EDITORIAL

by Stefano Rodotà*

When consent concerns existential situations, it moves away from the schemes and the criteria around which it was framed in legal modernity. We should not forget that the revolution enacted with the *Code Civil*, aptly described by Jean Carbonnier as "France's civil constitution," was not built on the idea of absolute property alone. True, the idea so codified did mark a transfer of power from one class to another, that is, to the historical subject of the French Revolution, the bourgeoisie, and did so in a way that way anything but symbolic. So, too, there is no denying what Cambacérès observed, underscoring that the code regulates all relationships "by reference to property." But then, if property had not been coupled with a tool that could ensure its free circulation, the outcome would have contradicted the very point of its codification, which was to free property from its feudal bonds.

Hence the contract as the power to freely dispose of one's property, an act recognized as having a force equal to that of law, as can still be found stated in Article 1372 of our own Italian Civil Code. Therein lies the root of the "dogma of consent," framed in such a way as to guarantee freedom and security in the circulation of goods. It is precisely this "need to ensure the circulation of goods" that we find invoked in the fine book by Emilio Betti on the legal transaction, when the discussion turns to the "practical problem of private autonomy."[1] And here we also encounter the term *self-determination*, but this in relation to the goal of "furnishing individuals" with goods and services, as is befitting in the given context, where the problem is that of governing the "patrimonial relationship" under the statutory definition of contract (Article 1321 of the Italian Civil Code).

This simple reference alone should suffice to alert one to how inappropriate it is to rely on these frames of reference and these concepts in an attempt to outline the institutional setting within which to locate the right to self-determination, for this

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[1] E. Betti, *Teoria generale del negozio giuridico* (1950; Turin: UTET, 1952: 40-43).

right pertains to life, in itself irreducible to the logic of the market: it is a right that must accordingly find its abode in the sphere of personality, and ultimately in that of sovereignty. As Paolo Zatti has rightly commented, "dignity, identity, freedom and self-determination, and privacy in its different meanings are rights to be fashioned by specifying the qualifier 'in the body,'"[2] and so in life.

What we are witnessing is indeed a shift in the legal paradigm: a new connection between a person's will and life, a connection recognized in constitutional law. This moves us away from the earlier connection between will and patrimony (a person's estate) by which the civil codes have traditionally been characterized, in a setting where private autonomy is constructed solely by reference to the economic sphere, with an exclusive interest in making for reliable business affairs, while neglecting the need to secure a person's self-government, in a sphere, that of the self, irreducible to that of the market. Individuals, then, are no longer regarded only or mainly as economic actors, but also as free makers of their own personality, in such a way that the object of their action is no longer confined to managing their economic interests but embraces the entire unfolding of their lives.

The legal principle underlying the "constitutionalized" person is thus grounded in a different anthropology than that of the civil codes. Self-determination in governing the body cannot be collapsed into the consent necessary to transact business in the economic sphere. Indeed, if we are to avoid cultural misunderstandings and inappropriate political conclusions, we will have to bear in mind that the notion and rules of autonomy as consent were framed by reference to the market and its dynamics, and it would be a mistake to move that notion or the accompanying rules out of their original context.

The change we are witnessing does not, however, come out of nowhere. A different conception of consent emerged in the wake of WWII, when the Nazi doctors were brought before the Nuremberg Military Tribunal in the so-called "Doctors' Trial" of 1946: the dramatic discovery that medical power had been abusively exercised in the experimentation carried out on human beings (it would later be discovered that the same practices had been undertaken in Japan, too) sparked an immediate reaction which led to the document that would come to be known as the Nuremberg Code, whose very first words, not incidentally, are: "The voluntary consent of the human subject is absolutely essential." Life is thus freed from encroachment by any outside power, for it belongs to the person and to his or her determinations, and the perspective is that of the constitutional principle recognizing everyone's right to freely construct a personality.

This different way of viewing self-determination in relation to life and the body forms the basis of an understanding of consent disentangled from the formalisms owed to an external criterion – namely, the need to guarantee secure economic transactions – in such a way as to bring consent under a different standard, that of the government of life.

[2] Zatti P. (2009), *Maschere del diritto volti della vita* (Milan: Giuffré), p. 86.

We can appreciate in this sense why bio-law, when it comes to the problem of determining a person's will, should have devised methods that mark a clear departure from the criteria in use in other situations and other areas of the law. Precisely this choice to chart a different course has attracted criticisms as harsh as they are blind to the undeniable peculiarity of the subject matter.

These criticisms have been aimed in particular at the opinion rendered in Italy's landmark case, the previously discussed one concerning Eluana Englaro, where instead a good example is offered of the way we ought to proceed in renewing our legal concepts and doctrine by reference to Articles 2, 13, and 32 of the Italian Constitution: arguing on the basis of principle makes it possible to design a framework within which to locate concrete situations. The Italian Court of Cassation has thus found it possible to explicitly invoke lifestyle as a criterion on which to rely in determining what end-of-life choices the person concerned would in fact have made. This is precisely the path followed by the Mental Capacity Act passed in the United Kingdom in 2005 and the German law of 2009 on patients' instructions and provisions. It is worth recalling that under the British law, those entrusted with deciding on behalf of an incapacitated person are asked to look to this person's wishes and feelings, along with the beliefs and values that gave purpose to his or her life, as factors illuminating the meaning of a life through its entire arc, so that when it comes time to make the most dramatic of all personal decisions – the one concerning the end of life – this is done through an understanding of that life's complexity as an existential affair, rather than by stripping that complexity away through a formal act exclusively based on criteria of administrative procedure. No less explicit is the German law: "A patient's presumed will must be ascertained on the basis of concrete elements. It is necessary, in particular, to take into account any oral or written statements the patient made before becoming incapacitated, along with this person's moral or religious beliefs and any other values he or she may have espoused." And that is also the line taken by the Oviedo Convention on Human Rights and Biomedicine, with its broad principled statement that we must take the patient's "previously expressed wishes" into account.

Self-determination is thus identified with the life plan pursued by the person concerned. And here life is to be understood in Montaigne's sense as "an uneven, irregular, and multiform movement,"[3] irreducible to any rigid formal scheme, for it is governed instead by an uninterrupted exercise of sovereignty, enabling that free construction of personality which we find enshrined at the outset of our own constitution as well as in others.

Neither a life plan nor a lived life can be bounded within the logic of the itemized consent proper to the instruments of private autonomy designed to govern patrimonial relations.

[3] De Montaigne M. (1588), *Essais*, livre III, chapitre III, "Des trois commerces." Quoted from *The Complete Essays of Montaigne*, book 3, chap. 3, "Of three kinds of association" (Stanford: Stanford University Press, 1958).

What is needed in either case is an institutional framework making it possible to uniquely appreciate each person through a narrative unfolding over time, through a sequence of behaviours comprising an entire biography, and it is on this basis that a reconstruction of consent can have any legitimacy.