

## ***Public Reason and Bioethics***

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1. Rawls puts forward a proposal of political philosophy suitable for a pluralistic society where members try to establish and make persistent a stable social cooperation. The proposal is very sophisticated and takes into consideration numerous elements of a complex society.

First of all, it is worth pointing out that the model of society proposed by Rawls is a liberal society, based on the ideal of free and equal citizens. Let's see the Rawlsian basic principle of liberty: «Each person has an equal claim to a fully adequate scheme of basic rights and liberties, which scheme is compatible with the same scheme for all».<sup>1</sup> The basic liberties specified by Rawls are freedom of political speech, assembly and participation; freedom of thought and conscience; freedom of association; freedom of the person; and freedom from arbitrary arrest and seizure as associated with the rule of law.<sup>2</sup>

Let's take the principle as non problematic as such, and as something we presuppose in the debate. There are still problems of application. First, there is the problem of establishing whether the content of basic liberties is well represented by the extension indicated by Rawls. Second, even if we accept this list, these freedoms are abstract, and, therefore, there is still the problem of determining the scope of each of these liberties. We can think about numerous examples that arise in the public debate. Do, for example, some statements on the policy concerning immigrants count as protected by the freedom of political speech, or are they excluded? In what follows in the paper, I will focus on examples in the domain of bioethics.

At this point, the important distinction is that between comprehensive doctrines and political views. Comprehensive doctrines are those that include the full metaphysical and religious premises to which one can appeal, in order to find support for a specific moral question. These are highly controversial

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<sup>1</sup> J. Rawls, *Political Liberalism*, New York, Columbia University Press, 1993, 5.

<sup>2</sup> J. Rawls, *Political Liberalism*, 291.

doctrines in a pluralist society. By contrast, political views are those that can be shared by every reasonable subject in public life (which, in Rawls's terminology, means those public institutions that have the legitimacy to take normative decisions on basic questions of justice). As compared to comprehensive doctrines, political views are less inclusive, but they are a suitable starting point of the debate on which there is consensus. Therefore, the best answer to the fact of pluralism in society is to take as the fundamental legitimate basis of public argumentation that related to political views, shared by every reasonable member of society.

Accordingly, the appropriate model of resolving public questions, at least when they concern the 'constitutional essentials', and fundamental questions of justice, is that of public reason. Rawls explains that «in a democratic society public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution».<sup>3</sup> The ideal of public reason holds for citizens who defend their views in the public forum, for members of political parties, candidates in their campaigns, people supporting them, for people when they vote as well. Public reason corresponds to the liberal principle of legitimacy because, in the public forum, in relation to the constitutional essentials and fundamental questions of justice, the different parties have to explain the basis of their actions to one another in a way that they may reasonably expect others may endorse as non violating of their freedom and equality. In virtue of this requirement, public reason can not appeal to what may be the whole of the truth in a situation under discussion. This is something that may be done in different situations where non public reasons apply, and where individuals participate by their free choice: in the context of a scientific association, a church, etc. Public reason also limits what are the appropriate guidelines of inquiry that specify ways of reasoning and the criteria for the rules of evidence in the public political debate. More precisely, by virtue of the need to respect the liberal principle of legitimacy, public reason says that in the process of justification in the public debate people may appeal to beliefs generally accepted and forms of reasoning found in common sense, as well as to conclusions of

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<sup>3</sup> J. Rawls, *Political Liberalism*, 214.

science when these are not controversial. It appears clearly that we may not appeal to comprehensive religious and philosophical doctrines. In brief, Rawls says that «As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally».<sup>4</sup>

2. The Rawlsian model of reasoning and procedure in political philosophy can be applied in various fields where we are concerned with questions related to constitutional essentials and basic justice. The bioethical field is one of particular relevance, because, more than many other fields, it faces us with a continuous moral dilemma. This happens when we have to confront, for example, very important values, like that of the human life, the equality of members of society, personal freedom, when we face the dilemma of respecting the life of one subject or the life of another subject, etc. Bioethics, in its public dimension, is, therefore, one of the sets of questions that may work as a very demanding verification of how the Rawlsian proposal may function.

Without entering into questions of Rawlsian exegesis, I will only announce that I privilege a Hobbesian or Humeian (referring to the artificial virtues doctrine of David Hume) foundation of the part of the Rawlsian proposal that I have described and that I endorse, in the sense that I look at this proposal as the best possible solution for obtaining peaceful stability and persistent social cooperation. So, morality, inclusive of the theory of justice, is a sort of convention the aim of which is to ensure peaceful stability and stable social cooperation, where each individual tries to protect and pursue her life perspectives. As I tried to show in my *Realismo morale*, this convention is not arbitrary.<sup>5</sup> For example, I think that from such a foundation the justification of a principle of liberty would result, as that Rawlsian indicated earlier. In my opinion, a principle like this motivates the pursuit of social cooperation because it protects at least the basic interest that each individual has to realize her life perspectives. With such a protection, individuals receive a strong motivation to participate in social cooperation. By contrast, if someone is so limited in her

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<sup>4</sup> J. Rawls, *Political Liberalism*, 225.

basic liberties that she can not pursue her life plan, she has a strong motivation for subversion of the social order. No one can expect from others to accept for themselves less protection than that allowed by the principle, and, therefore, this principle is a point of equilibrium for social cooperation that everyone must accept.

As I use the terminology later, I explain the idea of life perspectives, that I mentioned above, in Rawlsian terms. He speaks about two moral powers: the reasonableness («Persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. [...] Reasonable persons, we say, are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others»),<sup>6</sup> and the rational («The rational [...] applies to a unified agent [...] with the powers of deliberation in seeking ends and interests peculiarly its own. The rational applies to how these ends and interests are adopted and affirmed, as well as to how they are given priority. It also applies to the choice of means»).<sup>7</sup> Members of society, have a basic interest in exercising and developing these moral powers. Again, without entering into questions of Rawlsian exegesis, I interpret this as meaning that people have a basic interest in developing the sense of how social cooperation is to be established, as well as the sense of how to live their life in the best way. Or, to put it slightly differently, people have a basic interest in developing the sense of how to live a life in the best way, and of how to secure the social conditions for pursuing this life plan. A clear difference between Rawls and the outlook that I favor is that for Rawls the rational and the reasonable are two independent requirements, while in the view that I endorse, I leave as possible that the former is foundational of the latter.

With this, I come to one problem frequently addressed into liberal proposals. An objection to the outlook, inclusive of a methodology of public moral

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<sup>5</sup> E. Baccarini, *Realismo morale*, Torino, La Rosa, 1997.

<sup>6</sup> J. Rawls, *Political Liberalism*, 49-50.

<sup>7</sup> J. Rawls, *Political Liberalism*, 50.

reasoning, that I applied in my *Bioetica. Analisi filosofiche liberali*<sup>8</sup> was that it suffers from a contradiction due to the fact that it tries to put forward a public normative system that wants to be neutral, and therefore suitable for different moral communities, while, in fact, it is grounded on a particular moral vision, or a particular anthropological concept. More precisely, the proposal that I endorse, has been related to the anthropological concept of the *homo oeconomicus*.<sup>9</sup> This concept was seen as the background concept that justifies the model of stable social cooperation that I suggest. In this case, people inspired by a concept different from that of the *homo oeconomicus* would not be comfortable in the context of the public norms that I support. For example, instead of focusing on public norms that may serve as a reasonable consensus with the aim of stability and peaceful cooperation, a subject may find more important a system that aims at an order that is objectively just, or that corresponds to moral reality. In any case, the problem may be that the anthropological concept enters into the argumentation as a hidden infringement of the limits of public reason.

However, I do not intend my proposal to be so limited. The proposal that I endorse may welcome people firmly convinced of the truth or validity of their moral beliefs. The only thing that is required of them is that they have an important interest in, or attribute value to, a stable and peaceful social cooperation that is, consequently, founded on the mutual respect of the various subjects included in it, where divergences are prevailed over in a non violent form. In order to justify the argumentative structure that I offer, it is not necessary to rely on the concept of the *homo oeconomicus*. In other words, it is not required to rely on the concept of a subject who cares only about her own interests, and who is not concerned at all about other goals. It is sufficient to presuppose a society of subjects who attribute value, or have a common interest in living together in a peaceful society, and who try to resolve their divergences without the use of violence, i.e. without imposition or repression. This is a relevant interest, or value, for these subjects. But this does not deprive them from having other interests, or values. Different subjects may have

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<sup>8</sup> E. Baccarini, *Bioetica. Analisi filosofiche liberali*, Torino, Trauben, 2001.

<sup>9</sup> This is the objection of Massimo Reichlin to my *Bioetica*. See, M. Reichlin, *L'etica liberale e il concetto di persona. Note su un volume di Elvio Baccarini*, "Bioetica", 2003, 137-145.

different interests, may be inspired by different moral outlooks, and may also have, among their goals, that of creating a political society that corresponds to what they see as the moral truth. However, they may pursue this goal by an open and permanent discussion with subjects who embrace different moral doctrines (or different goals), or by imposition (which means by repression, and, at least potentially, by violence). The subjects who have a basic interest, or endorse the value of living in a scheme of peaceful cooperation, where divergences are reconciled for the goal of avoiding violence and repression, and everybody respect each others values and interests in the context of peaceful cooperation, correspond to the ideal of citizenship in the political conceptions of societies that have developed the principle of tolerance as a major public principle. This view of social cooperation may be founded in two different ways. Prudentially, by individuals who see that their interest will be protected in the best way by this kind of cooperation. Or, by virtue of a moral background. In the latter case, individuals recognize other individuals as reasonable subjects whose dignity they respect by avoiding the means of violence, repression and coercion, although they think that these subjects are wrong in their beliefs. Using Rawlsian terminology, it is possible to say that the proposal admits both that the rational founds the reasonable, as well as that the two concepts are autonomous. In any case, it seems to me that the opposition to this view may easily become qualified as fundamentalist, or fanatic. I have to admit that I have great difficulty to find arguments that may result in convincing this opponent. However, I think that this is a common problem for anyone who wants to argue with this opponent. I do not think, for example, that greater success may be obtained by a traditional Kantian philosopher, or by one who appeals to intuitions supposed to be true.

It may be possible to say that the proposal that I endorse leads subjects to contradictory (or even schizophrenic) behavior. On the one hand, they embrace a system of goals and values, on the other hand they put them aside in public life. In order to answer this, I rely on the distinction between different domains of morality and moral thinking. One of the moral dimensions is that of the critical reflection of a subject in front of her own conscience and moral sensibility. The dimension of moral reflection inside her moral commu-

nity is very close to that. A third dimension is represented by the reflection applied when different subjects, bearers of different moral convictions face each other in the public space. In this case, if a value is attributed to a society where relations are reconciled in order to avoid violence, and, are, therefore, grounded on cooperation and not imposition, subjects have to develop norms that are different from those of the more restricted domain. In particular, a principle of public respect of each subject's political autonomy is to be affirmed.

This is not to deny that there may be conflicts between the moral norms endorsed by a subject. The possible conflict is that between norms in public life and norms of her more restricted moral life. She has to find an accommodation between all of them, just as happens in the case of all conflicts between competing motivations. However, this is not contradiction, nor schizophrenia. It is the complexity of moral life. In any case, if she finds social cooperation valuable in the social dimension of life, as well as valuable a society based on tolerance and not on coercion and repression, she has to affirm, as a powerful moral reason in public life, that of the respect for the public autonomy of other subjects who actively participate in social life. This does not imply renouncing the public affirmation of her own convictions, but it limits the means she can use for this aim. The only means available are those of trying to convince other people, instead of making use of coercion and repression.

The proposal that I endorse does not exclude that the set of values and norms that deserve public recognition and protection will be wider in the future. The only limit is that these values cannot be grounded on controversial doctrines. If there was public enforcement of controversial doctrines, an injury would be done on the dignity of the subjects who support a different view. They would not be considered as individuals able to develop moral reasoning, and to be equal participants in the political society. Certainly, we could not expect anyone to accept such a condition in a political society, and, therefore, this cannot be part of a model of social cooperation.

I think that, in the widest ambition, it is possible to formulate my proposal as a metaethical proposal that serves as an overall foundation for a normative moral proposal. However, I think, as I explained above, that it may

be useful at the same time as a political proposal in the foundation of the public normative system.

This proposal has relevant moral implications. It may serve as a criterion for establishing who are the primary subjects of the recognition of rights in the political society. These subjects are those who may make use of the faculties that permit them to be active parts of social cooperation (because they have goals to pursue and they can understand and follow the norms that are required for social cooperation). From this it appears that not all human individuals are full-fledged subjects with rights, at least in a non derived way.

In my *Bioetica*, among others, I defended, as some of the more specific consequences of this proposal, the right to abortion (the potential mother is a full-fledged subject with rights, while the embryo is not); the legitimacy of euthanasia and physician-assisted suicide (each individual is free to make choices about her life plan, which includes also the final moments of life); the right to decide about procreation (if this is not damaging to the life opportunities of the future member of society); the right to the improvement of the quality of life (inclusive of the right to make use of the technological developments of genetic engineering). Legitimate limitations of these rights are dangers to the safety of others, social order, public health, and, in general, values that may be justified by respecting the guidelines of public reason.

3. Let us now see some questions linked to the problem of when does a subject become a person, and when does she lose personality.<sup>10</sup> My position is that a subject becomes a person (where this is the expression meant to indicate the primary and underivative subject of rights) when she has the qualities sufficient to be a cooperative member of society. By following the Rawlsian terminology, I speak about these qualities as being rational and reasonable (and I call them, as Rawls does, the two moral powers). Obviously, the two moral powers are features that are developed by a subject much later than the moment when she has the natural basis that permit her to have them, i.e. much later than the moment when she has a functioning cortex. On the other

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<sup>10</sup> This discussion is related to the book review of my *Bioetica*, by Snjezana Prijić-Samaržija. See S. Prijić-Samaržija, *Book Review of "Bioetica. Analisi filosofiche liberali"*, "Croatian Journal of Philosophy", 99-102, 2003.



hand, I think that the moment of the death of the person (which is not the biological death of the individual, which I relate to the death of the brain stem), is the death of the cortex. It may be possible to indicate a contradiction in this position. The two horns of the dilemma are: «(i) if a person dies with cortex death, a person then begins to live with the formation of a functioning cortex, that is, at about the 24<sup>th</sup> week of pregnancy before she develops rational capacities necessary for active participation in the community; or (ii) if a person begins to live with the development of rational capacities, the person dies and loses all his rights when he loses rational capacities in spite the fact that the cortex has still been in functioning. Moreover, if Baccarini defines the conditions for the attribution of human rights by the capacity to actively participate in the community, it leaves it questionable whether a person, during her lifetime, loses this status and rights if she temporarily loses these capacities. In other words, it opens the possibility that someone becomes a person more than once during her biological life».<sup>11</sup>

I do not think that there is a contradiction that has to be solved by the choice of one of the horns of the dilemma, in the context of the proposal that I endorse. The relevant aspect is that I am speaking about a public normative status, not of a metaphysical status. On these grounds, I think that the *reductio ad absurdum* is erroneous.

It is my opinion that a person begins when there is a subject that is able to be an active part of social cooperation. This follows from my proposal of a public normative system that is legitimized by its role in ensuring a stable social cooperation. It may appear natural that a subject loses her status of a full-fledged bearer of rights when she loses the features that conferred that status upon her. But the situation is more complex. Let's think about two possible situations in which a subject may lose her moral powers before the death of the cortex. One may be exemplified by the dementia in the case of Alzheimer, the other may be exemplified by the case of post-coma unawareness.<sup>12</sup>

In the first case, the situation is that a subject loses her cognitive abili-

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<sup>11</sup> S. Prijic-Samaržija, *Book Review of "Bioetica. Analisi filosofiche liberali"*, 101.

ties that attributed to her the status of a full-fledged bearer of rights. However, she may still feel pain, fear, manifest preferences, etc. It appears as clearly reasonable that a person who is participating in a social cooperation requires rights that extend to that situation, too, because she can obviously anticipate interests she will still have in that situation. It is related to the interests one has in her participation in a stable social cooperation to extend the status of a person to a situation that comes after the condition of possession of moral powers. One way of putting it is to say that the subject inherits the status of a person even when she loses the person-conferring status, and the reason is that this is part of the requirement of safety that one claims as a subject of stable social cooperation.

It is rational, in a similar way, that a subject of social cooperation requires rights to protect also the condition of post-coma unawareness. I think that this explanation is the answer also to the *reductio ad absurdum*, that says that people lose and re-obtain the status of person more than once in their life.

4.1. A question relates to the possibility that the limits of public reason are inadequate from the standpoint of looking for suitable public norms. I will discuss the position of Peter de Marneffe. This will help to show the question of public reason in a deeper way than in the foregoing.

As we remember, the general idea of public reason, in brief, «is that we should take only those positions on the scope of basic liberty that can be adequately defended solely in terms of values that every reasonable citizen could endorse».<sup>13</sup> The question, at this point, becomes which are these values, and what balancing of these values leads to conclusions that all reasonable citizens can accept.

Among the arguments offered by de Marneffe, the one most directly relevant for us is that based on the discussion on abortion. He starts from Rawls's exemplification of the debate in a footnote in *Political liberalism*, where a possible argument on the limits of public reason is given, in order to show the application of the method: «Suppose further that we consider the

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<sup>12</sup> I prefer this term to the more usual 'permanent vegetative state', for the reasons explained by Raphael Cohen-Almagor. See, R. Cohen-Almagor, *The Right to Die with Dignity*, New Brunswick, Rutgers University Press, 2001, 20-21.

question in terms of these three important political values: the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens. [...] Now I believe any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force».<sup>14</sup>

The worry de Marneffe has with this exemplification of a possible resolution of the debate on abortion is that it appears far from clear why Rawls's conclusion follows from the values he balances. As de Marneffe says, if «we appeal only to liberal political values to defend the right to abortion, we are left with certain questions. Why, for example, is a right to abortion necessary for women's equality? And how, in any case, is a right to abortion compatible with the due respect for human life? To answer these questions, one must, it seems, say something about why sex is important and about why embryonic human life is not so important, or about why, although important, it is perfectly permissible to put an end to it. But to say something about these matters one must, it seems, appeal to nonpolitical values that could not be endorsed from within every reasonable comprehensive doctrine».<sup>15</sup>

There is a way out from this impasse, as de Marneffe indicates. His answer is that this appeal to such non-political values is legitimate, provided that a position is, at least, adequately defended in terms of liberal political values. He says that «a position is *adequately defended* in general [...] if it is able to answer all the relevant questions it raises at least as well as the contrary position is able to answer all the relevant questions it raises. A position is adequately defended *in terms of liberal political values*, then, if it is able to answer all the relevant questions it raises solely in terms of liberal political values at least as well as the contrary position is able to answer all the questions it raises solely in terms of liberal political values».<sup>16</sup> Let's go back to our example. As we saw from what has already been said, Rawls's exemplifica-

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<sup>13</sup> P. de Marneffe, *Rawls's Idea of Public Reason*, 235.

<sup>14</sup> J. Rawls, *Political Liberalism*, 243.

<sup>15</sup> P. de Marneffe, *Rawls's Idea of Public Reason*, "Pacific Philosophical Quarterly", 1994, 239.

tion of the procedure of public reason in a possible defense of abortion raises several questions that are difficult to answer. However, any alternative based on the three values raises similar difficult questions. For example, one may ask why a right to abortion is incompatible with the value of human life; why it is not necessary for the value of equality of women; etc. The right to abortion is, therefore, adequately defended in terms of liberal political values, and citizens can take this position, while endorsing the idea of public reason.

But, de Marneffe says that this is not enough for liberals. «The fact that Rawls's idea of public reason permits citizens to take controversial liberal position on the scope of basic liberty does not yet show that it is acceptable to liberals, however. To be acceptable to liberals, this idea must permit citizens not only to *take* controversial liberal positions on the scope of the basic liberty, but also to *defend* these positions in public discussion, and to defend them *fully*, or in a way that is philosophically adequate or intellectually complete».<sup>17</sup> The problem is that a full defense of abortion requires an appeal to controversial values, i.e. to non political values. This is exactly what seems to be forbidden by the idea of public reason.

However, de Marneffe thinks that there is no reason to be so restrictive. According to him, it may be enough to say that «citizens may take a position on the scope of basic liberty only if it *can be* adequately defended in terms of liberal political values alone; but this does not mean that citizens must appeal only to liberal political values in the defense of this position. [...] Rawls's idea of public reason thus permits citizens to appeal to nonpolitical values in the public defense of their positions on the scope of basic liberty as long as these positions can also be adequately defended in terms of liberal political values alone».<sup>18</sup>

This defense, however, is not such a good result for those who hope to find justification for a liberal position from Rawls's proposal. The reason is that this strategy may allow the defense of conservative, as well as liberal positions. As de Marneffe wants to show, this appears as clear when we consider Rawls's exemplification of the argument on abortion, where all the strength of

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<sup>16</sup> P. de Marneffe, *Rawls's Idea of Public Reason*, 240.

<sup>17</sup> P. de Marneffe, *Rawls's Idea of Public Reason*, 240.

<sup>18</sup> P. de Marneffe, *Rawls's Idea of Public Reason*, 241.

the argument relies on the political value of the equality of women as equal citizens, as the ground for the right to abortion. In de Marneffe's opinion, it is possible to interpret the liberal value of equality so that there is no relation between the equality of women and the right to abortion. He says that we may interpret equal civic liberty to mean an equal right to liberties traditionally considered as the core of democracy, like the freedom of speech, freedom of worship, freedom from arbitrary arrest, etc.; equal opportunity to mean equal right to an adequate education, and a right to be considered for positions only the basis of the relevant merit; social equality to mean a right against caste restrictions and racial segregation. This interpretation does not offer any ground for the right to abortion. A restrictive position on abortion may be stated: «The liberal political value of due respect for human life requires individuals to act so as to preserve the lives of humans who depend on them for survival, unless this dependence has resulted from the violation of a basic right or preserving these lives is incompatible with self-preservation. Properly interpreted, the liberal political value of equality does not conflict with this claim. The set of liberal political values relevant to abortion thus supports the position that there is no general right to abortion».<sup>19</sup>

This position leaves some questions unanswered. However, de Marneffe says, this is not a lethal defect, to be adequately defended. The important thing is that the alternative, or rival positions, leave similar unanswered questions. We have seen that, in relation to abortion, this is what happens to the liberal position. At this point, de Marneffe says that, in virtue of the fact that the conservative position on abortion is adequately defended, public reason allows citizens to appeal to controversial non political values, for its public defense: «citizens [...] may argue that women can control their reproductive commitments adequately without a right to abortion *because it is a bad thing for people to have sex without willing pregnancy as a desirable outcome*. These claims are controversial of course, but if citizens can make controversial claims in the defense of liberal positions, then presumably they can do the same in defense of the conservative positions».<sup>20</sup>

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<sup>19</sup> P. de Marneffe, *Rawls's Idea of Public Reason*, 242.

4.2. In a sense, Rawls, himself agrees with what de Marneffe says. In a later work than the one to which de Marneffe refers, Rawls explicitly says that his exemplification of the model of public reason in the case of abortion was just an exemplification of how public reason may work, but not his statement on abortion. Rawls admits that the discussion on abortion is still open and that there are various values that can be appealed to in this debate.<sup>21</sup> However, he does not seem to be ready to accept the inclusion of non public support for arguments, at least in the way de Marneffe suggests. Rawls admits that it may be permissible to include non public reasons, as aspects of comprehensive doctrines, in a public argument. But he says that «reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support whatever comprehensive doctrines introduced are said to support».<sup>22</sup> The condition Rawls mentions is, therefore, more restrictive than the one admitted by de Marneffe, because he says that non public reasons can be used only if what they confirm may be independently argued by public reason. This condition is valid even when two competing positions are equally supported by public reasons: «When legal arguments seem evenly balanced on both sides, judges cannot resolve the case simply by appealing to their own political views. To do that is for judges to violate their duty. The same holds for public reason; if, when stand-offs occur, citizens simply invoke grounding reasons of their comprehensive views, the principle of reciprocity is violated».<sup>23</sup>

What must citizens do, in such cases, when public reasons are evenly balanced on both sides? As Rawls says, «when hotly disputed questions, such as that of abortion, arise which may lead to a stand-off between different political conceptions, citizens must vote on the question according to their complete ordering of political values. [...] The outcome of the vote [...] is to be

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<sup>20</sup> P. de Marneffe, *Rawls's Idea of Public Reason*, 243.

<sup>21</sup> J. Rawls, *Public Reason Revisited*, in J. Rawls, *The Law of Peoples with The Idea of Public Reason Reconsidered*, Cambridge, Mass., Harvard University Press, 1999, 169 n.

<sup>22</sup> J. Rawls, *Public Reason Revisited*, 152. There is another reason to include non public reasons in the public debate, and this is related to the value of showing to each other that the allegiance to the public political culture is deeply rooted in each's comprehensive doctrines.

<sup>23</sup> J. Rawls, *Public Reason Revisited*, 168.

seen as legitimate provided all government officials, supported by other reasonable citizens, of a reasonably just constitutional regime sincerely vote in accordance with the idea of public reason». <sup>24</sup>

So, for example, people opposing abortion would be unreasonable in manifesting forceful opposition to abortion, if laws permissive to abortion were voted in the way indicated. The only opportunity that remains is continuing to argue against abortion, and to try to change the majoritarian attitude in the future. This, obviously, is only an exemplification, and not an argument on abortion. Rawls only wanted to say that it is not to be expected that public reason will always lead to a general agreement of views, and to indicate what is the appropriate solution in those cases, that is, the majoritarian vote in accordance with public reason. However, if this is so, it appears that Rawls leaves open a solution in relation to legitimate prohibitive laws related to abortion, as well as permissive laws. A majoritarian law restrictive in relation to abortion may be reasonable and would have to be respected.

There is, here, an important aspect on which Rawls's and de Marneffe's positions seem to be equivalent, and that is related to the fact that there does not seem to be a clear presumption in favor of abortion, as far as the liberal theory of justice, inclusive of the basic principles of liberty, as well as of the content and methods of public reason, is concerned. The focus of the question seems to be about how much space is left in interpreting the scope of the basic liberties protected in a reasonable political system. Both Rawls and de Marneffe agree that there is enough space to leave open the debate on abortion. I agree with them, but I think that there is at least a presumption, although defeasible, for the liberal view on abortion. In other words, my opinion is that it is an open question whether the most reasonable interpretation of the scope of basic liberties supports a permissive view on abortion. However, it offers at least a presumption in favor of the permissive views. The result is that it is not reasonable to leave to a legitimate majoritarian vote, as described by Rawls, the decision on the question. On this matter, a legitimate prohibition may be only the result of reasonable consensus.

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<sup>24</sup> J. Rawls, *Public Reason Revisited*, 169.

4.3. Let's remember that the motivation for the basic liberties, and for assigning to them priority, is their correlation to the development of the two moral powers, or, more precisely, the requirement of guaranteeing the social conditions essential for the adequate development and full and informed exercise of these powers. In particular, I focus here on the possibility of developing a sense of good, i.e. the «capacity to form, to revise, and rationally to pursue a determinate conception of the good»<sup>25</sup>, and its relation to the liberty of conscience. In my opinion, it is the motivation for this liberty, and its role among the basic liberties, that offers a presumption in favor of the right to abortion.

As Rawls remarks, there are two different ways of indicating the relevance of the liberty of conscience for the development of the sense of the good. First, we may see that individuals do not exercise this power only in rationally pursuing their ends, and in articulating their ideas of a complete life. The power has, also, the role of constructing more rational conceptions of good, and of revising actual conceptions of the good. This is because there is no guarantee that the actual formulation of a conception of the good is the most rational. But, if this is so, it appears to be clear why a subject needs the liberty of conscience, as well as the possibility to make mistakes. The way to the development of a rational conception of the good, and the revision of the actual conception of the good, consists in a free exercise of conscience, as well as of attempts that may imply errors. Second, in order to make a conception of the good as really our own, we need to have the possibility to critically examine it. In the absence of this possibility, we can feel a conception of the good only as an external element, and not as our own conception of the good. This, again, renders clear why every person needs liberty of conscience, and has a strong interest in its protection. A political society that does not allow liberty of conscience is unacceptable for the members for whom this liberty is limited. First, because they are limited in the development of their life plan, and, second, because they see the values enforced in this society as an imposition. There are, clearly, two strong reasons for not accepting a society like this.

A source of a possible objection to this argumentation is represented

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<sup>25</sup> J. Rawls, *Political Liberalism*, 312.



by de Marneffe's statement that no particular interpretation of the scope of basic liberties is justified by the requirement of the social conditions for the exercise and development of the two moral powers, because people who disagree on substantial moral protection can disagree also on what are the social conditions for the full development and exercise of the moral powers.<sup>26</sup> However, here we have to remember that we are looking for stable social cooperation, where a condition is represented by the requirement that the terms of social cooperation are acceptable to each individual. I do not see how any individual could possibly accept an external limitation, by imposition, of her liberty of conscience in the name of establishing better social conditions for the full development and exercise of the two moral powers, and therefore, how she can require a limitation of other people's liberty of conscience. From the prospective of each individual, the limitation of her liberty of conscience represents serious damage to the full development and exercise of the moral powers. There is, therefore, certainly, a strong reason for the protection of the liberty of conscience, on the basis of the principle of reciprocity and equality of liberties.<sup>27</sup>

However, in my opinion, it is implausible to think that a conception of the good can be reformed, or revised, or critically examined and made really our own just by abstract thinking. Experimentation of a conception of the good in real life seems required, as well. The consequence is that for a development of the sense of the good the liberty to live in accordance with a conception of the good is required just the same as the liberty of conscience, and for the same reasons.<sup>28</sup>

It is true that the liberty to live in accordance with a conception of the good requires some stronger limits than the liberty of conscience, because it

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<sup>26</sup> P. de Marneffe, *Rawls's Idea of Public Reason*, 247.

<sup>27</sup> It is possible that a subject S feels that another subject S<sub>1</sub> is more reliable than she is, and, therefore, she delegates to S<sub>1</sub> the exercise of the liberty of conscience on specific matters. This is, obviously, not a limitation of the liberty of conscience of S. She exercises the liberty of conscience at the epistemological level of attribution of reliability, and, then, freely, on this ground, she delegates the exercise of the liberty of conscience to another subject on specific matters.

<sup>28</sup> Rawls himself extends the domain of liberties to be protected, by caring about the effectiveness of the liberty of conscience. He remarks the relation between the liberty of conscience and the liberty of association: «Here we should observe that freedom of association is required to give effect to liberty of conscience; for unless we are at liberty to associate with other

has stronger influences on others, and can more frequently and directly cause damage to others, or, more directly lead to infringements of relevant values. However, there is still a presumption in favor of the recognition of this liberty, that manifests itself, at least, in the requirement to ascribe to each citizen a right to live in accordance with their conception of the good. As a consequence, the burden of proof pertains to those who want to limit liberties related to central aspects of conceptions of the good endorsed by citizens. In order to limit the right to live in accordance with a life plan as an expression of one's sense of good, it is required to offer reasons acceptable to each rational and reasonable person in a political society, in the limits of public reason.

What are the consequences for abortion? In his more recent work, Rawls does not exclude the possibility that different values can be balanced, so that the most proper balance can speak in favor of restrictions to abortion. His conclusion is that, as far as this possibility is admitted, there may be a proper majoritarian vote. However, as a consequence of Rawls's own considerations on the liberty of conscience, to which I relate the liberty to make life experiments in accordance with the liberty of conscience, there is a presumption in favor of the right to abortion, if it is related to the possibility of pursuing a model of life, as an expression of the sense of good, i.e. to the moral power of rationality. Again, the right cannot be limited by anything except offering reasons acceptable to all rational and reasonable persons in a political society. A majoritarian vote as such may damage the proper interest related to the liberty of conscience, and to the liberty of making life experiments related to the exercise of the liberty of conscience.

Now, the question becomes whether the right to abortion may be an essential condition of a life plan, and, therefore, related to the expression and development of a sense of good, or is a futile liberty. Many find it plausible to think of an essential connection between the freedom to form sexual partnerships, that include the right of having sex without pregnancy, and a fully emotionally satisfying life, while having a fully emotionally satisfying life is an essential part of their concept of a good life. If the considerations on the relevance of liberty of conscience and the liberty to make life experiments shown

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like-minded citizens, the exercise of liberty of conscience is denied. These two basic liberties

earlier are right, we would harm the exercise and development of the sense of good, and, therefore, the moral power of being rational, by the imposition of limits on the freedom to form sexual partnerships, that includes having sex without pregnancy. For these people, sex without pregnancy, that includes the right to abortion, is an essential aspect of a life plan, and an essential aspect of the expression of the sense of good.

It is true, as de Marneffe says, that some people «may say that women can control their reproductive commitments adequately without a right to abortion *because it is a bad thing for people to have sex without willing pregnancy as a desirable outcome*».<sup>29</sup> However, if it is true that there is a presumption in favor of the liberty to live in accordance with a life plan, as related to the exercise and development of the sense of good (just the same as liberty of conscience is), and if it is true that the right to abortion is related to this, then it is not enough to show that some people may object to sex without pregnancy, but it is also required that they have decisive arguments in their objection, valid from the standpoint of public reason, and able also to convince reasonable and rational people on whom the limitation would apply. Otherwise, the limitation of the right to abortion would be damaging to some people's moral power of rationality.<sup>30</sup>

In conclusion, it seems to me that, so far as the present discussion is concerned, the right to abortion is protected by considerations related to the interests linked to the moral power of rationality, as far as there are no decisive arguments valid from the standpoint of public reason against the right to abortion. The appeal to the absence of such an argument on the side of the right to abortion (as de Marneffe does), or to a possible legitimate majoritarian vote (as implied by what Rawls says), is not sufficient to restrict the right to abortion.

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go in tandem». See, J. Rawls, *Political Liberalism*, 313.

<sup>29</sup> P. de Marneffe, *Rawls's Idea of Public Reason*, 242.

<sup>30</sup> There is a problem that I avoid in this paper, i.e. the possibility that abortion is not essential to having sex without pregnancy, by virtue of contraception. However, I do not discuss this complication of the debate, because it is not contextually relevant, i.e. relevant for the present discussion, in virtue of the fact that neither Rawls, nor de Marneffe take it into consideration. The intention of the paper is not to give a conclusive argument for the question of abortion, but

5.1. I conclude the paper with some remarks on more abstract methodological questions. In particular, I answer some objections made to my *Bioetica*.

What is the kind of moral reasoning suitable for a proposal like the one that I endorse? I am very skeptical in relation to the methodology of authors who try to resolve bioethical questions by appealing to moral intuitions only. I think that this is a mistaken approach because bioethics is a field of permanent conflicts of intuitions. By relying on intuitions only we would have to appeal to a judgment on any specific case of conflict, but this, as I tried to show in the case of Judith Thomson's debate on abortion (together with reactions to her proposal) will not resolve situations of interpersonal conflict, which is a major failure for any proposal of a system of public norms.<sup>31</sup> Instead of moral reasoning based on moral intuitions only, I propose a model that appeals to moral theory, as well.

This kind of proposal has opponents: «many bioethicists in their research rely on the so-called case-study approach as being completely legitimate in their domain. Some of them assume that anyone who approaches an ethical problem by announcing 'I hold such and such a theory, therefore my conclusions about bioethical questions are so-and-so' will be unlikely to get much of a hearing. Namely, bioethicists have to search for the best solution not just from what theory says or what is a political optimal overall standpoint».<sup>32</sup> There are several problems that may be attributed to the position that I endorse. First, there is no moral theory that has resolved all moral questions. Furthermore, bioethical questions are too complicated, to be resolved by the mere application of a theory. Instead, bioethical problems have to be focused on scientific investigations of specific cases, where these investigations make use of analytical ideas and principles that appear as the most helpful in the circumstances at hand. However, it is possible to say that bioethical questions cannot be resolved by case studies only, and that bioethical questions may not be rendered as a one-way affair: «bioethics with its specific studies of scientific facts contributes to ethical theory as well as benefiting

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only to see that the Rawlsian proposal has means to favor the right to abortion, beyond what is admitted by Rawls himself and by de Marneffe.

<sup>31</sup> See my *Pobačaj. Pomažu li moralne intuicije?*, in "Zbornik Pravnog fakulteta Sveučilišta u Rijeci", 1998, 115-132.

<sup>32</sup> S. Prijić, *Book Review of "Bioetica. Analisi filosofiche liberali"*, 101-102.

from it. [...] Bioethical investigations cannot operate independently of ethical theory, but neither does it proceed by simply 'applying' a theory to particular cases». <sup>33</sup>

There are various things I would like to explain related to this problem. First, there is the problem of establishing the limits of moral theory. I think that there is a sense in saying that there is no moral theory that can free us from the problem of the moral dilemma. <sup>34</sup> We may say that there is no unproblematic moral theory that we can take for granted as *the* theory leading us with certainty to valid moral judgments. <sup>35</sup> We may say, as well, that whatever moral theory we choose, we will face the problem of applying a moral judgment in a specific situation. It is also possible that the moral theory is ideal, but facing evil in the world we have to adapt it to the circumstances of life. <sup>36</sup>

Second, I do not think that theoretical reasoning is by itself sufficient for moral reasoning. I endorse the method of reflective equilibrium. This is a method of multidirectional justification, that establishes that moral judgments may be taken as justified if they are part of a set of moral beliefs at different levels of generality, mutually supporting themselves. Some of these beliefs are common sense intuitive moral beliefs. Correct solutions to moral questions are found in the process of accommodation of all beliefs. Sometimes, particular intuitive moral beliefs may suggest the amendment of the original theoretical proposal.

But, I do not think that these limits of moral theory damage the appeal to moral theory as I intend it in moral reasoning in the public domain. Here, in fact, my terminology in *Bioetica* may be misleading, because it reflects a term more appropriate to a different domain of thinking. When the problem is that of public normative rules, moral theory is not committed to finding a definite moral answer to all (or most of all) moral questions. The problem is to see to which moral questions it is possible to find definite moral answers, and which have to be left to the separate answers of separate individuals or communi-

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<sup>33</sup> S. Prijić, *Book Review of "Bioetica. Analisi filosofiche liberali"*, 102.

<sup>34</sup> I find particularly instructive from this standpoint the book of Carla Bagnoli, *Il dilemma morale e i limiti della teoria etica*, Milano, LED, 2000.

<sup>35</sup> In my *Realismo morale* I indicate some problematic aspects of two major candidates, i.e. Alan Gewirth's and Richard Hare's proposals.

<sup>36</sup> Christine Korsgaard says this in relation to the Kantian approach. See, C.M. Korsgaard, *Creating the Kingdom of Ends*, Cambridge, Cambridge University Press, 1996, 133-158.

ties. So, the precise structure is this. There is a general problem for public normative theory: how to establish norms and values that may protect a stable social cooperation. These norms and values include that of the respect of basic liberties of all the full-fledged members of the political society. What I call 'moral theory' in *Bioetica* is applied to see who are the full-fledged holders of rights, what rights there are, what the values are that have to be protected, and, in particular cases, the theory serves to indicate what norm can be enforced in a specific situation by respecting the basic liberties of other individuals, and the principles of legitimatization of liberal societies. It appears clear from this that the kind of moral theory that I propose has only the limited ambition of finding answers to moral questions, in the sense that it leaves a space for further answers to each individual in her non public space. This specification, I hope, suffices to overcome some of the criticisms and limits of moral theory as a comprehensive approach.

Now, I face the problem of the role of science in bioethical reasoning. There are authors who appeal to science as a clear source of verdicts in bioethical matters. I do not think that their strategy is fruitful. There is one obvious reason to say that considerations of science are crucial for bioethics, and this is because moral reasons find support from natural facts. In this sense, bioethics cannot proceed by abstract moral reasoning only. Moral thinking has to interfere with natural studies, as the source of our knowledge of what the natural facts are on which the moral facts supervene. If natural sciences proved that a human being has all her cognitive abilities on her 20<sup>th</sup> day of existence, then our moral judgment about the attribution of moral protection would have to be quite different. If the natural sciences proved that we are fully determined by our genetic structure, then the attitudes toward cloning would have to be different. There is no doubt that bioethics has to rely heavily on natural sciences.

However, it is not true that natural facts by themselves speak the moral language. A natural fact may be judged as nothing more than this, until it is identified as having moral relevance by relation to a moral sensibility, a moral theory, or a moral outlook. In bioethics authors frequently behave as if this was not true. They proceed from natural description and, then, without a clear

motivation, they arrive at a moral conclusion. It seems to me that a frequent mistake in bioethics is equivalent to the one indicated by David Hume: «In every system of morality which I have hitherto met with, I have always remarked that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a god, or makes observations concerning human affairs; when of a sudden I am surprised to find that instead of the usual copulations of propositions *is* and *is not*, I meet with no proposition that is not connected with an *ought* and *ought not*. This change is imperceptible, but is however, of the last consequence. For as this *ought* or *ought not* expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given for what seems altogether inconceivable, how this new relation can be a deduction from others which are entirely different from it».<sup>37</sup>

5.2. I said earlier that I endorse the method of reflective equilibrium as valid in the justification of moral norms, in particular, in relation to public moral norms. However, it may be possible to object that the proposal I endorse is heavily counterintuitive.<sup>38</sup> In particular, the exclusion from the attribution of the rights of those not able to be active parts of social cooperation seems very unusual.

It seems to me that the alternative proposals face counterintuitive consequences, as well. It is surely not a widely shared idea that the embryo deserves absolute protection. When there is the need to choose between the life of the mother and the life of the embryo, surely most of the people support the option of saving the mother. Let us see by another example. There is an adult human being in the full possession of mental abilities. The person suffers from an illness that we are not able to treat at the moment. However, the possibility comes if we do some research on embryos. How many people think that they can say to that person that they will forbid this research because the embryo deserves full protection, and so condemn her to a painful death? I do not think that this is a widespread shared intuition. But, if this is so, it must be admitted that rights of people who are already members of the

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<sup>37</sup> D. Hume, *A Treatise of Human Nature*, in D. Hume, *Moral and Political Philosophy*, New York, Hafner Publishing Company, 1948, 43.

political society are privileged. On the other hand, although it does not ascribe underivative rights to subjects who are not active parts of social cooperation, my proposal recognizes some sources for the attribution of some rights and moral protection to them. This helps in avoiding many counterintuitive consequences.

I think, therefore, that the proposal that I endorse can accommodate with success our common moral intuitions, and consequently, satisfy the requirements of the method of reflective equilibrium.<sup>39</sup>

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<sup>38</sup> See, M. Reichlin, *L'etica liberale e il concetto di persona. Note su un volume di Elvio Bacca-*  
*rini*.

<sup>39</sup> Many colleagues helped me to improve earlier versions of the paper. My thanks go to the participants and professors of the seminar of bioethics at the postgraduate course at "La Sapienza" in Rome, in particular Prof. Eugenio Lecaldano, Dr. Piergiorgio Donatelli and Dr. Gianfranco Pellegrino, as well as to my colleagues of the Department in Rijeka, in particular Boran Berčić and Nenad Smokrović. As always, the greatest attention, patience and help came from my colleague and friend Snježana Prijić-Samaržija.