The value of virginity and the value of the Law: generality, neutrality and the accommodation of multiculturalism in health care

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1. Introduction:

In the realm of human behavior there are no virgin islands for the Law. Not even virginity, one of the quintessential features of our intimate life. Should the non-virginal state of the bride be considered a legitimate cause for the annulment of marriage for those individuals who belong to a community in which virginity is expected? The affirmative answer was given by a court in Lille (France), a decision which caused significant controversy (1). Think of the surgical reconstruction of the hymen (“hymenoplasty”): should the Government ban it? Should it take it as the object of a private contract between the physician and its “patient”? Or should it incorporate it as part of the coverage that a public health care system provides? Hymenoplasty raises many different and fascinating normative questions, but in this paper I will just cover some of the legal quandaries associated with it.

Of course the answer to those questions is dependent on a previous conception of what is Law, a topic too broad and complex to handle here; and yet, several caveats and preliminary clarifications are in order before I argue for my main thesis, which is: a) Law should allow hymenoplasty and b) the public health care system, if there is one, should provide it when the loss of virginity has been a result of a sexual assault, and the non-fulfillment of the cultural

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expectation seriously impinges the possibilities for the woman’s flourishing within her community.

2. **Law: the role of Law and the Rule of Law**

I will take Law as the set of norms that grant the Government a monopoly on the legitimate use of coercion and force. Law is, in my understanding, a “superior” and “comprehensive” normative system. I already hinted at the concept of “comprehensiveness”: Law penetrates every aspect of human interaction in the sense that even if there is no explicit legal regulation – think of friendship, for instance – Law’s silence on that matter should be interpreted as legally empowering individuals to self-regulate in that realm(2). By “superiority” is meant that Law – and not social morality, ethics or the precepts of any religion – is predominant as the instrument for resolving social conflict.

Law’s superiority and comprehensiveness should not be taken to mean that Law pervades other normative systems or becomes fused with them. Law can be superior, comprehensive but also abstinent when it comes to many areas of the personal and social lives of individuals. And this is extremely important for the following reason: in societies in which the Government, and thus the Law, assumes the task of guiding citizens towards virtue, there is a more straightforward answer to the question about how to deal with a dubious practice such as hymen reconstruction. In those countries there is resort to an alternative and immediate source of normativity in the precepts of an official Religion or social morality as it is understood by some body of interpretive authorities. In societies such as these, there is no distinction between sin and crime, so it can never be the case that Law permits to do something that might be generally deemed as immoral (3). For example, the existence of a device for faking virginity built by “Gigimo”, a Japanese sex-shop, provoked a huge outburst in Egypt, and some official representatives and
politicians urged the banning of its import. Abdul Mouti Bayoumi, a reputed expert in Islamic law from al-Azhar University, reminded that using or providing the device is a way of “spreading vice in society” which is punishable with death penalty according to the Sharia (4).

I will circumscribe my analysis of hymenoplasty to the so-called liberal States, which I will, very roughly, characterize as follows: in those States, as opposed to totalitarian regimes, prevails the “general principle of liberty” that I have already described (lack of legal regulation to do or not to do X implies that the X is permitted). In that scenario the Government might nevertheless feel that there is a need to enact an explicit permission – more or less broad- or forbiddance, or an obligation as regards to the act. In the United States, for example, it is claimed that individuals don’t have a duty to rescue strangers, but allegedly this might not be the case if the potential rescuer is a physician (due to his specific role). The issue was hotly debated when the phenomenon of “patient dumping” shocked the American public during the decades of the seventies and eighties of the last century. Absent a clear or non-controversial guidance from general or professional ethics, the matter was finally settled with the enactment of the Emergency Treatment and Active Labor Act (EMTALA) in 1986. And finally, Law intervenes, either directly or by relying on professional bodies of physicians, signaling whether something is a “medical procedure” and what are the circumstances under which it is legally performed. Otherwise, the risks and harms involved in the procedure might be constitutive of a crime (5).

Last but not least, liberal States abide to the ideal of individual autonomy in pursuing life plans. As Ronald Dworkin has recently put it: “You may think that subscribing obediently to the traditions of some culture or faith is, at least for you, the right path to success in living. But that must be what you think…” (6). A commitment to neutrality on the part of Government between different conceptions of the good – religious or culturally based- seems particularly stringent
when dealing with morally diverse societies. And yet, the fact of multiculturalism also poses formidable challenges to the way in which the Law attempts to remain faithful to the goal of neutrality.

So as I just said, in liberal States the aim is to give individuals the possibilities for self-development according to their own conception of how to live a good life. Law becomes the instrument for fostering individual autonomy when legal norms gather certain formal features such as, among others, generality, publicity, predictability and congruence (7). In regimes in which legal regulation follows these requirements we live under the Rule of Law. In those regimes we don’t harmonize social life by indoctrination, manipulation or pure arbitrariness in the exercise of power. Paraphrasing Dworkin’s famous example, we would not permit the Government to address the fact of religious and cultural diversity by giving a bit of satisfaction to all the sensibilities at stake allowing to provide hymenosplasty for women born in even year (8), or flipping a coin to give equal chances to both sides of the issue.

When a State embraces the Rule of Law, lawgiving is, to the contrary, an act of communication that levels rulers and addresses, and is, or attempts to be, in that sense, “neutral”. Not, however, in another sense, as “morally indifferent”. The Rule of Law is the institutional manifestation of highly praised ethical aspirations, namely, the protection of individual freedom to the extent that is compatible with everyone’s freedom (9).

That being said, in the rest of the paper I want to use the demand for hymen reconstruction to show the extent to which, in an attempt to remain faithful to the Rule of Law, we might necessarily sacrifice certain dimensions of justice, fairness and neutrality when regulating hymenoplasmy. I will conclude that in various ways the Law of a Liberal State should assume a margin for imperfection and immorality when dealing with practices such a hymen
reconstruction. It should, in other words, turn a blind eye for the sake of fulfilling no less worthy goals in a non-ideal world.

3. **Generality:**

As with other pieces of conduct that are idiosyncratic of certain minority groups, legally regulating a demand driven by cultural expectations erodes generality, one of the emblematic traits of legal norms under the Rule of Law. The most familiar way in which law’s generality is undermined by multicultural requirements is that members of minority groups ask for legal exemptions to some general duties or prohibitions (10). Should the State of Oregon deny the unemployment benefits if someone has been fired for violating the prohibition on the use of peyote, even though the employee claims that the use of the drug is part of a religious ritual of his? (11) Can the French Government make an exception to the general forbiddance of the use of the *hijab* in public schools?

There is an array of reasons that are pondered in order to admit such exemptions for cultural or religious reasons. The initial inclination is, of course, to respect everyone’s beliefs to the extent that this is compatible with someone else’s rights or with public interests. Accommodation is possible if, in constitutional jargon, there is no compelling State interest at risk when allowing discrete exemptions to compliance. Physicians in many countries are exempt from performing abortions, as well as Quakers to join the military service (12). Sometimes the exemption is possible merely because is not costly in economic terms. Of course that conciliation is complex and controversial, but for the moment we can put aside those difficulties and advance in the discussion.

The cultural accommodation turns out to be much more problematic when at stake is not the negative right of an individual to be exempt from *doing* something, but his positive right to
receive something. From a purely economic perspective some culturally or religiously-driven demands are relatively easy to satisfy, as opposed to, for example, the request of Jehova’s Witnesses to be operated with the guarantee of not undergoing blood transfusions (13).

In any case, in order to advocate for those multicultural demands, one has to elucidate the underlying reasons behind the provision of other goods or services by Governments, and check whether those same reasons apply to the case. Regarding health care, there are different reasons that have been pointed out as the justification for distributing resources not according to an economic criterion (willingness to pay) but according to need. Either humanitarian duties in emergency situations, or some form of the egalitarian argument (14) serve that justificatory purpose. Can those reasons also build the case for hymen reconstruction?

We can, first of all, easily dismiss the emergency argument and look to the more promising egalitarian strategy. Could it be the case that for the woman who belongs to a community in which her premarital virginity is expected, hymen reconstruction is the means to put her on an equal footing for the development of her personal autonomy? If there are other cases in which the State provides plastic or cosmetic surgery in order to protect individual’s autonomy, not covering hymenoplasty would be unfair. The analogy would run as follows: the woman who suffered an accident, or who underwent a mastectomy, is given reconstructive breast surgery because for her flourishing, for her social and sexual life, not to mention her self-esteem, her physical appearance is important. That could also be argued by the woman who demands hymen reconstruction: remaining in her community is also a pre-condition for the development of her personal projects, namely, for getting married and for the enjoyment of other goods whose meaning is culturally bounded (15).
But in order for the analogy to be cogent, the loss of virginity, as it happens with the damage to the physical appearance of the woman who suffered from breast cancer, should not be the outcome of an elected course of action, which is not always the case when we face the demand of revirgination. Muslim or gypsy women who have had voluntary sexual intercourse, have simply given up that aspect of her culture (16).

4. Neutrality:

So we have preliminary reached the somewhat modest conclusion that women who will not be able to pass a virginity ritual or expectation for no fault of their own might be entitled to obtain hymenoplasty as part of their right to health care. It is likely along this sort of reasoning that the French health care system provides hymenoplasty to raped women (17).

This conclusion, although modest, is not uncontroversial because it puts neutrality at jeopardy in various and mutually contradictory ways. At least in the following:

First of all because there is an alternative reading of the equality requirement, one that, aiming at the emancipation of women, prompts us to move exactly in the opposite direction: to forbid hymenoplasty and remove every cultural or religious pattern which tend to perpetuate blatant discrimination against women. Arguably, the State should not remain neutral when dealing with an expectation that is clearly gender-biased according to article 1 of the Convention On the Elimination of All Forms of Discrimination Women (CEDAW) adopted in 1979 (18). As a matter of fact, article 5 encourages State Parties to “… take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (19).
However, one could argue that there is no incompatibility in implementing both policies: on the one hand, remedying what is perceived as a crucial loss for some women, and, on the other, educating the public on the facts with the hope of advancing the elimination of a discriminatory pattern: a ruptured, stretched or intact hymen does not correlate with previous sexual intercourse – most women may have loose the virginal appearance of her hymen due to physical activity, or the use of tampons, for instance- and, although rarely, a hymen can appear virginal after vaginal penetration.

And yet, it is true that at the bottom of the cultural or religious expectation of virginity lies not merely the physiological status of the hymen, but the condition of “honor”, “decency”, “honesty” evinced by not having had premarital sex. It goes without saying that such understanding of virtuosity is mainly expected (and enforced) for women. Should the Government take the further step of not only educating the citizenry on the physiological realities, or disentangling the gynecological myths, but also rebut the belief that virginity, at the end of the day, is not important from a moral standpoint? That would abandon the neutrality requirement to the same extent that it would be partisan to admit, for example, the non-virginal state of the bride as a legitimate cause for the annulment of marriage that I mentioned at the beginning, or to privilege the judgment, sustained by some Muslim authorities and scholars, that women who give up virginity outside marriage must face the social and legal consequences of their licentious behavior (if not punishment) (20).

In the case of hymenoplasty there is a further complexity which compromises neutrality in a different way. Under most circumstances, hymenoplasty, like the signing of “virginity certificates”, is an instance of deceit (21). Neither the Government nor the profession should be entitled to officially state what they know is scientifically nonsensical. However, the surgical
procedure to reconstruct the hymen, even when installing the capsule to simulate bleeding, differs crucially from the virginity certification: the physician is not declaring what she knows cannot be declared. In the former case, as opposed to the latter, it can be the case that the physician is ignorant of what the patient is actually resolved to do (22). And yet, in either case, a health care service is used for simulation, theatrical, ritual or faking purposes, and that constitutes also a compromise for the ethics of the medical profession as well as for the public service.

We should acknowledge it, but I think that if the woman lost her virginity non-voluntarily, hymen reconstruction might be deemed as “truth-restoring” more than a way of deceit. That of course presupposes, again, that “is all about the hymen” (when we know that it is not), but in another sense when we proceed to reconstruct her hymen, we are helping the woman in restoring the meaningful and sensible way in which virginity might have value for her.

5. Conclusion: turning a blind eye or becoming blind to reality?

The purpose of extricating the best reading of a cultural expectation would show the Liberal State’s willingness not to be belligerent against irrationality and prejudice, but “culturally-sensible”. There is a price, however: the price of “entangling” with beliefs that appear, in the end, misguided if not outrageous. On the other hand there are benefits and consequences that should be taken into account.

In an ideal world, women should not get hymenoplasty because women, in the first place, should not be expected to be virgin as a way of gaining respect and possibilities for self-development. In an ideal world, the only value that sexual activity between consenting adults has is the value ascribed by the partners themselves (sometimes mere pleasure, sometimes something
else and more profound). It is idle to insist that we don’t live in an ideal world and this is why a Liberal State should, so to speak, turn a blind eye to hymenoplasty.

A public policy which provides it under the non-arbitrary, neutral, and generalizable condition of having “lost virginity” due to rape, because the fulfillment of certain cultural expectations will protect or enhance the woman’s exercise of her autonomy, incurs the obvious moral hazard of satisfying undeserving women, who falsely claim to have been raped. We should expect the cheating on the system. In that case, the Government would be providing something for no good reason, and likely helping in deceit, a conspicuous immorality sanctioned by the Law, another instance of the turning a blind eye by the Liberal State (23). But it seems to me that it is a cost worth assuming when at stake is integration, or even women’s lives which might be at serious risk (24). It seems to me that neutrality should not turn into blindness.

ENDNOTES


(2) In the United States, for example, it is fairly plausible to claim that physicians are under no duty to satisfy the request for hymenoplasty, and that, unlike female genital mutilation (see 18 USC 116), there is no ban on the procedure. The prevailing legal doctrine is that medical services, in general, are conceived as quasi-contracts, and the old ruling by the Indiana Supreme Court in 1901 (Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058) still governs (see in the same vein Principle VI of the Code of Medical Ethics of the AMA). There are exceptions to the general liberty to treat, such as the prohibition on discrimination (Title VI of the Civil Rights Act and the American with Disabilities Act) as well as a legal duty to attend patients in need of urgent care (EMTALA). There are certainly borderline cases in which the scope of the duty is debatable: irresponsible or dangerous patients, as well as the whole area of futile care.


(5) Think for example in the demand for an amputation by someone who suffers from the somewhat weird condition known as Body Integrity Identity Disorder (BIID). The surgeon, not to mention the layman, who accepts to do so runs the serious risk of being charged for a criminal offence. As regards to hymenoplasty and other cosmetic vaginal procedures, the American College of Obstetricians and Gynecologists has recommended to discourage the patient who requests the surgery, stating that the marketing of such procedures is “troubling” and that its safety and effectiveness have not been documented; see “Vaginal “Rejuvenation” and Cosmetic Vaginal Procedures,” ACOG Committee Opinion, no 378 (September 2007).
Such opinion combined with the lack of an explicit legal permission adds uncertainty for the physicians who perform those procedures and also increases the risks of malpractice lawsuits. I owe Lydia Mayer the provision of the Opinion and her remarks on this important aspect of the discussion.

(6) Justice for Hedgehogs (Cambridge, Mass.-London: Harvard University Press, 2011): 204 (his italics). In the same vein, Will Kymlicka reminds us that the most important aspect of religious freedom in Liberal States is not the possibility of embracing a religion, but of changing faith or abdicating from it; see “Dworkin on Freedom and Culture,” in Dworkin and His Critics. With replies by Dworkin, ed. Justine Burley (Blackwell, 2004): 113-133, 115.

(7) There is an “inner morality of Law”, as famously stated by Lon Fuller in The Morality of Law (New Haven: Yale University Press, 1969): 39. The remaining features are, in Fuller’s account: prospectivity, perspicuity, consistency, feasibility, stability and congruence.

(8) These are, in Dworkin’s terms, “checkerboard” statues and his example was given in the context of the discussion about abortion and Law’s integrity; see Law’s Empire (Cambridge, Mass.: Harvard University Press, 1986): 178.

(9) See Bruno Celano, “Liberal Multiculturalism, neutrality and the Rule of Law,” Diritto & Questioni Pubbliche 11 (2011): 559-599, 585. The idea goes back as far as Aristotle’s Politics: “It is better for the law to rule than for anyone of the citizens to rule” (Politics, III.16, 1287 a19).

(10) Celano, see note 9 above, p. 595.

(11) See Employment Division, Department of Human Resources of Oregon v. Smith 494 US 872 (1990). The Supreme Court held that the State may accommodate such exemptions, but is not required to do so. The decision, a cornerstone in the doctrine of religious freedom’s exercise, has received the bitter criticism of, among many others, Martha C. Nussbaum; see Liberty of Conscience: In Defense of America’s Tradition of Religious Equality (New York: Basic Books, 2008): 153.

(12) See, in the same vein, Nussbaum note 11 above, p. 353.

(13) In Spain, for example, the Constitutional Court held that the denying the reimbursement of health care expenses to a Jehovah’s Witness who underwent surgery at a private hospital because the public facility did not assure him not to be transfused, did not violate his free exercise of religion. See Sentencia 166/96 (October 28th).

(14) A nicely brief account of the discussion between the so-called luck egalitarians and those who, like Norman Daniels, resort to the idea of equality of opportunity for normal functioning, can be found in Shlomi Segall “Is Health (Really) Special? Health Policy between Rawlsian and Luck Egalitarian Justice,” Journal of Applied Philosophy, 27, no. 4 (2010): 344-358.

(15) This is one of the basic tenets of Kymlicka’s Liberal Multiculturalism. See his recent defense in note 6 above, pp. 117-9.

(16) As opposed to the woman who needs reconstructive breast surgery for self-esteem reasons when she cannot be made responsible of her unsatisfactory physical appearance. I owe Robert Truog for pressing me to clarify this point.


(18) “[T]he term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

(19) For an account of the many different practices that the Committee of the CEDAW has urged the States to eliminate, see Michael K. Addo, “Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights,” Human Rights Quarterly, 32 (2010): 601-664, 628-636. Many feminist voices have argued against cosmetic surgery in general as a practice which perpetuates demeaning stereotypes of women, standardizing her female traits for the purpose of satisfying men’s expectations.

(20) It seems to me that in both cases we would be clearly violating two of the three prongs of the so-called “Lemon test” that is used to assess whether a legal act has violated the Establishment Clause of the US Constitution: the no endorsement and no entanglement requirements. See Lemon v. Kurtzman 403 U.S. 602 (1971). It is also what happens in Turkey, according to some reports, when Doctors are willing to perform “virginity tests”; see Pelin, “The Question of Virginity Testing in Turkey,” Bioethics, 13, nos. 3/4 (1999): 256-261.
(21) According to D. D. Raphael this is the major ethical issue regarding hymen reconstruction; see “Commentary: The ethical issue is deceit,” British Medical Journal 316 (February 7 1998): 460. In order to deceive one has to intentionally cause to believe what is false by bringing about evidence (we don’t deceive if we use a drug that causes a false belief). Therefore, the existence of deceit depends on the information that is conveyed by the patient to the physician.

(22) Sometimes women request the procedure just to give a “surprise gift” to her partner for Valentine’s day. See “In Europe, Debate over Islam and Virginity”, note 1 above.

(23) When the abortion is permitted within a certain period of time we are also assuming the possibility of women performing “immoral” abortions, if, for example, they decide to abort for trivial reasons. See in that vein, Ronald Dworkin, note 5 above, p. 378.

(24) A final caveat has to do with underage women. As Luara Ferracioli has warned me, when a minor woman has been raped, the request of hymen reconstruction is made on her behalf. In that case, undergoing surgical hymen reconstruction may add trauma to the victim, who is not, in any case, autonomously embracing the cultural expectation of virginity.