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RESISTANT LIVES: Law, Life, Singularity

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Abstract

This article examines the potential of Roberto Esposito's work for a rethinking of the relationship between norm and life: in particular, the possibility of a vitalization of normativity which subverts the normative ordering of individual lives. Esposito's intervention in biopolitical debates allows us to think of a micropolitics of life as *zoe* which contests the ordering molarpolitics of Life as *bios*. The author examines this play between normativization of life and vitalization of norm in the context of citizen resistance to the attempt to normatively order their reproductive choices in the case of the 2004 Italian law on assisted reproduction.

Keywords

Biopolitics, Law, Biotechnology

Resumen

En este artículo se examina el potencial del trabajo de Roberto Esposito en el replanteamiento de la relación entre norma y vida: en particular, la posibilidad de vitalizar la normatividad que subvierte el ordenamiento normativo de la vida individual. La intervención de Esposito en los debates biopolíticos nos permite pensar en una micropolítica de la vida como *zoé* que impugna el ordenamiento de políticas morales de vida como *bios*. Yo examino este juego entre la normativización de la vida y la vitalización de la norma en el contexto de resistencia ciudadana con el intento de ordenar

normativamente las posibilidades reproductivas en el caso de la ley italiana del 2004 sobre la reproducción asistida.

Palabras clave

Biopolítica, ley, biotecnología

Introduction

In September 2013, a Rome Court ruled in favour of a couple who had been refused access to treatment at a fertility clinic under the normative order established by the 2004 Act on Assisted Reproduction. In particular, they fell foul of the provision of the Act which prohibits couples who are healthy carriers of a genetically inherited condition access to pre-implantation genetic diagnosis and IVF. The Court held that the couple have a right to have a healthy child and a right to make autonomous healthcare decisions and as such ruled this prohibition in the Act unconstitutional. This was the 28th challenge to the Act's constitutionality in its almost 10 years in existence, the 19th successful one. This case almost completes the judicial unwriting of the act provoked by constant legal challenges by groups and individuals affected by the Act's prohibitions. The law on assisted reproduction is a clear example of a normativization of life which ordered citizens ability to make choices in relation to assisted reproduction and gave symbolic legal recognition to the embryo. Most of the Act's provisions have now been declared unconstitutional as well as being contrary to the European Convention of Human Rights and Fundamental Freedoms in a Grand Chamber decision of 2013.

The 2004 Italian Assisted Reproduction Act (Legge 19 febbraio 2004, n. 40: "*Norme in materia di procreazione medicalmente assistita*") displays an auto-immunitarian logic in which law is used to protect a particular national narrative based on Roman Catholic heteropatriarchal family values. The Act set out to create a model which protected Life in the abstract and restricting the ability of living citizens to make free decisions. It prohibited the testing of embryos for research purposes, embryo freezing, pre-implantation genetic diagnosis for the detection of genetically transmitted diseases, donor insemination, denied access to assisted reproduction services to single women and provided that no more than three ova be fertilized *in vitro*, and that these be transferred to the womb

simultaneously. Once couples agreed on the treatment they would not be allowed to withdraw their consent. Any medical professional attempting to carry out procedures prohibited by the legislation would face prison terms or fines, as well as suspension from the medical register. The law directly contradicts the provision in Article 31 (2) of the Constitution of the Italian Republic, which states that no protection independent of the mother shall be accorded to the unborn. Indeed, the Constitutional Court has held that the welfare of the embryo or foetus does not override a woman's right to health. The Act limited access to in-vitro fertilisation to those categorised as infertile or sterile couples. Couples who were not so defined but who were carriers of a hereditary genetic condition would not have access to assisted reproductive services. The Act limits access to assisted reproductive services to adult heterosexual couples who are either married or in a stable relationship, are of a potentially fertile age and are both living. As Ingrid Meltzer has observed the law led to the construction of the embryo as "a new citizen subject."¹

The Act epitomizes a negative biopolitics which orders the lives of citizens and makes them the objects of the norm, i.e. normativizes life. The Act instantiates what Roberto Esposito would call a politics over life. Citizen contestation of the Act, on the other hand, has led to a judicial unwriting of its prohibitions. Here we have a parallel creation of law which is also a hollowing out of the law from within, a case of vitalizing an abstract norm. Citizens have inhabited the law, have taken up residence there, changing it from within. Citizen resistance to the Act demonstrates that the biopolitical imperative to control lives is not a one-way street and can be resisted by the micropolitical acts of citizens. It is in Esposito's terms an instantiation of a "politics of life" which points to the possibility of an "affirmative biopolitics."² In other words, it is a politics which does not valorize an abstract ideologically rigid notion of Life which restricts individual lives, but performs a politics of life which is driven by actions of individual living beings acting in relation with one another. As Esposito observes: "essa passa per la disattivazione dei dispositivi autoimmunitari e per l'allargamento dello spazio del comune."³ In such an affirmative biopolitics we see the move from what Adalgiso Amendola has called: "the absolute normativization of life... [to]... the vitalization of the norm."⁴ What can

1. I. Meltzer, "Between Church and State: Stem Cells, Embryos, and Citizens in Italian Politics", in S. Jasanoff (ed.), *Reframing Rights: Bioconstitutionalism in the Genetic Age*, The MIT Press, Cambridge (MA.), 2011, p. 118.

2. R. Esposito, *Dall'impolitico all'impersonale. Conversazioni Filosofiche*, Mimesis, Milano-Udine, 2012, p. 185.

3. Ibid.

4. A. Amendola, "The Law of the Living: Material for Hypothesizing the Biojuridical", in *Law, Culture and the Humanities*, 8, 2012, p. 115.

be seen in such moments of contestation is the emergence of what Amendola terms: “a law that isn’t imposed on subjects or that creates them artificially... but that might be produced together with the same processes of subjectivation through which subjectivities as such are formed.”⁵ For Amendola: “this affirmative biojuridical moment... can open to a reading of the same juridical normativization as a process that isn’t superimposed abstractly over conflicts... Therefore, a path can be opened, a bumpy one admittedly, though not impassable, from a *law of the immune* to a *law of the common*.”⁶

Law's Politics Over Life

The Italian law on assisted reproduction reveals a bio-theopolitics in which life becomes the ground of a conflict between competing models of community, one immunitarian, and based on rigid delineations of a national essence and the other plural, singular and never completed or formed. In the Italian case the Act is the manifestation of a theo-political discourse which valorizes ‘Life’ as an abstract value. In this politics what is sought is the emplacement of a particular religious traditionalist thinking at the heart of secular political life. The rhetoric of embryo politics endows the embryo with the characteristics of a fully-fledged citizen. In such a politics the embryo represents the promise of regeneration and perpetual life. The rhetorical linking between ‘embryo’ and ‘Life’ become part of the fantasy narrative that the pro-life movement fashions. As Condit has noted in relation to the pro-life politics of anti-abortion campaigners but which can be applied *mutatis mutandis* to the politics of embryo protection:

the major rhetorical effort of the pro-life movement was... expended in constructing... the verbal linkages between the terms *fetus* and *Life*. The concrete term *fetus* and the abstract value of *Life* were woven together primarily through a frequent recitation of the claim that the authority of “science” had discovered that the fetus was a human being from the time of conception.⁷

5. Ibid.

6. Ibid., p.116.

7. C. Condit, *Decoding Abortion Rhetoric: Communicating Social Change*, University of Illinois Press, Urbana, 1990, p. 61.

In pro-life rhetoric doctors who conduct pregnancy terminations are constructed as having transgressed the ‘natural’ order of things and are somehow tainted or associated with death and murder. As Merton has put it:

the movement accuses anyone who condones legal abortion of, at the very least, standing by and doing nothing while millions of innocent human beings are slaughtered. The logic goes this way: a) zygotes/embryos/fetuses are human beings in the fullest sense of the term, and therefore deserving of protection; b) abortion kills zygotes/embryos/fetuses; therefore c) abortion is murder, and d) anyone who condones abortion condones murder.⁸

Such a politics over life constructs women who exercise freedom of reproductive choice as enemies of the foetus. This discourse homologizes the foetus and the nation into a figure faced with death from a threatening force, i.e. self-determining women. As Lauren Berlant has noted in relation to the pro-life narration of national identity:

the normativity of pro-life society dictates that once pregnant the woman loses her feminine gender, becoming primarily a mother... In protecting the fetus from the woman they divide into a nongenital ‘female’ part – the maternal womb, which really belongs to the fetus – and a potentially malevolent section, composed of a sexual body (un)governed by a woman’s pseudosovereign consciousness.⁹

This immunitarian model of the maternal-fetal relation makes women invisible, creating a model of community in which the mother is seen as somehow a threat to the fetus. This model fails to see the contingent and relational element of the maternal-fetal dyad and exemplifies in Derrida’s words: “a state power where sovereignty is itself essentially phantasmatico-theological and, like all sovereignty, is marked by the right of life and death over the citizen, by the power of deciding, laying down the law.”¹⁰

Such an immunitarian logic sets up a conflictual relationship between the embryo seen as worthy of legal protection and the mother seen as threatening to the nation. The 2004 Act driven by the need to reclaim a conservative notion of the nation based on patriarchal family values. This is a politics which lessens the freedom of living citizens in

8. A. Merton, *Enemies of Choice. The Right to Life Movement and Its Threat to Abortion*, Beacon Press, Boston, 1981, p. 7.

9. L. Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship*, Duke University Press, Durham, 1997, p. 99.

10. J. Derrida, *The Death Penalty: Volume 1*, University of Chicago Press, Chicago, 2014, p. 5.

the interest of an abstract notion of the sanctity of life. As Esposito has put it: “il concetto... di ‘sacertà’ della vita e spesso usato come un dispositivo di esclusione o di soppressione di altre vite, giudicate non altrettanto rilevanti”.¹¹ Precisely in this sense we see the use of the term sanctity of life and right to life as non-negotiable and as exclusionary dispositives. The lives and beings of individuals denied access to reproductive choice and justice are disregarded along with the constitutional rights to health and self-determination in the name of an abstract signifier of Life as normativizing and subject forming. The model incorporated in the Act sees the creation of a notion of community as immunity against intruders and ultimately against death, a social compact built on the desire to survive. As Krause and De Zordo have noted in this regard:

The rigid politics of life operating in Italy supported by the Catholic Church and sympathetic politicians defends the ‘life’ and the rights of the embryo and the ideal Catholic family at all costs. As a result, women who do not have children or who postpone motherhood are stigmatized, as are infertile women and couples who confront a restrictive law on medically assisted technologies, which excluded single women and same-sex couples.¹²

By valorizing life as true abstract life, woman is relegated to the status of mere life, an intermediary figure used as a means of reproducing life.

Vitalizing the Norm: Towards a Politics of Life

In this regard what the Italian case allows us to see is the operation of a biopolitics which both governs and excludes. This exclusionary consequence of biopolitics has been well defined by Didier Fassin as “about inequalities in life which we could call bio-inequalities.”¹³ Such a notion of bio-inequality includes a “withholding [of] recognition from the other.”¹⁴ It is precisely this withholding of recognition from individuals denied reproductive choice that has led to a counter-politics of resistance against the legislation. This resistant biopolitics of living citizens calls for a continuous struggle to maintain and

11. R. Esposito, *Dall'impolitico all'impersonale*, p. 185.

12. E. Krause-S. De Zordo, “Introduction. Ethnography and Biopolitics: Tracing ‘Rationalities’ of Reproduction across the North-South Divide”, in *Anthropology and Medicine*, 19, 2012, p. 143.

13. D. Fassin, “Another Politics of Life Is Possible”, in *Theory, Culture & Society*, 26, 2009, p. 49.

14. *Ibid.*, p. 57.

win rights. It allows us to move from “a rigid politics of life” to a “power of life as such.”¹⁵ It demonstrates the power of individuals acting in concert to contest draconian state action and allows us to see in Fassin’s terms that “another politics of life is possible.”¹⁶ Ingrid Meltzer has described such individuals as biological citizens: “speaking in the name of their physical vulnerability and mobilizing their damaged bodies, they acted as ‘biological citizens.’”¹⁷ Such biological citizens use their bodies as a strategic means of achieving reproductive freedom and choice. The notion of the biological citizen is an interesting one in that it brings together both the reality of contemporary political regimes in which we are all the subjects of governance, with the co-existing ability to resist such governance in the mode of an affirmative biopolitics. It creates a space of resistance in which citizens take on an active role in contesting the manner in which their citizenship is constructed. Here what we witness is a vitalizing of the norm as a form of counter-conduct. What we have witnessed in the last ten years of contestation of this Act is the slow and painful process of the becoming sovereign of what the law has considered to be mere life.

In order to contest their construction by the law as citizens without reproductive rights, patients’ rights groups affected by the legislation engage in, in Stephen Collier and Andrew Lakoff’s term a “counter-politics of sheer life”, which they define as “a claim to state resources that is articulated by individuals and collectivities in terms of their needs as living beings.”¹⁸ This praxis of active citizen resistance to claim new rights or to reclaim rights taken from one is an instance of an affirmative biopolitics which opens up the field for political resistance by those categorized as bare life or lives excluded from human rights protection. In Joao Biehl’s terms we can see such patient action as enacting a form of “biocommunity.”¹⁹ This community is made up of: “a... group of... patients [which] fights the denial of rights and carves out the means to access them empirically.”²⁰ Such a biocommunity proposes an alternative model of community, not one based on auto-immunity, but based on what Esposito would call a model of “common immunity.”²¹ Unlike the model of auto-immunity, the idea of “common immunity” provides a mode of imagining and experiencing

15. *Ibid.*, p. 49.

16. *Ibid.*, p. 44.

17. I. Meltzer, “Between Church and State”, p. 111.

18. S. Collier – A. Lakoff, “On Regimes of Living”, in A. Ong, S. Collier, (eds.), *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems*, Blackwell, Oxford, 2005, p. 29.

19. J. Biehl, *Will To Live: AIDS Therapies and the Politics of Survival*, Princeton University Press, Princeton (NJ), 2007, p. 324.

20. *Ibid.*

21. R. Esposito, *Immunitas: The Protection and Negation of Life*, Polity, Cambridge, 2011, pp. 165-177.

political community as open and contestatory. This model of common immunity is based on an understanding of community not as bounded and based on defending the nation from enemies, but on an inclusion of one within the other, on community as difference.²² This undoes the symbolic conservative notion of the self-sufficient nation under attack from others seen as enemies.

Esposito thinks political community in terms of difference and not in terms of a hegemonic identity. Esposito is concerned with the deactivation of *dispositifs* such as that of the juridical person in favour of the expansion of the space of the common. For him, the notion of the person inherited from Roman law constitutes a mode of disembodiment of the individual, of devaluing the material in favour of the abstract. This valorization of an abstract rational subject over the mere life of actually existing individuals leads to the denigration of the flesh in favour of abstract reason. Individual lives are devalued in favour of a politics which rules over these lives. As Esposito observes: “the person doesn’t coincide with the body in which it inheres, just as the mask is never one with the actor’s face.”²³ As such it can be seen as a *dispositif* which allows the material lives of individuals to be subjected to power, to be constructed as objects of power. For Esposito, the idea of material singularities coming together to act in common provides an example of the power of a collective being in common of material lives. In effect it provides a means of countering the *dispositif* of the person and the biopolitical governance of lives through law. It allows us to see how an impersonal force may dissolve the enforced distinction between *bios* and *zoe*, between the homogeneous non-differentiated subject of power and the flesh of individual lives, and exposes singularity in difference. This overcoming of the separation between bare life and Life is for Esposito the task of an affirmative biopolitics which is a continuous task, a work in progress, a becoming, and a continual beginning.²⁴ For him: “an affirmative biopolitics always involves decisions about life, its meaning, its different demands, its preservation, and its expansion.”²⁵ What he leaves as a question is how one thinks:

An intrinsic relationship between humanity and rights, one that is freed from the subjective slant of the legal person and brought back to the singular, impersonal being of community, is only conceivable starting from life.²⁶

22. Ibid.

23. R. Esposito, “The Dispositif of the Person”, in *Law, Culture and the Humanities*, 8, 2012, p. 25.

24. See further, M. Vatter, “Biopolitics. From Surplus Value to Surplus Life”, in *Theory & Event*, 12, 2009.

25. R. Esposito interviewed by: T. Campbell-F. Luisetti, “On Contemporary French and Italian Philosophy: An Interview with Roberto Esposito”, in *The Minnesota Review*, 75, 2010, p. 111.

26. R. Esposito, *Third Person*, Polity, Cambridge, 2012, p. 140.

Life, Humanity, Rights

One of the most important in the long series of legal challenges by individuals affected by the 2004 Assisted Reproduction Act was the decision of the Regional Administrative Tribunal of the region of Lazio of 21 January 2008. This case was initiated by the World Association for Reproductive Medicine (WARM), a not-for-profit organisation which represents the interests of professionals working in the area of medically assisted reproduction. The action challenged, *inter alia*, the legitimacy of the Code of Practice introduced by Ministerial Decree in 2004, as being *ultra vires* the powers of the Minister of Health, as well as the constitutionality of Article 13 (which prohibited embryo experimentation), and Article 14 (which provided for the transfer of no more than three embryos to the womb simultaneously) of the 2004 Act. WARM also contested the conflation of the terms sterility and infertility in the Act and the legal status accorded to the embryo in the Act. This challenge which also had the support of a number of other reproductive rights organisations was opposed by the Italian government together with a number of conservative civil society organisations, such as the Movement for Life, who intervened *ad opponendum*. The Court in its decision overruled parts of the Code of Practice introduced pursuant to the 2004 Act in July 2004. The impugned provisions related to article 13.5 of the Act which prohibits experimentation on human embryos. The decision also raised doubts over the constitutionality of article 14.2 of the Act. In effect what the decision did was to overrule the limitation on pre-implantation genetic diagnosis of embryos for observational purposes only, on the basis that such a provision could not be enacted by delegated legislation. The Minister of Health had therefore exceeded his powers in introducing this measure by ministerial regulations. As a result of this decision, the guidelines on assisted reproduction were revised on 11 April 2008 to remove the *ultra vires* limitation on pre-implantation genetic diagnosis for observational purposes only.

In its decision, the Lazio court also referred the question of the constitutionality of Article 14 of the Act to the Constitutional Court. In its decision of 1 April 2009 the Constitutional Court reversed the prohibition contained in Article 14 of the 2004 Act on the transfer in any one cycle of a maximum of no more than three embryos. In addition to the referral from Lazio, the Court also received two referrals from the *Tribunale Ordinario* of Florence from its decisions of 12 July 2008 and 26 August 2008. In both of these decisions the Florence court questioned the constitutionality of Article 14 of the Act insofar as it prohibited the freezing of spare embryos, the imposition of a maximum

limit of three embryos which could be created in any IVF treatment cycle and the need for their simultaneous transfer to the patient's womb. In addition the court questioned the constitutionality of Article 6 (3) of the Act which decreed that once a woman had consented to the simultaneous transfer of these three embryos she could not withdraw that consent. The Constitutional Court in its decision held that article 14.2 of the Act was unconstitutional and in particular breached Article 3 of the Constitution in relation to equality and article 32 of the Constitution which upholds the right to health. As a result of this decision, article 14.2 of the 2004 Act was no longer to be interpreted as placing a limit on the number of embryos to be transferred. The Court held that the number of embryos transferred in any treatment cycle should be based on individual medical opinion based on the facts of each patient's case. The decision also overruled the ban in Article 14 (1) on the freezing of embryos. As a result of the decision, embryos which might not be used in a treatment cycle may now be frozen. The Court, in referring to Article 1 of the Act, noted that the interests of all parties (not just the embryo) should be considered citing the Constitutional Court's previous jurisprudence on abortion in which the rights of the woman to self-determination and health should be given priority.

Following the Constitutional Court ruling there have been a number of subsequent successful challenges to the Act in the lower courts. The *Tribunale Civile* of Florence in its decision of 6 October 2010 overturned the ban on IVF with donor eggs or donor sperm in Article 4 of the Act and referred this aspect of the Act to the Constitutional Court for review. On 21 October 2010 the *Tribunale Civile* of Catania made a similar ruling, questioning the constitutionality of the ban on IVF using donor gametes. In the decision of the *Tribunale Civile* of Salerno of 13 October 2010 the limitation in Article 1 of the 2004 Act on access to in-vitro fertilisation to those categorised as infertile or sterile was successfully challenged. The Court ruled in favour of access to pre-implantation genetic diagnosis in the case of a couple who were neither sterile nor infertile. The couple suffered from amyotrophy, which causes the progressive wasting of muscle tissues.

The 2004 Act was the object of a further important Constitutional Court decision in May 2012. This case concerned the question of the prohibition of IVF using donor gametes under Article 4 of the Act. The decision however turned out to be more of a non-decision in that it held that the cases should be referred back to the regional courts from which they issued for re-hearing. The case involved references from three lower courts, in Florence, Catania, and Milan in relation to Article 4, paragraph 3 of the Act (which bans IVF using donor gametes), on the grounds of potential constitutional

incompatibility. The Florence case involved, a couple, SB and FB. The male partner was infertile and the couple required access to donor sperm. The clinic which they attended could not carry this out as the Act prevented it from doing so. The court was of the opinion that the impugned section of the Act was, *prima facie*, unconstitutional but noted that it needed to refer the matter to the Constitutional Court as lower court judges do not have the power to declare a part or whole of a statute unconstitutional.

The reference from the court in Catania concerned a couple, PC and GR. PC suffered from premature menopause and attended a clinic in order to request an egg donation. However she was prevented from doing this by the prohibition contained in Article 4, paragraph 3 of the 2004 Act. The Court noted a *prima facie* breach of the Constitution and noted that such a procedure was medically necessary. Again due to the inability of lower court judges to declare statutes unconstitutional the case was referred to the Constitutional Court. In the Milan case a couple, EP and MM, required sperm donation as the male partner suffered from azoospermia. In this case the prohibition contained in Article 4, paragraph 3 of the 2004 Act prevented the couple from gaining access to such a procedure. All three courts noted that there was a *prima facie* constitutional violation. The justification given by lawyers on behalf of the Government in the argument before the Constitutional Court for such a prohibition was the right of the child to know the biological identity of their parents. This justification had more to do with a conservative mentality in relation to family relations rather than any rights of the child involved.

On hearing the references before it the Constitutional Court decided not to decide and instead referred the issue back to the lower courts. The Constitutional Court used as a justification for this the then recent decision of the Grand Chamber of the European Court of Human Rights in the case of *S.H. and others v. Austria* (Application No. 57813/00, Grand Chamber decision 3 November 2011). In that case the Grand Chamber held that there was no violation of Article 8 of the *European Convention of Human Rights and Fundamental Freedoms* in a case involving a challenge to the provision of the Austrian *Assisted Procreation Act* which prohibits the use of sperm from a donor for IVF and ova donation in general. The Austrian *Assisted Procreation Act* only allows IVF with gametes from the couples involved. Even though the Grand Chamber noted that there was a clear trend across Europe in favour of allowing gamete donation for IVF, it added that an emerging consensus was still under development and so was not as yet based on settled legal principles. The Court held by a majority of thirteen votes to four that there had been no violation of the Convention. The Grand Chamber further noted that the Austrian legislation was not disproportionate as it had not banned individuals from

going overseas for infertility treatment unavailable in Austria. This assumes, without thinking, that couples are in a position to engage in such reproductive tourism.

The decision of the Grand Chamber was entirely at odds with the First Instance ruling in the same case on 1 April 2010, *S.H. and Others v. Austria* (Chamber judgment) which held that the impugned section of the Austrian legislation breached Article 8 of the *European Convention of Human Rights and Fundamental Freedoms* as this prohibition interfered with the couple's right to access treatment which would allow them to found a family. The lower courts had noted, based on the First Instance decision of 1 April 2010 in *S.H. and Others v. Austria*, that the prohibition in the 2004 Act of IVF using donor gametes constituted a breach of Articles 8 and 14 of the *European Convention of Human Rights and Fundamental Freedoms*. The Constitutional Court observed that as the Grand Chamber had overruled this decision the referring courts should re-hear these cases based on this new development.

Since the Constitutional Court judgment in May 2012, the Court of First Instance of the European Court of Human Rights handed down a decision against Italy in relation to the prohibition of pre-implantation genetic diagnosis where a couple are carriers of a genetically inherited condition. In the case of *Costa and Pavan v. Italy* (Application No. 54270/10), a couple, Mr. Pavan and Ms. Costa, both carriers of a hereditary illness, cystic fibrosis, wished to prevent this condition being inherited by any second or subsequent child they might have together. In September 2006 they gave birth to a child with cystic fibrosis, only then becoming aware that they were both carriers of the disease. The couple have a one in four chance of having a child born with the condition and a one in two chance that any future child of theirs will be a carrier of the condition. They want to ensure that any further child they have will neither have nor be a carrier of the condition. The 2004 Act prevents access to pre-implantation genetic diagnosis to couples suffering inherited genetic conditions. It only allows access to screening for infertile couples or where the male partner has a viral disease which can be transmitted through sexual intercourse, such as HIV, or Hepatitis B and C. Since these exceptions did not apply to this couple, the only option open to them as the law stood was to have an abortion on discovery via foetal testing that the future child was either a sufferer or carrier of the condition. In fact, Ms. Costa conceived a child with cystic fibrosis so decided to undergo an abortion in February 2010.

In their application to the European Court of Human Rights in Strasbourg, the couple relied on Article 8 in conjunction with Article 14 of the European Convention on Human Rights and Fundamental Freedoms. Their complaint was that their right

to privacy and family life had been infringed in that they were not allowed access to pre-implantation genetic diagnosis to allow them to prevent the birth of a child with cystic fibrosis. They also claimed that they suffered discrimination compared to infertile couples or those couples in which the male partner has a sexually transmitted disease. In its decision of 28 August 2012, the Court of First Instance of the European Court of Human Rights held unanimously that the ban on access to pre-implantation genetic diagnosis for couples with genetically inherited diseases infringed Article 8 of the Convention. The Court found that there was no breach of Article 14. The Court held that the desire of the couple to have a child who was not affected by a genetically inherited disease of which they were healthy carriers and to undergo pre-implantation genetic diagnosis and IVF in order to do so was protected by Article 8 as it formed part of their right to private and family life (*Costa and Pavan v. Italy*, Application No. 54270/10, Court of First Instance decision 28 August 2012, paragraph 57). The Court unanimously declared that the 2004 legislation was incoherent in that on the one hand it prohibited the transfer of only embryos which were not affected by cystic fibrosis and on the other hand it allowed the couple to abort a foetus affected by this condition. There was a clear impact on the couple's Article 8 rights in this case as a result.

The Court distinguished the decision of the Grand Chamber in *S.H and Others v. Austria* in which the Court allowed a wide margin of appreciation to Austria in legislating in this area. The Court concluded that the interference with the applicants' right to privacy constituted by the ban in the 2004 Act on of pre-implantation genetic diagnosis to such couples was not proportional. The Italian Government entered an appeal against this decision. However, the Grand Chamber of the European Court of Human Rights rejected this appeal in February 2013, noting that the Italian Law on Assisted Reproduction was clearly incoherent and in breach of Article 8 of the *European Convention on Human Rights and Fundamental Freedoms*. The decision of the Court of First Instance of August 2012 is now the final word on the matter as far as the compatibility of the 2004 Act with the *European Convention on Human Rights and Fundamental Freedoms* is concerned. This decision strengthens the hand of those groups in Italy campaigning for the legislation to be reviewed. The decision requires the Italian Government to revise the 2004 Act to make it compatible with the *European Convention on Human Rights and Fundamental Freedoms*. However given the lack of willingness of successive Italian governments to move in this direction it is unlikely that such a review process will begin immediately. What will continue to happen will be individual court challenges to the Act which will gradually have the cumulative effect of nullifying the Act's prohibitions.

It will then be imperative even for unwilling politicians to act to introduce a law which is both coherent and compatible with the *European Convention of Human Rights and Fundamental Freedoms*.

This series of challenges is an example of the vitalization of the norm brought about by the dogged persistence of biological citizens. This active citizen politics allows us to see how the abstract control over Life exercised by the State in the name of religious ideology can be contested successfully. Such a mode of political intervention allows us to imagine a “politics of life” in the sense outlined by Esposito. Such a model stresses the need for continuous political engagement to make real the merely declaratory nature of rights. It is an active engagement with the promise contained in constitutional bills of rights to enable citizens to access rights in reality. As such, this recent episode in Italian political life has universal resonance in that it demonstrates clearly the need on the part of citizens to resist in contemporary regimes of biopower when their material lives are devalued and their full citizenship is threatened in the name of a totalizing narrative of Life. As Krause and De Zordo have put it: “the struggles around reproductive policies are articulated in juridical terms... and produce rights-bearing citizens pitted against each other... These new moral regimes generate social and political spaces for ongoing negotiation.”²⁷

Becoming Normative?

This example provokes us to think how the normativization of lives can be contested by the vital contestation of individual citizens. In this ongoing challenge to their normative ordering citizens engage in an active mode of using rights discourse in a subversive manner to undo accepted models of subjectivity, community, identity, law and politics. Such a micropolitics of rights opens up the field for political resistance by those categorized as excluded from full citizenship. It is in Rosi Braidotti’s terms a “move towards ‘Life’ as a non-essentialist brand of contemporary vitalism and as a complex system.”²⁸ As such we come to see the emergence of a creative jurisprudence in the Deleuzian sense, a disarming of the normative ordering of individual lives. Such legal and political challenges are initiated by assemblages of individuals acting in concert to use rights discourse in a manner which would empower them. Such a

27. E. Krause – S. De Zordo, “Introduction”, p. 148.

28. R. Braidotti, *The Posthuman*, Polity, Cambridge, 2013, p. 158.

creative bottom up employment of rights as political weapons allows us to glimpse what Gilles Deleuze called the creative and collective praxis of jurisprudence. For Deleuze it is jurisprudence “that truly creates law/right.”²⁹ Jurisprudence for Deleuze is not the abstract conceptualization of law or legal theory but rather an active mode of resisting established legal concepts and changing and troubling the law through the collective action of singularities. For Deleuze, it is not “established and codified rights that count, but everything that currently creates problems for the law and that threatens to call what is established into question.”³⁰ In reflecting on Deleuze’s thinking on and about law and human rights, Paul Patton observes that for Deleuze:

jurisprudence was always a matter of politics, in the broad sense in which he understood the term... Jurisprudence involves the creation of new laws but also the creation of the rights that are expressed in these laws... in so far as jurisprudence is also a matter of politics, it involves the processes through which new ways of acting or being acted towards become established (or old ways disestablished).³¹

Esposito declares an affinity with Deleuze in his thinking which opens up a thinking of the impersonal and the anonymous, of a life rather than Life as abstract ordering. This thinking allows us to reframe the tired language of institutionalized and abstract subject-centred human rights discourse and instead force us to think a materially embodied concept of rights as the collective action of singularities, a post-human rights if you will. Such a praxis of rights is similar to what Paul Patton terms a “non-transcendent, immanent conception of rights.”³² These rights embody the claims of transversal assemblages of individuals who do not see a binary cut between thought and action, life and death, environment and humanity, or animality and humanity. Esposito’s reliance on Deleuze is evident throughout his work and indeed we can see in his latest book *Due: La macchina della teologia politica e il posto del pensiero* (2013) a suggestive opening to Deleuze’s thought on jurisprudence in an affirmative biopolitical key when he observes in relation to Deleuze’s notion of jurisprudence:

29. G. Deleuze, *Negotiations: 1972-1990*, Columbia University Press, New York, 1995, p. 169.

30. *Ibid.*, p. 153.

31. P. Patton, “Immanence, Transcendence, and the Creation of Rights”, in L. de Sutter, K. McGee (eds.), *Deleuze and Law*, Edinburgh University Press, Edinburgh, 2012, pp. 15-31, pp. 20-21.

32. *Ibid.*, p. 15.

For [Deleuze]... if the subject is no longer what s/he was because subjectivity is not measurable in temporal terms given that its past is always overtaken and reconfigured by the present, then it is no longer entirely subsumable by the order of law. That which its becoming something other escapes is precisely that normative regime which makes of the law not only a dispositive of guilt and punishment within a theo-political paradigm. This doesn't mean that Deleuze is placed outside or against the sphere of law. What he performs is a linguistic movement which moves the norm from the vertical relation of sovereign command to that of the horizontal plane of the form of life. The passage from one to the other, from the regime of imposition to that of metamorphosis is linked to the creative capacity of jurisprudence. If, in the *a priori* logic of law, facts like persons are subjected to an order which judges single cases on the basis of pre-existing principles, jurisprudence in the Deleuzian sense, conceived of in its originary creative power, derives principles from single cases.³³

This overturning of our understanding of the established ordering of the norm, allows the singular case to drive the norm, an instantiation of the vitalization of the norm, a vital resistance to the norm. Thus what is at stake here is an understanding of jurisprudence as the possibility of making the norm something other than what it was, through the vital intervention of biological citizens.

We can see in the critical responsiveness to the 2004 Act the possibility of the creative transformation of this imposition of ordering. It provides us with a glimpse of a creative jurisprudence in which rights are not achieved by a top down “molarpolitics of public officials”³⁴ but come instead from the mobilisation of self-styling selves, “the molecular movements of micropolitics.”³⁵ In this example we witness the play between the *micropolitics* of movements of individuals who are attempting to self-style their reproductive choices, and the *molarpolitics* of politicians, who attempt to prevent the creation of this right. This *molarpolitics* is based on rigid moral beliefs and refuses to recognize contrary views. It blocks the dialogic political process and creates stasis. William Connolly has termed this behaviour on the part of citizens an *ethos of engagement* with existing moral and social givens which may bring about unexpected consequences or transformations in the societal default thinking on bioethical issues.

33. R. Esposito, *Due: La macchina della teologia politica e il posto del pensiero*, Einaudi, Torino, 2013, p. 217.

34. W. Connolly, *Why I Am Not A Secularist*, University of Minnesota Press, Minneapolis, 1999, p. 147.

35. *Ibid.*, p. 149.

Similar to Esposito's notion of affirmative biopolitics this active resistance on behalf of citizens affected by prohibitive legislation on bioethical issues leads to a reactivation of rights protection for those deprived of such protection. This process Connolly terms "an ambiguous *politics of becoming* by which a new entity is propelled into being out of injury, energy and difference."³⁶ Micropolitical movements such as the patients' rights groups in Italy which continue to call for more liberal regulation of the assisted reproductive technology sector or those individuals who bring legal challenges to the existing law, provokes us to rethink existing modes of addressing bioethical problems. Individuals take responsibility for their selves and work on the political and legal terrains to bring about real change. The intervention of individuals in the political scene via the creative use of jurisprudence allows precisely what cannot be brought about by appeals to politicians to change legislation, the move from, in Esposito's terms, the regime of imposition to that of metamorphosis.

36. Ibid., p. 160.