right to engage in activities that do not violate other's right. Each individual has its rights, and the state should only protect these rights, without judging how people are using their rights.

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 entity, 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 its 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 authentically[8]. Universal categories, therefore (such as the citizen, the man, the

7 Villey M. La formation de la pensée juridique moderne. – Paris, 2006. See also: Villey M. La genèse du droit subjectif chez Guillaume d'Occam // Archives de Philosophie du droit. – 1964. – IX. – p. 97; Coing H. Zur Geshichte des Begriffs 'Subjektives Recht' // Coing H., Lawson F. H., Gronfors K. (Hrsg.) Das subjektive Recht und der Rechtsschutz der Persönlichkeit. – Frankfurt-am-M., Berlin,, 1959. – pp. 7ff.; De Lagarde G. Alle origini dello spirito laico. – Brescia, 1964-1968. – Vol. II.

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

society, and so on), are not real, but only any linguistic tools, signs to build sets of individual substances, combining individual phenomena on the basis of similarities or common characteristics. Put succinctly, the 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 has the outcome of focusing legal theory on the problem of the determination of individual faculties, of its powers and, particularly, of its rights[9]. The whole structure of law, in other words, is now reconstructed from the individual: this perspective postulates a series of individual rights, namely the existence of a dimension within which the subjective will assume a legal character, and brings 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, in that perspective rights arise from an overlap between the individual power and the legal recognition of it, and they are essentially a legalization of subjective powers.

In fact, this idea is the core of our way to think law and rights. We are used to think that every person has certain rights on its property, on its person, and it can decide if and how to use them. A legal relationship (for example a sale), is therefore just the consequence of the fact that two or more individuals have decided to exercise their rights in this way. Similarly, a marriage is only the consequence of the fact that two individuals have decided to exercise their fundamental right to marry, and that they did it towards each other.

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

9 For a complete analysis of the medieval juridical order, see: Grossi P. L'ordine giuridico medievale. – Bari, 2007.

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.

For example, in a purchase agreement, none of the two parties has any rights *before* the contract. But if they enter into such an agreement, they obtain some specific rights as a consequence of that contract: the right to receive the property, and the right to receive the payment. But the seller and the buyer also become recipients of specific duties: the duty to give the payment, and the duty to give the property. The pivotal question is not what rights do the subject have, but what is due to each person involved in a relationship, as a consequence of that relationship?

In this perspective, no legal status is attributed to subjective will, 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 originally unlimited, 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 relationship, and if the determination of individual's rights is only the consequence of this, the

framework within which the person can exercise its freedom is limited in principle. In this perspective, subjective rights are only the result of a division between 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 subjective rights derive 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 over-simplifying, 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 goes 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 its 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

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

11 Zagrebelsky G. Il diritto mite. – Torino, 1992. – pp. 110-111.

individuals of their faculties (e. g., 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 its 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 legal status of individual liberty, and the priority (logical, but also axiological) of the subject and of its 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).

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

Now I will try to see if one 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 the predictability of social structures. They precisely allow us to engage in long-term projects. In other words, the way we realize our long-term projects is considering 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 to achieve any 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 its 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].

Social order balances the existential uncertainty with the need of certainty in relations, but it has also to make possible the integration between people. Of course social order is what makes possible our plans (without any kind of order, no one could make any project, nor realize its plans), but it is also what we need to integrate each other, what makes the difference between a mass and a community.

12 MacIntyre A. After virtue. A study in moral theory. – N. Y., 2007.

13 "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" (Machiavelli N. Discorsi sopra la prima Deca di Tito Livio. – Torino, 1993. – II, § 29).

14 "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" (Machiavelli N. Discorsi sopra la prima Deca di Tito Livio. – 351 (II, § 29)). See also on the relationship between individual virtue and the Fortuna (Ibid. – III, § 31); "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" (Machiavelli N. *Il Principe.* – XXV).

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. 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 a 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. The sum of these practices is the actual social order.

6. *What is a social order, and what is its structure?*

Not every kind of human action can be considered a practice, but only if it is 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 behaviour to specific models and skills which are required for that practice. So *when* a human activity becomes relatively stable, and people involved in conform their behaviours to models required for it, this action is understandable as a 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, between 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

15 von Hayek C. F. Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy. – London, 1973.

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 behaviours 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*[16].

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 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[17]. 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, social order (intended as sum of social practices) is the

16 For example, today we generally consider homeopathy something internal to the medical practice, but in the past decades it was not.

17 In that perspective see: Taylor Ch. Sources of the Self. – Cambridge, 1989). – pp. 51ff.; MacIntyre A. After virtue; Ricoeur P. The human experience of time and narrative // Research in Phenomenology. – 1979. – Vol. 9, No. 25. – pp. 17-34; Narrative time // On Narrative / Ed. by Mitchell W. J. T. – Chicago, 1981. – 165-186; samples of different approaches to narrative identity can be found in: Narrative Psychology: The Storied Nature of Human Conduct / Ed. by Sarbin Th. R. – N. Y., 1986.

result of a historical development, and this development is what allows us to perceive these practices, and 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, it is observable a different social order from what occurs in Iranian society, or in the Polynesian one, 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 a husband and a wife – in contrast to what happens in many other societies. This value is *internal* to the practice of "marriage" because of the historical development of Italian society: first Christianity, then feminism and '68, pushed Italian society to structure 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 me and my wife enjoy the same rights), practice of marriage is one of those that allows the integration between myself and other people. I feel myself integrated in Italian society (or: I feel myself integrated in that particular social order), because I share these values with other members of that community. 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 that contributes to determine the structure of practices to which he refers in his life, is the object of an ongoing public discussion. Values that constitute the shared horizon of a given community, and that the subject endorses as participant in that particular community, are not the result of a process of accumulation, or of a historical sedimentation, but are continuously and publicly discussed, in a self-reflective process that the community takes upon itself[18].

18 On the importance of public discussion and its rules, I refer primarily to the philosophy of Juergen Habermas and Karl Otto Apel. See: Habermas J. Theorie des kommunikativen Handelns. – Frankfurt-am-M., 1981; and about it: Communicative Action: Essays on Jurgen Habermas's Theory of Communicative Action / Ed. by Honneth A., Joas H. – Cambridge, Oxford, 1991; Rationalité, communication, modernité: agir communicationnel et philosophie politique chez Habermas / Ed. by Mellos K. – Ottawa, 1991. On structure of argumentation, and the specific rationality of consensus, see: Seel M. The Two Meanings of "Communicative" rationalty: Remarks on Habermas's Critique of a Plural Concept of

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

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 practised (e. g, the *suttee*, as a practice no longer implemented, was crystallized in a definite form forever). However, the diachronic evolution of 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 history of our specific relational context, is referred to a particular relational structure, 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*. History is, in short, the source of social order, or more precisely: sources of social order are history and public discussion on values.

Due to this structure of marriage, 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. Public debate has also 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,

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Reason // Communicative Action: Essays on Jurgen Habermas's Theory of Communicative Action / Ed. by Honneth A., Joas H. – Cambridge, Oxford, 1991. – pp. 45-48.

On norms that rule this public discussion, see: Habermas J. Law and Morality, Tanner's Lectures. – I, § 3. – URL: www.tannerlectures.utah.edu/lectures/habermas88.pdf. See also, with particular reference to contemporary moral debates: Apel K.-O. (1997), Plurality of the Good? The Problem of Affirmative Tolerance in a Multicultural Society from an Ethical Point of View // Ratio Juris. – 1997. – Vol. 10, Issue 2. – pp. 199-212. See also: Apel K.-O. The Response of the Discourse Ethics. – Leuven, 2001.

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, will consider polygamy acceptable, 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 that disagreement, as well as other factual circumstances, 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 personal perspective, it does not imply any fragmentation of social bond: the person will be stimulated to participate in public debate and to activate it, the more strongly the greater the interest he has for that particular practice.

This approach implies that 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) values are not a matter of subjective choices, but the main focus of public debate.

7. Subjective rights and values: the role of social order.

The identification between social order and the complex of social practices can be more precisely understood. Social order, in fact, can be described as the complex of values that express the sense of social practices.

Social order, furthermore, plays a pivotal role in making inconsistent any formal interpretation of personal liberty, so limiting individual self-determination. It is now important to analyze how may an order so conceived limit a formal interpretation of liberty rights.

However, it is crucial to stress that this perspective is an alternative to

the individualistic one. In an individualistic paradigm liberty right are a characteristic of individuals, and they are based on individual dignity. As shown before, in that perspective people has some rights (property, personal liberty, consciousness, ...) because they are human beings, and they have only to decide how, or if, or when, to use their rights. That perspective give priority to individual rights, and relationships are a consequence of them.

In the paradigm I have called relational priority it is given to relationships, and not to rights. People don't have rights abstractly, outside of a specific relationship with one other person or with the generality, of with other citizens, or with the generality of human beings. For example, I don't have an abstract right to sell my car, but *if* I sell my car to a specific person I have a right to receive payment from it. Similarly, I don't have an abstract right to be cured, but *if* I get ill I have a right to be cured in hospitals of my country, thus I have a right to pretend that my fellow citizens pay for my therapies (but *only if* I live in countries like France, Germany or Italy, where health care cost are paid by taxes). Finally, I don't have an abstract right not to be killed, but every human being I meet in my life has a duty to respect me (but *only they*: it is nearly ridiculous to say that I have a right not to be killed by people who live thousands of miles away from me, and with whom I have no concrete relation).

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, subjective freedom produces legally irrelevant activities, or illegal activities.

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

First, it may be that 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, subjective praxis can be incoherent to the sense of a practice, but this practice is, in itself, positively evaluated by the law. We can imagine this case: Tom wants to get married. In itself, 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 (if he's able to). 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 one could say: really Tom has a right to live his polygamous relationship because no one has the legitimacy 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). Indeed, this objection does not imply 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 a concrete possibility 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, values internal to this practice are reduced to one: 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 others' freedom. In the relational perspective, individuals have a right *only if* their

action is consistent with the internal values of a referred practice.

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

Similarly, imagine that Tom wants to marry a woman, but that he wants to treat his wife as 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 homosexual 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. For example, it is possible that some Italian person does not like the idea that sexual difference (or monogamy) 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 active participation in the discussion, encouraging a cultural change.

In that example, Tom (who lives in Italy, but who don't agree with the way practice of marriage is interpreted in his community) should actively participate in the public debate about same sex marriage, trying to contribute to a cultural change: he and all those who think that heterosexuality should not be an intrinsic value of marriage can be a pivotal factor of a historical development of that practice. If their arguments are convincing, they can determine a change in way that practice is 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 is seriously ill and wishes to die, and that he cannot (or will not) to kill himself. Can we

say that he has a *right to die*? Or that Tom has a 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 have to recognize that Tom is exercising his right to live in a totally independent way, and in a way that does not harm rights of any another person. We must then ask why, in that 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 (lethal injection). Therefore, the related social practice is the practice of medicine.
> 2) Medical practice is positively considered by the law, and in fact, physicians and patients have mutual rights and obligations.
> 3) In 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 described 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 to undergo that treatment, contrasts – in a different degree – in both of those dimensions. It infringes the principle of the therapeutic alliance, because that decision makes 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.

8. Conclusion

Conclusively, the principle of self-determination can be understood in two different perspectives: starting from the individualistic paradigm, or starting from the relational one.

In the first perspective, that principle is clearly internal to the liberal tradition, and affirm that every human being (or at least every adult and mentally sane person) has a right to decide how to determine its liberty, insofar it does not infringe rights of other people. As I've tried to show, doing so the individual liberty became totally formal: only the single person can decide if the concrete determination of its liberty is worthy of value, or it is not. That perspective, however, is inconsistent with the requirements of an authentic community, that postulates an integration between people and a relative stability. In a community, it has to be realized and implemented a kind of social order, but without stability and integration that order is unthinkable. Without stability, the system of social relations constantly changes, and produce a disorder inconsistent with everyone's necessity to plan its life. But the order is not a *social* order if it does not achieve some kind of integration between people: members of a community are united by something that makes their existential choices compatible one to the other, and comply with the relational models that society has institutionalized.

In the second perspective, social order plays a pivotal role in making inconsistent any formal interpretation of personal liberty, so limiting individual self-determination. In that perspective subjective liberty generates rights only

if it takes place within a relationship that the law considers in itself positively, and if the subjects involved act consistently with the social meaning of that practice. If not, subjective freedom produces legally irrelevant activities, or illegal activities. People don't have rights abstractly, outside of a specific relationship with one other person or with the generality of human beings. Rights, conclusively, are recognized to people only if their praxis is consistent to meaning and values expressed by practices they want to realize: if the individual praxis is consistent to these values it determines a recognition of rights.

Thus, in a relational perspective it is incorrect to affirm that one has a right to determine itself, insofar its determination don't infringe liberties of others. In that perspective does not exist a general liberty to determine itself, outside of a specific relational situation. It could only be affirmed that one has a practical liberty (not a right) to do and to act as it wants, but its rights depends on relationships in which the person is engaged.