

# The judge's power over life and death\*

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**SUMMARY:** 1. How do constitutions do with the power over life and death; – 2. How judges get more and more involved in life-end questions: comparative background; – 3. A judge claims a right to conscientious objection against the abortion of a minor (1987); – 4. Judges allow to withdraw fluids and feeding in vegetative coma (Englaro 2009); – 5. A judge challenges the law in order to increase judicial power over guardians (X 2017); – 6. The constitutional judge “allows” a reform of the crime of assisted suicide (Cappato 2018); – 7. Final observations.

**ABSTRACT:**

*European Constitution makers have been reluctant to grant specific rights and powers related to life and death, but judges are more and more involved in life-end questions. The paper analyses a few Italian cases of the last thirty years in which the judges' conscience seems to have increased their power.*

## 1. How do constitutions do with the power over life and death

The power over life and death doesn't look like a power that could be entrusted to human beings. “Master over life and death” sounds more like a science fiction (Robert Silberberg 1957) or a computer-game or a psychoanalysis of Anders Behring Breivik and other terrorists. Shouldn't it just be a power of spiritual sovereignty reserved to religion?

In fact, there are ideas and myths of a supreme divine power over life and death, for example in the death-rebirth of Isis and Dionysos. In the Ancient Testament, 1 Samuel 2:6 states: “The Lord brings death and makes alive”. This power over life and death is es-

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essentially a spiritual one, being derived from the tongue: “The tongue has the power of life and death, and those who love it will eat its fruit.” (Proverbs 18, 21). This is the power of the “word”. And from a Christian point of view, any power over life and death is or has to be reserved to God who decided over life, death and resurrection of Jesus Christ, his son who could even undo death through a miracle. The idea that the decision over life and death is in the exclusive domain of God is therefore a traditional Christian idea supported by the narrative and the icon of the crucifix which might become a symbol of human dignity. There are modern ideas on the power of life and death as a part of temporal sovereignty. Meanwhile Hobbes considered the preservation of life as a natural right, Rousseau’s *Contrat social* (1762) justified a sovereign power to inflict death penalty upon any citizen: “when the prince says to him: “It is expedient for the State that you should die,” he ought to die, because it is only on that condition that he has been living in security up to the present, and because his life is no longer a mere bounty of nature, but a gift made conditionally by the State.” (Book II, Chapter 5: The Right to life and death).

In his theory of biopolitics, Foucault theorized this shift in temporal sovereignty from a sovereign who “makes” death and “allows” survival to a sovereign who “makes” life and rejects it into death<sup>1</sup> or, more precisely, “allows” to die. This is the power of the “sword” and of the modern State’s monopoly of legitimate force as described by Max Weber, a State that can’t be yet declared death itself, nor is expected to be of eternal life. In order to protect the right to survival of citizens, some State claims a power to apply death penalty and to kill terrorists like Bin Laden, even to sacrifice the lives of their victims when terrorists take control over aircrafts.<sup>2</sup>

If one looks at similar extreme positions, the power over life and death seems to be vindicated by two different empires, the “empire of the sword” governing the death after life and the “empire of the word” governing the life after death. The separation and reciprocal limitation of these empires as well as their cooperation – the word and the sword upheld each other – is principled and ruled by constitutional law, a sort of “constitutional bio-law”. If the people prefer confessionism, the State can be authorised to enforce religious commands and prohibitions of life and death, if they prefer secularism, the State has to respect freedom of conscience.

From the point of view of modern constitutionalism, any power over life and death needs a constitutional basis. First of all, contemporary constitutions transform human rights in fundamental rights that ought to be ensured by divided public powers. For this purpose

<sup>1</sup> M. FOUCAULT, *Il faut défendre la société*, Paris, Gallimard, 1997, p. 214. ID., *Histoire de la sexualité*, I, Paris, Gallimard, 1976, p. 181: “le vieux droit de faire mourir ou de laisser vivre s’est substitué un pouvoir de faire vivre ou de rejeter dans la mort”.

<sup>2</sup> O. DEPENHEUER, *Das Bürgeropfer im Rechtsstaat*, in *Festschrift J. Isensee*, Heidelberg, Nomos, 2007, p. 43ff.; C. SCHMITT, *Der Begriff des Politischen*, Berlin, D’Uncker & Humblot, 1963, p. 70. Contrary the German Federal Constitutional Court in BVerfGE 115, 118 (Luftsicherheitsgesetz).

they divide sociocultural and socioeconomic from political powers, including religions from politics. They can ensure life as a fundamental right to be defended in jurisdiction, but most constitutions refrain from granting such a right as they refrain from declaring a right to die, rights that could be considered as the positive and the negative choice in a freedom. If they do not declare a similar fundamental right, that might happen due to deference to the belief that there is a divine power or to the belief that temporal sovereignty might include a secular power over life and death. Otherwise the constitution makers could leave space for doctrinal and jurisprudential recognition of “natural” or “implied” fundamental rights or create constitutional norms that allow (only parliamentary) lawmakers to establish duties of life and death.

The first word in the secular constitutional state is that of human legislation. Insofar as life and death are considered, bio-policies need to be transformed into bio-legislation. The legislation has to be consistent with written or unwritten fundamental rights and fundamental principles of human dignity, that can be linked to freedom of conscience as well as to religious concepts. Today, the protection of Human Dignity under European constitutions requires a prohibition of the death penalty as well as an active protection of the right to life against violence that “can allow recourse to lethal force”.<sup>3</sup> The right to dignity is often used as an umbrella for a right to life, but it also implies a right of self-determination through a “last word” – or, from a religious point of view, “penultimate word” – of the human person. On the other hand, freedom combined with proportionality requires to make prohibition to state agents or private defenders to use arms for killing a human person. If the ending of life can't be a duty to be enforced, another question is to what extent the beginning and continuation of life could become an enforceable duty. For this question even further fundamental rights and duties of solidarity as well as power related fundamental constitutional principles could matter.

## 2. How judges get more and more involved in life-end questions: comparative background

In order to be taken seriously, private “last words” need to be respected not only by family members, friends and doctors, but even by public administrations and jurisdictions. Administration could serve interests of public security and welfare, including bioethical interests. Ordinary civil, criminal or administrative jurisdiction can resolve conflicts through bio-jurisprudence.<sup>4</sup>

<sup>3</sup> ECHR 27. 9. 1995, McCann v. UK.

<sup>4</sup> D. VOLLMERT, *Richter über Leben und Tod? Die Rolle des Richters bei der Realisierung von Patientenautonomie am Lebensende*, Hamburg, Kovac, 2005.

Even conflicts between judges and governments happen at an increased rate. For example, a judge of Hamburg denounced Chancellor Merkel for apology of crime when she said that she was happy for the death of Bin Laden.<sup>5</sup>

And in *Hurst vs. Florida*, the US-Supreme Court held that Florida's death penalty sentencing scheme, in which jurors make capital punishment recommendations and judges make the final decision, is incompatible with the Sixth Amendment, which requires jurors, rather than judges, to find each fact necessary to impose the death penalty.<sup>6</sup> From this point of view it is not the judge, but rather the jury that has to decide over death penalty and the judge can't override the decision of the jury. In Europe, death penalty has been abolished and the context of Foucault's observations on bio-politics has been completely changed. European judges can't decide any more for death penalties, but what about the freedom to die and the duty to stay alive?

The question was first raised in *Cruzan v. Director Missouri Department of Health* (1990).<sup>7</sup> The US Supreme Court found that it was not unconstitutional to require "clear and convincing evidence" of a patient's wishes for removal of life support (advance health directives). Scalia's concurring opinion defended the prohibition of suicide quoting Blackstone and held "that the point at which life becomes "worthless", and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate", are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory". Brennan's dissenting opinion defended "the right to be free from unwanted medical attention" against the State: "The only state interest asserted here is a general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the persons choice to avoid medical treatment."

In the case *Rodriguez* (1993), the Canadian Supreme Court argued that the fundamental principle of "sanctity of life" excluded yet a freedom of choice in the self-infliction of death: "no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives."<sup>8</sup>

After the failure of popular ballots in Washington 1991 and California 1992, a small consensus of voters decided in 1994 in favour of the Death with Dignity Act (DWDA) of Oregon. In *Lee v. Oregon*, an injunction was granted upon the challenge of a violation of the federal Constitution, in 1997 dismissed by the Ninth Circuit Court of Appeals when even a repeal failed. Other state legislations followed in Washington (2008), Vermont (2013), California (2015), Colorado (2015), District of Columbia (2015) and Hawai (2018). In the case

<sup>5</sup> Die Welt, 6. 5. 2011.

<sup>6</sup> 577 U.S. \_\_\_ (2016).

<sup>7</sup> 497 U.S. 261.

<sup>8</sup> 3 SCR 519 Rodriguez (1993)

of Dianne Pretty, the UK-High Court observed that assisted suicide was legalised only in Oregon, Switzerland and the Netherlands and hold that human dignity “is not the right to die in dignity, but the right to live with as much dignity as can possibly be afforded, until that life reaches its natural end.”<sup>9</sup>

In first approximation, the judges of common law countries seem to have been more reluctant to recognize a right to die in dignity. Nevertheless there are some significant exceptions, specially but not exclusively in contexts of federalism.

The Montana Supreme Court decided the “legalisation” of physician assisted dying in the case *Baxter v. Montana*, stating that “nothing in Montana Supreme Court precedent or Montana statutes indicating that physician aid in dying is against public policy” (2009).<sup>10</sup> The Supreme Court of British Columbia ruled in 2012 that provisions in the Criminal Code prohibiting doctor-assisted suicide, if applied to severely disabled patients capable of giving consent, infringe the Charter, “and are of no force and effect to the extent that they prohibit physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship”. Quebec legalized it in 2014 and in 2015, the Canadian Supreme Court overruled *Rodriguez* and suspended its ruling, giving the federal government 12 months to amend the laws.<sup>11</sup> On the other hand, in 2016 the State Supreme Court of New Mexico overruled a district court ruling that in 2014 proclaimed physician-assisted dying in the state a right, considering the matter reserved to executive and legislative branches.

Even in the Netherlands, a civil law country that prohibits constitutional review of law, the Euthanasia legislation of 2002 was preceded by corporative recommendations and judicial decisions. Already in the *Schoonheim* case of 1984, the Hoge Raad (Dutch Supreme Court) allowed the physician to invoke the defence of a state of necessity (*force majeure*) at least in unbearable and hopeless situations, conditions that have been by later decisions.<sup>12</sup>

So if one looks at the powers at the origins of the right to die in dignity, we find strong inputs of direct democracy in Oregon and other west-coast states and expectations of a “new consensus in society” expressed in *Rodriguez*, but even expectations that it could be a last piece of the civil rights revolution expected to be written by legislatures or courts. Nevertheless, the common law judges themselves felt frequently uncomfortable with these expectations. Cass Sunstein observed in 1996 that the conscience of the judge asks to mobilise the conscience of others: “It is not the Supreme Court but these other arenas-state

<sup>9</sup> A violation of art. 2 ECHR was denied by ECtHR, 29. 4. 2002, *Pretty v. UK*.

<sup>10</sup> *Baxter & others v. State of Montana* (2009), MT DA 09-0051, 2009 MT 449.

<sup>11</sup> *Carter v. Canada* (Attorney General), 2012 BCSC 886 and 2015 SCC 5.

<sup>12</sup> 27. 11. 1984, *Nederlandse Jurisprudentie*, 1985, no. 106. E. PANS, *The Normative Context of the Dutch Euthanasia Law*, in S. YOUNGNER, G. KIMSMA (eds.), *Physician-Assisted Death in Perspective: Assessing the Dutch Experience*, Cambridge, Cambridge University Press, 2012, pp. 71 ss.; M. ADAMS, J. GRIFFITH, *Comparative Law as an Act of Modesty*, in M. ADAMS, Bomhoff (eds.), *Practice and Theory in Comparative Law*, Cambridge, Cambridge University Press, 2012, p. 289.

legislatures, prosecutors' offices, hospitals, and private homes—that should decide whether, when, and how to legitimate a 'right to die'.<sup>13</sup>

While the prudential modesty of common law judges asked to wait for the bio-politics of legislators and civil society, civil law culture judges were less reluctant and less tolerant with the silence of the lawmakers. The Italian experience shows that the judges conscience led them into various temptations.

### 3. A judge claims a right to conscientious objection against the abortion of a minor (1987)

In Italy, legislation on abortion was changed first by a decision of the Constitutional Court<sup>14</sup> and then by Law n. 194/1978 which was later upheld by a popular referendum. The law demands physicians to assess the serious danger necessary for allowing an abortion, grants them a right to make an a priori conscientious objection and obliges judges to authorise the abortion of a minor in place of the parents or legal tutors. The latter duty was that recognized to challenged by a judge of Naples that claimed a right to conscientious objection similar to physician and suspended the authorisation asking for a preliminary ruling of the Constitutional Court. The Court dismissed the question of constitutionality because the judge was not in a situation similar to that of physician and the judges freedom to decide in coherence with his own *conscientia virtutis et vitiorum* shall be limited to the benefit of the necessary neutrality and the regular exercise of jurisdiction in a way that ensures that justice can be done. The general duty to adjudicate “with conscience” was recognized at the end of the Fascist Regime in Art. 4 Law no. 478/1946, but in the view of the Court conflicts of conscience could be avoided through ordinary instruments of court organisation.<sup>15</sup>

The problem of this case was that the judge's conscience even with the negative answer of the constitutional judge prevailed over the conscience of the minor. The procedure of authorisation was suspended for the whole length of the constitutional court procedure, more than 30 months, with the full name of the applying minor published in the *Gazzetta Ufficiale*. It has never been clarified whether the abortion has been performed at the minors and the physicians full risk or not. The judge acting in the interest of the unborn and for its own convictions more than in the supreme interest of the minor, did not recuse himself because of his conflict of cultural interest, but asked to consider his private interest

<sup>13</sup> C. SUNSTEIN, *The Right to Die*, 106 *Yale Law Journal*, 1163, (1996).

<sup>14</sup> Corte costituzionale, sent. n. 27/1975.

<sup>15</sup> Corte costituzionale, sent. n. 196/1987.

colliding with the law when exercising the power to start a proceeding for a preliminary ruling in the Constitutional Court.

The Court's decision underlined that independent judges should not be sanctioned for their decisions and probably no disciplinary proceeding has been started. As a matter of fact, the procedural choice of the judge to challenge the constitutionality of the law implied a vindication of a power over life and death of the unborn.

The right of a judge to conscientious objection in cases of bio-law has been recently debated even in other catholic countries like Poland.<sup>16</sup> If a judge believes that his judgment could be troubled by his religious belief or by the supervisors of his religious conscience, he might have the duty to refuse the judgment and ask for substitution in a way that no petitioner of justice has to suffer delay. In a secular state, judges should avoid to use their subjective conscience as a title against the law, because otherwise the feeling of the sanctity of life might vindicate a power over human life and death and people could fear the end of the judges' general subjection to the law and the beginning of a judicial tyranny.

#### 4. Judges allow to withdraw fluids and feeding in vegetative coma (Englaro 2009)

In 1992, 21-year-old Eluana Englaro was involved in a car accident, leaving her in a permanent vegetative state (PVS) with irreversible cerebral damages.<sup>17</sup> Following a visit to her friend who was at that time in the same condition she expressed verbally the desire not to be kept artificially alive 'attached to a pipe'. Her father was nominated her guardian in a special "incapacitation procedure" and asked the court for authorisation to stop alimentionation which was granted only in 2008 after a ruling of the Supreme Court that declared withdrawal of artificial nutrition and hydration permissible if the patient's condition is certified to be irreversible and artificially prolonging the patient's life is inconsistent with his or her express wishes, character, or outlook on life.<sup>18</sup> The Court of Appeals of Milano granted the authorisation referring also to the cases of Hervé Pierra (France) and Tony Bland (UK).

Several conservative and catholic MPs obtained a majority in both chambers for the initiation of a conflict of competence procedure in the Constitutional Court claiming that the authorisation would violate the legislative power in already pending legislative procedu-

<sup>16</sup> S. MAZURKIEWICZ, *Judge as Conscientious Objector – Analysis Based on Cultural Exemptions Theory and U.S. Law*, in *Polish Review of International and European Law*, 2017, 73ff.

<sup>17</sup> For a detailed reconstruction S. MORATTI, *The Englaro Case*, in *EUI Working Paper MWP*, 2012/04. <http://cadmus.eui.eu> and G. GENTILI, T. GROPPI, *Italian Constitutional and Cassation Courts: when the right to die of an unconscious patient raises serious institutional conflicts between state powers*, in *ILSA Journal of International & Comparative Law*, 2011, 73ff.

<sup>18</sup> Corte di cassazione, 14. 11. 2008, no. 27147. In Italian: <http://bit.ly/IeEtMw>.

res. The Constitutional Court declared the applications inadmissible because the judges had decided over a case and did not produce norms and the Parliament asked substantially for an opposite judgment, being free to bring the legislative procedure to an end.<sup>19</sup> The national and regional governments tried to order the prosecution of alimentation as basic care, but the administrative court struck down the order and even decided to recognize damages to the family (2016). The President of the Republic refused to sign a new governmental emergency decree prohibited withdrawal until an organic legislation has been approved by parliament. The Strasburg court declared a further recourse of pro-life associations inadmissible.<sup>20</sup> The alimentation was stopped and Eluana Englaro finally died after 17 years of coma while the Senate was debating a new legislation. A criminal proceeding was opened and closed without punishments and the father was later elected as a MP. The case was without precedent and has been strongly debated over the last years.<sup>21</sup> The judges decided to authorize the decision of the father, to be carried out by physicians, to respect a former unwritten will of the patient and refused to wait for the ending of a law-making procedure in parliament.

The question was: what happens if the legislator is unable or unwilling to decide a regulation of a practice that is yet neither commanded nor forbidden and that, from an individual liberal point of view should therefore be free, from a communitarian point of view should therefore need a specific permission? The answer could depend from secular and religious options. The Italian state being pope-friendly, but secular, the decision not to wait neither for the decision of god to end this life, nor for the decision of the lawmakers to produce adequately balanced rules was probably neither cynical, nor hypocritical, but rather “civil and civic” in the sense that it could (and should) not be taken as a normatively binding precedent.

## 5. A judge challenges the law in order to increase judicial power over guardians (X 2017)

The law no. 219/2017 finally established a new “relationship of care (cura) and trust between patient and physician ... where the decisional autonomy of the patient meets the competence, professional autonomy and responsibility of the physician” (art. 1 s. 2). The law calls on various rights guaranteed by the Constitution and the Charter of Fundamental Rights of the European Union, not the European Convention of Human Rights, and recognizes the right of the patient a) to decide on any health care treatment through informed

<sup>19</sup> Corte costituzionale, no. 334/2008.

<sup>20</sup> Ada Rossi and Others v. Italy, 22. 12. 2008.

<sup>21</sup> See J. LUTHER and others in: *Il potere, le regole, i controlli: la Costituzione e la vicenda Englaro*, (Roma, 5 marzo 2009) [http://www.astrid-online.it/static/upload/protected/Luth/Luther\\_Seminario-Astrid\\_caso-Englaro\\_05\\_03\\_09.pdf](http://www.astrid-online.it/static/upload/protected/Luth/Luther_Seminario-Astrid_caso-Englaro_05_03_09.pdf)



consensus (art. 1 s. 1), b) to know the own conditions of health in order to be enabled to express informed consensus, c) to renounce to similar information, d) to delegate the expression of informed consensus (art. 1 s. 3), e) to refuse or renounce to diagnosis and treatments, f) to revoke the consensus (art. 1 s. 5). Furthermore, the law establishes a duty of the physician to offer a palliative therapy, even in deep and continuative forms, and to avoid unreasonable obstinacy in other therapies (art. 2). Minors have the right to get adequate information, but need to be represented by their parents, meanwhile elders can be represented by persons authorized to support their self-administration (amministrazione di sostegno). If they refuse the informed consensus, the physician can ask a judge to decide (art. 3 s. 5). Every adult can make a written or equivalent certified forms of expression called “advance directives of treatment” (disposizioni anticipate di trattamento - DAT) that expresses consensus and refusal of specific health treatments and have to be registered by the local administration and respected by the physician unless the DAT is “obviously incongruent and doesn’t correspond to the present clinical condition of the patient” or there are available “therapies not expectable at the moment of the signature and that are able to offer concrete chances to better the life conditions”. In cases of a conflict between a fiduciary and a physician, the latter can ask again for a decision of the judge (art. 4 s. 5). A judge of the civil court of Pavia decided to challenge the constitutionality of the provision that allows the court appointed guardian for support administration, if vested with a power of assisted or exclusive representation in the field of health services, to refuse informed consensus on the basis care for PVS-patients without any prior authorisation of the judge.<sup>22</sup> The Constitutional Court has not yet decided and could even dismiss the question as inadmissible because of not being strictly relevant for the decision whether to confer or not the guardianship with a power of representation in health service affairs. In the meantime, the judge participated to a public meeting of catholic lawyers in order to gain public support on the matter.<sup>23</sup>

At any case, the decision of the legislator to leave the decision over the prosecution of basic care for a PVS-patient to the court appointed guardian and the physician, giving the judge only the last word in cases of disagreement, is considered by this judge as unreasonable because the right to refuse treatments should be “personalissimo”. For the future, the problem can be avoided by a DAT, but ca. 3.000 existing PVS-patients never had the chance to do so and their guardians and physicians are practically condemned to wait for the decision of the Constitutional court. For the past and the pending cases, the legislator seems to have entrusted the solution to guardians and physicians, with no legal opportu-

<sup>22</sup> Tribunale Pavia, ordinanza 24.3.2018, in [www.biodiritto.org](http://www.biodiritto.org). The question has been surprisingly commented by the assistant of constitutional judge: B. LIBERALI, *La problematica individuazione e il ruolo dei soggetti terzi coinvolti nella relazione di cura fra medico e paziente nella nuova disciplina sul consenso informato e sulle DAT*, (25.6.2018), in [www.forumcostituzionale.it](http://www.forumcostituzionale.it).

<sup>23</sup> <http://ilnuovogiornale.it/archivio-articoli/appuntamenti-diocesani/1183.html>.

nity of conscientious objection. The judge considered this a surprising and unreasonable choice, being the guardians obliged to ask for the judges authorisation for all mayor decisions regarding the patrimony, but not for a decision to end life.

Nevertheless, to make a general prohibition and grant a power of authorisation to the judge in similar situations where no right to die and no duty to survive has been recognized, could not be the only reasonable way out for the legislator and be an inadmissible manipulation of the law n. 219/2017. Alternatives could be more sophisticated procedures with the prior involvement of bioethical commissions, a duty of written motivation of the decision of the guardian and the physician and perhaps even an ad-hoc procedure for the adoption of PVS-patients.

## 6. The constitutional judge “allows” a reform of the crime of assisted suicide (Cappato 2018)

The aforesaid law changed only the civil law, not art. 580 of the Italian criminal code of 1930:

*“Anyone who instigates others to suicide or reinforces the intent of another to commit suicide or facilitates in any way to carry it out, shall be punished, if the suicide occurs, by imprisonment from five to twelve years. If the suicide doesn’t occur, he shall be punished by imprisonment from one to five years, as long as there is a grave or very grave injury resulting from the suicide attempt.”*

The punishments are increased if the crime is committed against a minor over 14 or with mental, psychologic handicap o depended from alcohol and drugs. The sanctions for murder apply if it is a minor under 14 or person unable to understand and decide.

Even prior to the approval of law no. 219/2017, a former radical deputy of the European Parliament and leader of the Associazione Luca Coscioni, Marco Cappato, drove Mr. Fabiano Antoniani, a former DJ rendered by a car accident paraplegic and blind and suffering pains, his mother and mother to the clinic Dignitas where he participated to an assisted suicide procedure under medical supervision in conformity with the Swiss law. Under art. 115 Swiss criminal code, assisted suicide is punished only if committed for “selfish motives”.

The Public Prosecutor was constrained to open a criminal proceeding, but plead for acquittal. The Court of Assise of Milano excluded any instigation and reinforcement of the intent to commit suicide, but hold that there has been facilitation. It decided to suspend the proceeding and referred to the Constitutional court the question whether the aforesaid article is

(1)incompatible with the principle of equality, personal freedom and the principle of primacy of international law applied to articles 2 and 8 ECHR “insofar as it punishes the conduct of help in alternative to instigation, independently from its contribution to the instigation or the reinforcement of the intent of suicide”,

(2) incompatible with the principles of equality, personal freedom, *nullam poenam sine legem* and compatibility of punishments with the sense of humanity “insofar as it provides that the conduct of facilitating to carry out a suicide without instigation and reinforcement of the intent to commit it, shall be punished with an imprisonment from 5 to 10 years, with no distinction from the conduct of instigation”.

The Court quoted the precedents of Welby and Englaro and of the ECtHR in the cases Haas v. Switzerland (2011) and Gross v. Switzerland (2014) and hold that the legal recognition of a “right to self-determination related to when and how put an end on one’s own existence” through law n. 219/2017 would imply that the mere facilitation can no more be punished as a violation of this freedom. This argumentation has been criticised because Switzerland is not Italy and the freedom to “let myself die” could be different from the decision to take a lethal drug.<sup>24</sup>

The Constitutional court decided to delay the decision and issued the following press release:

*“In today’s closed session, the Constitutional court has found that the present normative framework regarding life end leaves without adequate protection certain situations worthy to be safeguarded and to be balanced with other constitutionally relevant goods. In order to allow first of all the Parliament to intervene with an appropriate legislation, the Court decided to postpone the discussion of the question of constitutionality of art. 580 Criminal Code to the hearing of 24th of September 2019”.*

This is a quite new form of procedural decision that is not contemplated by the legal framework of Italian constitutional justice where declarations of unconstitutionality of laws can’t be made with delayed effects *pro futuro* like in Austria or freeze the application of the merely incompatible (*bloss unvereinbar*) law like in Germany.

The comparative law matters. In Haas v. Switzerland the ECtHR concluded: *“However, the research conducted by the Court enables it to conclude that the member States of the Council of Europe are far from having reached a consensus with regard to an individual’s right to decide how and when his or her life should end”*. In Koch v. Germany (2012), the ECtHR recognized that only in Switzerland and the Benelux-countries as well as in Sweden and Estonia, assisted suicide has been at least partially legalised. Germany itself decided in 2015 to restrict criminalisation to “businesslike” (*geschäftsmäßige*) organised assistance (§ 217 criminal code), but a proceeding of constitutional review is still pending in Karlsruhe and a preliminary injunction in order to allow assisted suicide by suspending a recent reform act was denied.<sup>25</sup>

<sup>24</sup> See f. ex. M. RONCO et al., in <https://l-jus.it/wp-content/uploads/2018/10/L-JUS-fascicolo-speciale-ottobre-2018.pdf>; A. Morrone, G. Di Cosimo et al. in: <https://www.radioradicale.it/scheda/554071/il-caso-cappato-davanti-alla-corte-costituzionale>.

<sup>25</sup> BVerfG, Decision 21. 12. 2015 - 2 BvR 2347/15. The public hearing was in march 2018. For an amicus curiae defence see for ex. [https://www.palliativstiftung.de/fileadmin/images/service\\_aktuelles/downloads/2017-02-25\\_\\_Stellungnahme\\_\\_](https://www.palliativstiftung.de/fileadmin/images/service_aktuelles/downloads/2017-02-25__Stellungnahme__)

In France, only “provocation” and “propaganda” is punished with up to 3 years imprisonment, if the provocation is committed on minors up to 5 years (art. 221-13, 14). Even in Greece, only the inducement is punishable (art. 301).

In Spain, instigation is punished from 4 to 8, cooperation from 2 to 5 years, but shall be reduced if it is requested by a conscious and suffering person (art. 143).<sup>26</sup>

With the exception of Denmark, where assisted suicide is punished with imprisonment not exceeding 3 years (art. 240), the Scandinavian countries (Norway, Finland, Sweden) don't have specific provisions for assisted suicide that risks nevertheless to be punished as a lighter case of assistance to manslaughter. In Latvia, only leading to suicide is punished with imprisonment not exceeding 3 years [section 124 (2012)].<sup>27</sup>

Other codes punish both, instigation and aid, without differentiation, but the Italian criminal code provides much harsher punishments than other European criminal codes.

A harsh punishment up to 14 years of imprisonment, but without any minimum, was established only in the UK by the Suicide Act of 1961 and in Ireland by the Criminal Law Suicide Act 1993. Even in Malta, no minimum is provided and the maximum is imprisonment for 12 years.

The Austrian punishments vary from 6 months to 5 years (art. 78)<sup>28</sup>, Polish punishment from 3 months to 5 years (art. 151), Hungarian punishments have no minimum and the same maximum (art. 168). In Albania, only suicide caused by holders of specific social solidarity duties is punished from 3 to 7 years [art. 98 (2013)].<sup>29</sup>

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DPS\_\_217\_StGB.pdf.

<sup>26</sup> Artículo 143. 1. El que induzca al suicidio de otro será castigado con la pena de prisión de cuatro a ocho años.

2. Se impondrá la pena de prisión de dos a cinco años al que coopere con actos necesarios al suicidio de una persona.

3. Será castigado con la pena de prisión de seis a diez años si la cooperación llegara hasta el punto de ejecutar la muerte.

4. El que causare o cooperare activamente con actos necesarios y directos a la muerte de otro, por la petición expresa, seria e inequívoca de éste, en el caso de que la víctima sufriera una enfermedad grave que conduciría necesariamente a su muerte, o que produjera graves padecimientos permanentes y difíciles de soportar, será castigado con la pena inferior en uno o dos grados a las señaladas en los números 2 y 3 de este artículo.

<sup>27</sup> “Section 124. Leading to Suicide. (1) For a person who commits leading a person to commit suicide or attempt suicide by cruel treatment of the victim or systematic demeaning of his or her personal dignity, if such person has not been in financial or other dependence upon the offender, the applicable punishment is deprivation of liberty for a term not exceeding three years or temporary deprivation of liberty, or community service.

(2) For a person who commits the same acts with regard to a person who has been in financial or other dependence upon the offender, the applicable punishment is deprivation of liberty for a term not exceeding five years or temporary deprivation of liberty, or community service, with or without probationary supervision for a term not exceeding three years.”

To lead a victim to suicide is even a reason for higher punishments in several crimes of the Estonian Penal code. See [https://www.rsu.lv/sites/default/files/dissertations/A%20Gabrieljans\\_kopsav\\_ENG\\_A4.pdf](https://www.rsu.lv/sites/default/files/dissertations/A%20Gabrieljans_kopsav_ENG_A4.pdf).

<sup>28</sup> Identical art. 78 Criminal Code Liechtenstein.

<sup>29</sup> “Causing suicide or a suicide attempt to a person because of the systematic maltreatment or other systematic misbehaviors which seriously affect the dignity, committed by another person being the superior, or by the person having family or cohabitation relation shall be punished three up to seven years imprisonment”.

Some countries followed the Italian distinctions, but not the harshness. In Portugal, the punishment can't exceed 3 years, if committed on minors under 16 years or non autonomous persons from 1 to 5 years (art. 135). In Slovenia, solicitation to and assistance in suicide is punished for not less than 6 months and not more than 5 years, for minors over 14 years and less autonomous persons from 1 to 10 years and for minors under 14 years and not autonomous persons "according to the prescription for murder" (art. 120). In Croatia, assisted suicide is punished by imprisonment not exceeding 3 years, if qualified from 1 to 8 years (art. 114 (2011)). In the Czech Republic the basic crime is punished up to 3 years, if qualified from 2 to 8 years (art. 144 (2009)). In Slovakia, participation in suicide is punished with imprisonment from 6 month to 3 years or 3 years to 8 years if the offender is "acting in a more serious manner, against a protected person, or by reason of specific motivation." (art. 154). In Bulgaria, normal assisted suicide shall be punished by imprisonment from 1 to 6 years, if committed on minors or not autonomous persons from 3 to 10 years [art. 127 (2010)]. In Romania, the basic punishment is from 3 to 7 years, if committed against juveniles (13-18) from 5 to 10, against children from 10 to 20 (art. 191).

This comparative panorama shows on the one hand that European legislators are still free to liberalize assisted dying or not and have a large range of options how to punish assisted suicide, but on the other hand there is a clear trend from harshness to meekness. The Austrian Constitutional decided in 2016 that the prohibition of an "association for self-determined dying" based on the Austrian criminal code was not incompatible with art. 11 s. 2 ECHR if the legislator "holds a general prohibition of assisted suicide necessary for the protection of health and morals or for the safeguard of rights and freedoms of others".<sup>30</sup> In the Italian case the lawmakers might nevertheless be obliged by the constitution to be coherent and mitigate not just the civil law governing the relationship between patient, physician and relatives, but also reasonably the criminal law punishing instigation and aid to suicide (arg. art. 3) in a context of criminal law committed to meekness and to safeguard a general "sense of humanity" (arg. art. 27 (3) Const.). If compared with other European criminal law cultures, the Italian harshness of the punishments for assisted suicide could be considered anachronistic and no longer consistent with proportionality. To qualify assistance to suicide tourism today as one of the highest and most alarming crimes that needs to be reserved to the competence of the Court of Assise with popular judges means to rely on a popular legal conscience that might have changed over the last generations.

For the moment, the constitutional judges declared only a principle of unconstitutionality of the law under review, that could be considered to be not avoidable by the technics of interpretation in conformity with the constitution. They decided to "allow" the parliament to make a non scheduled maintenance of the book of crimes, with only one bill pending that has been advanced by a popular initiative and aims at legalizing euthanasia under

<sup>30</sup> Verfassungsgerichtshof (VfGH), 8. 3. 2016, E1477/2015.

the same conditions that have been defined for advance directives.<sup>31</sup> Is it just a warning or could it be read even as an implicit endorsement of the project of popular legislation promoted also by Mr. Cappato himself? The proposal was already pending when the parliament enacted law no. 219/2017. At that time the legislator decided to admit the advance directive, but not to legalize active euthanasia. Should this debate be reopened by the early warning of the Court? This is the expectation of Mr. Cappato, but the Court did of course neither make an endorsement to the popular legislation initiative, nor enforce simply an amendment to law no. 219/2017. The time for a new debate over legalising euthanasia could not be sufficient and a governmental initiative would be the best way out. But what will happen if the lawmakers in government and parliament don't take the warning of the constitutional judges seriously? Various scenarios for the conclusion of the constitutional proceeding without legalisation of euthanasia could be prospected. One might consist in a declaration of partial unconstitutionality of art. 580 of the Criminal code insofar as it establishes a minimum of 5 years imprisonment for the punishment. This solution would allow mitigation, but increase indeterminacy of the law and enhance the judicial power of the Court of Assise. A second possible conclusion would be to declare the aforesaid article unconstitutional insofar as it doesn't prescribe that the 5-year-minimum and the 12-year-maximum can be reduced by the judge in cases of mere facilitation, when facilitation is not combined with instigation. Even this solution of a derogation norm would again increase indeterminacy of the law and enhance the judicial power. A third possibility would be to declare the aforesaid article unconstitutional to the extent that the facilitation of assisted suicide is punished even if the suicide is carried out in a State where assisted dying is not punished. And a fourth possibility would be to declare art. 580 c.p. tout court unconstitutional insofar as it does not respect the constitutional principle of equality, liberty and reasonableness, recognizing a duty of the parliament to reform the article and a power of the judges to suspend pending proceedings until the reform happens.

The variety of the outcomes is a strong argument for the necessity to safeguard the discretionary power of the legislator. In the past, the Constitutional court decided to declare similar questions inadmissible because they required a choice among a plurality of legislative solutions that would transform the constitutional judge from a negative in a positive legislator. Now the Constitutional court can't decide first an early warning to the legislature and at the end dismiss the question as inadmissible, because the procedural decision on the delay has been grounded on a consideration of the merit. The main problem is that the final judgment of the constitutional judge could be made without any assessment of the consequences of that choice for the suicide rate.

The constitutional judges didn't gain a concrete power over death and life, but might feel quite uncomfortable in conscience.

<sup>31</sup> <http://documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.2.18PDL0001020.pdf>

## 7. Final observations

Life end questions are more and more pushed to courts. People assign to the judges a power to decide over life and death, but the legitimacy of such a power is far from being consolidated.

The distrust in such a judicial power is not a completely new experience. Already during enlightenment, the fear of judicial tyranny was referred to life and death jurisprudence: “ein Richter über Leben und Tod muß uns fehlbar seyn, wie die Inquisition in Spanien” – a judge over life and death must be for us as fallible as the inquisition in Spain”.<sup>32</sup> Today, constitutionalism could offer better protection, but not a fully efficient vaccination.

The cases here examined, but even the cases of Lambert in France and Alfie in the UK,<sup>33</sup> the guidelines of the Indian Apex for euthanasia and the still pending appeals against the suspended decision of the Court of Rajasthan to stop Sallekana and Santhara rituals of Jainism<sup>34</sup> as well as the pending proceedings in the German constitutional court on the prohibition of businesslike assistance and many others show that judges are expected to get more and more power over life and death.

Under conditions of limited general and legal multiculturalism, the end of life law is still characterised by fragmentation and legal tourism for rich people, not yet a global humanitarian law based on uniform concepts of dignity. Human dignity as a contrary of misery means not just the heroism or patience of the individual at life end, it is even a concept open for ethical and moral dialogues and open procedures. By virtue of human dignity, the individual has always a right to the first word as a right to be heard. The right to human dignity can't be disjoint from other fundamental rights such as the right to life and health care of the patient, the right of families to take care of him, the rights of the doctors to self-determine their job. It can't be disjoint from the rights of conscience of all persons involved, even if conscience might be troubled by conflicts of interest.

All need to be heard and respected, but if conflicts raise and can't be resolved by mediation, judges can have a word that commands the sword. This includes a power over life and death that can't be completely bound by the legislator. The living law of bio-jurisprudence always needs balance and prudence. The balance includes the fundamental principles, being human dignity the first, but not the sole principle and always linked to other fundamental principles such as freedom, equality and solidarity. The prudence includes self-restraint and modesty, a virtue that can't be enforced by the lawmakers.

<sup>32</sup> F. ZACCARIA, *Briefe aus Rom über die Aufklärung in Österreich*, Frankfurt 1785, [https://books.google.it/books?id=8kCW5A8Ss7YC&printsec=frontcover&hl=it&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.it/books?id=8kCW5A8Ss7YC&printsec=frontcover&hl=it&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).

<sup>33</sup> For the Italian debate see, *inter alia*, D. SERVETTI, *Dopo Charlie e gli altri “casi Gard”, ripartiamo da alcune domande, in Corti supreme e salute*, 2018, 1.

<sup>34</sup> Supreme Court, 09/03/2018, common cause (a regd society) vs union of india [https://www.sci.gov.in/supremecourt/2005/9123/9123\\_2005\\_Judgement\\_09-Mar-2018.pdf](https://www.sci.gov.in/supremecourt/2005/9123/9123_2005_Judgement_09-Mar-2018.pdf), 31/08/2018; Rajasthan High Court, Nikhil Soni vs Union Of India & Ors. on 10 August, 2015, <https://indiankanoon.org/doc/173301527/>.

In “The Children Act”, a drama written by Ian Ewan and a film directed by Richard Eyre, the heroism of the judge Fiona reveals a human incompleteness and that the power of the judge to order lifesaving blood transfusions never implies a final word.