"Killing Me Softly": New Questions About Therapeutic Self-Determination in the Italian Society and Old Answers from the Criminal Code

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Abstract Euthanasia and assisted suicide are both considered criminal offences under Italian penal law. This chapter examines the provisions of the Italian Criminal Code relevant to the end-of-life debate, i.e. articles 575 (murder), 579 (murder by consent), and 580 (aiding or abetting suicide), and the practical difficulties arising in their application to complex end-of-life cases, where these norms prove to be to some extent inadequate and outdated. It also offers an overview of recent case law, especially the Englaro and Welby cases, from the criminal perspective and highlights the shortcomings of the Calabrò Bill on advance directives regulation.

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1 Introduction: The Role of Comparative Criminal Law in Biolaw

The juristic comparison is a set of techniques to study how two different countries deal with some social and legal problems. Using comparative law in approaching the legislations is very important in a globalised world in order to make every kind

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of international relationship easier. In the European Union, the juristic comparison is not only helpful but also necessary.[1]

Recent history tells us that the laws of European countries share common foundations and values, converging over the common objective of a more similar legislation. However, the speed of this historical process is different, depending on the branch of law: it is higher in private law, especially in commercial law, and it is slower in a few sectors of public law, in particular in criminal law.[2]

The convergence of the criminal norms of European countries began just a few years ago. The more widespread explanation of this lateness is the decision of national governments against losing the political and media power that characterises criminal law. For this reason, the convergence process began with the Euro and the financial interests of the EU[3]: i.e., objects that are impossible to protect without a shared interest. In 2008, a first-pillar instrument with criminal norms came about with the Directive 99/EC. This is an environmental protection law through criminal law, and it is interesting that at the moment European penal norm projects on biolaw do not exist. It may be that the convergence of the penal norms about liability of physicians, euthanasia, or assisted reproduction in EU countries is not necessary, but, for example, we cannot say the same with norms about stem cell research or use of biotechnology in agriculture.[4]

Anyway, the juristic penal comparison is important in every sector of biolaw, even though it generates only mutual knowledge of the juristic reality. It is interesting to know how different countries, which share the same values in the EU context, balance the interest in play in the most important bioethical questions. At the same time, it is necessary that the differences between the countries' legislations be limited, even if a convergence of norms is not indispensable. On the contrary, we have two different problems: one is practical, and the other is political.

The practical problem is medical tourism. At the moment, Italy suffers from two important phenomena based on its very restrictive legislation. The first one is fertility tourism: today, thousands of Italians travel every year to Spain or other countries for fertility treatments, especially the strictly banned sperm-egg donation.[5] The second one is "assisted-suicide tourism": in this case, the "most popular" destination is Switzerland,[6] depending on the money that the sick person can spend and on how much his friends and family want to help him. The present and the recent past offer other grim examples of travel in Europe based on the legal regulation of the procedure sought in the home country: it is the history of the

[1] Sacco (1992), pp. 6–26, 154–168; Gambaro and Sacco (2008), chapters I and II.

[2] Bernardi (2004); Cadoppi (2004), pp. 44–54; Fornasari (2006), p. 270.

[3] Bernardi (2005).

[4] See e.g.: Vagliasindi (2012), pp. 246–247.

[5] Dolcini (2008), p. 64.

[6] As far as the Netherlands is concerned, officially only Dutch residents should receive medical assistance to commit suicide. But the law does not prohibit doctors from administering euthanasia to non-residents.

regulation of abortion in Ireland and Germany, among others. All these important examples are connected with criminal law.

The political problem is based on a question: if there is a remarkable difference between national legislations concerning the most important bioethical problems, does that mean that there is no real sharing of values in the EU context? It does not indeed, since each country respects the European Union Fundamental Rights Charter (especially art. 3) and the ECHR case law. This is not a detailed law, of course, but it defines the framework guiding national Parliaments when passing laws on bioethical-sensitive issues. For example, the ECJ and the ECHR could not now admit an act of Parliament strictly prohibiting fertility tourism because this law would infringe not only the four EU freedoms but also, and mainly, the fundamental rights.

For this reason, the juristic comparison in criminal law is necessary today in the EU: the more European judges from different countries evaluate the compliance of the acts of a national Parliament with EU law, in criminal topics too, the more the EU national Parliaments must consider what happens abroad. These judges, these members of Parliament, and all the people working with them need juristic comparison in criminal law.

2 "A Law from (and for) the Past": Presentation and Discussion of the Most Relevant Articles of the Criminal Code

I The existing legal provisions concerning end-of-life-related crimes are actually to be found in the Criminal Code. They have never been changed since the adoption of the Code in 1930. We find these norms within three articles: murder, murder by consent, or assisted suicide (Articles 575, 579, 580 C.C.).

The first one is the general norm concerning murder. It punishes with imprisonment from 21 to 24 years whoever kills another person. According to Article 40, para. 2 C.C., the law punishes the person who did not prevent the event as if he had provoked it, being obliged to do so according to the law (for example, the physician must prevent the patient's death).

The second one—and most important in this paper—is Article 579 C.C.: murder by consent. The only different element between the conducts of these articles is the element of consent. Punishment is, according to Article 579, imprisonment from 6 to 15 years.

This provision is an innovation of the 1930 Penal Code. With this rule, the legislator intended to resolve a dispute that had arose in the Courts concerning the enforcement of the articles on murder or on assisted suicide in the previous Criminal Code.[7] Even though Article 579 does not give any justifying role to

[7] Cagli (2001), pp. 105–106.

consent, this element is very important. The Report for the final Bill of Penal Code in 1930 affirmed it too, in particular, in relation to malice and the personality of the guilty.[8]

However, Article 579 C.C. was considered from the very beginning a rule that affirmed the principle of the absolute unavailability of human life. Until now, this norm—with Article 580 C.C. and Article 5 of the Civil Code—expresses a kind of fundamental principle de facto and it influences the scale of values of the 1948 Constitution, even though it is a lower level source.[9]

The Doctrine and the Courts say that the written form is not necessary to express consent. So it can be a tacit agreement,[10] but it must be real: in a case that happened in the 1960s, the Court didn't consider that the expressions of discouragement of a sufferer were an authentic consent.[11]

Another important characteristic of Article 579 C.C. is the inapplicability of the common aggravating circumstances (Article 61 C.C.). This means that the legislator considered the consent of the offended person dominant over every other circumstance that may be able to extend the punishment.[12]

Moreover, the mentioned Report suggested that the judge has to apply an attenuating circumstance (Article 62 n. 1 C.C.) if the motive of the murder was mercy on the sufferer. However, the Courts always interpreted restrictively this norm (which affirms that the punishment must be attenuated if the subject acted for reasons of special moral and social value). For example, in 1989[13] the Corte di Cassazione (the Italian Supreme Court) stated that these reasons must have the wholehearted approval of society at the moment the act is committed. It is the special moral and social value—expressed in that society in that moment—that attenuates the antisociality of the criminal offence and that gives the general approval of the community.

However, Article 579 C.C. is a kind of "short blanket". The questions about euthanasia were the same in 1930 as today, but the present medicine turned a problem concerning only a few people into the destiny of a large part of society.[14]

The right to therapeutic self-determination is well established today. The Corte di Cassazione recognised it by a direct interpretation of Articles 32 and 13 of the Constitution,[15] which override the civil and criminal statutes without need for other

[8] Relazione al progetto definitivo del codice penale e di procedura penale, in Mangini et al. (1930), p. 462.

[9] Cagli (2010), p. 1983.

[10] Antolisei (2008), p. 64; Corte d'Assise di Roma, 10.12.1983, in Foro italiano, 1985, II, 4891983.

[11] Corte d'Appello di Ancona, 06.02.1969, in Giurisprudenza di Merito, 1969, II, 173.

[12] Mantovani (2008), p. 173.

[13] Cassazione Penale, Sezione I, 7.04.1989 in La Giustizia penale, 1990, II, 459 (a commentary on the sentence: Bellotto 1993).

[14] In her most important book, Maria Beatrice Magro states that she doubts that Article 579 C.-C. complies with the Italian Constitution; Magro (2001), passim.

[15] Cassazione Penale, Sezioni Unite, 18.12.2008–21.01.2009, n.2437 http://www.altalex.com/index.php?idnot=44514.

specifications. The doctrine decisively supports this interpretation,[16] which seems to have definitively prevailed.[17]

Thus, killing by consent is nowadays a crime in Italy too, but refusing medical treatment is a right, even if the physician has to switch off a ventilator or another life-sustaining machine.

That means that the right to therapeutic self-determination can make the conduct of active murder allowable[18]; this is a very conflicting debate, that the media often used to support the legal ground of the Calabrò Bill (the last draft bill—with a liberticidal approach—with dispositions on the Advance Treatment Directives (ATDs), infra paragraph 4).

The rise of the Constitution's predominance is winning against this position, but there is another helpful argument that does not need to resort to the sources of the theory of law because it is based on penal dogmatic. Hence, we have to shift the attention from the objective element of the crime to the mens rea. If the physician considers that the sufferer consciously and unconditionally wishes his death, then the doctor wants to help the patient commit suicide, whether he acts as an active or passive conduct. Thus, the mens rea is not that of murder by consent but of assisted suicide, and it would be impossible to punish on the strength of Article 579 C.-C. because the correspondence between conduct and mens rea is necessary to arrive at a guilty verdict in a legal system based on the culpability principle.[19] This shows one more time that the norms in force today are inadequate.

II Assisted suicide is a crime in Italy, according to Article 580 C.C. This norm also punishes soliciting suicide. The punishment is imprisonment from 5 to 12 years; therefore, it is slightly milder than murder by consent, but only if suicide happens. If it does not occur, the punishment is imprisonment from 1 to 5 years, but only if the attempt causes serious or very serious injuries.

It is a complex and ambiguous system of punishments that does not clarify the attitude of the legal system with regard to suicide.[20] One more time, the 1948 Constitution is indispensable for a correct interpretation: on the strength of its norms, not punishing suicide (and attempted suicide) is a Hobson's choice and it is not simply a choice of political opportunity. Moreover, the right to self-determination is so important that not only it warrants the lawfulness of suicide,

[16] Donini (2007), p. 903; Risicato (2009); Viganò (2007).

[17] Before that, the Ordinanza of Tribunale Civile di Roma on 2006, December 16th—concerning the famous "Welby case"—goes in the opposite direction (a commentary in Donini (2007), p. 903).

[18] One more time: Sentence GUP Roma, 23.07.2007, n. 2049 (on the Welby case, see in Rivista Italiana Diritto e Procedura Penale 2008, p. 437). With this statement, the sentence set a question about the right of the physician to refuse to turn the switch off in accordance with his conscientious objection (Giunta 2008, p. 868).

[19] A similar argument is used by certain authors who would charge with temporary embezzlement rather than normal embezzlement situations of loss or destruction of assets before restitution in the case of acts of God (cfr. Fornasari 2008, p. 113).

[20] Bertolino (1999), p. 113.

but it even justifies the punishment of the person who strengthens or creates another subject's intent to commit suicide.

So, in the case of refusal of medical treatment, even if the mens rea is the one required by Article 580 C.C., the physician cannot be punished according to this norm because the conduct does not correspond to that described in the precept. Moreover, the Corte di Cassazione expressly said that the difference between Article 579 C.C. and Article 580 C.C. rests on the responsibility over the act.[21] In the conduct of assisted suicide, responsibility over the act must be of the person who is going to die, whereas in murder by consent it is of the other person.

Therefore, it is plain that it is impossible to resolve the legal questions about the end of life with the penal norms currently in force in Italy. These provisions were created for a country that has changed. We believe that in Italy the majority of people die in a hospital when the physician and the relatives decide that they have done "enough".

The provisions in force today have only one thing in common: these norms are an expression of the approach that the 1930 legislator had towards the right to life. It was an absolutely unavailable right, and its real holder was not the person but the State and the community. As we showed, this old conception influences contemporary discipline regardless of the Constitution. For this reason, it is not positive that the Calabrò Bill did not introduce any change in the penal norms: today, Articles 579 and 580 C.C. are useless and detrimental. It is clear that the provisions of the Criminal Code must recover their role of regulating the country's real situation. At the moment, this is not the case, unfortunately. In the last passage of the Calabrò Bill (from the Camera dei Deputati to the Senate), the members of the Lower House changed the word volontà (will, wishes) of the patient to the word orientamenti (tendency) (cf. Article 7, para. 1)!

3 "Today": A New Lexicon for Discussing the End of Life. The Rules Established in Court

I What has been written until this point shows that in Italy there is no corpus of specific norms dedicated to the decisions concerning the end of life, living wills, or advanced treatment directives; there is a jumble of generic norms in the Italian Constitution and in the Penal Code. In the twenty-first century Italian society, the former are insufficient, while the latter are also inadequate.

This lack of regulation has forced the Courts to solve the concrete cases by employing constitutional principles directly, using a very unusual method in a civil law country.

For this reason, the solutions for the most internationally renowned cases (Englaro, Welby, Nuvoli), as many more less famous ones, are similar to those

[21] Cassazione Penale, Sezione, 6.02.1998, n. 3147, in Rivista Penale, 1998, p. 466.

given by other European countries, including Germany. However, since Italy is a civil law country, those verdicts, even though famous and eminent, do not establish a solid precedent.

First of all, they do not give to physicians, patients, and relatives the serenity to decide what to do in critical situations, serenity that they would have if there were a specific law on the matter. The physicians are above all afraid of being forced by the threat of a legal punishment to justify their actions before a Court.

Second, the verdicts give answers only to a few aspects of the legal problems surrounding the "end of life", while many important issues have to be dealt with in the Italian Parliament: among those issues, living wills and proxies.

II What does this law "based on the jurisprudence" say?

Before presenting it, it is necessary to clear the role that the words have within the Italian debate on the end of life.

First of all, has the word "euthanasia" been de facto banned?[22]

As Giunta mentions, the first few times this word was used in the past there was an intention of unmasking collective fears about end-of-life decisions; he underlines that today, thanks to technical progresses, "to die" is increasingly a human decision rather than an unexpected event.[23]

Those who consider this fact an attack on the idea that only God has the right to decide about human life[24] succeeded in imposing the idea that the word "euthanasia" had only a negative meaning similar to "legalised murder". Quoting the Nazi euthanasia program, they affirm that every concession to the contrary position will put society on the infamous slippery slope.

The expression "right to life" is nowadays also less used, as is "right to die", the dark side of the moon. In Italy, the idea that the right to life is a kind of "super-right" that impedes a trade-off with every other right is still very strong. Nevertheless, also those who strongly endorse the freedom of self-determination never allow a complete freedom of suicide.

This does not occur because there is no faith in the freedom of the people but because of the consequences of the recognition of this freedom.

The first consequence is the freedom, without exceptions, of assisted suicide, perhaps the most admissible because these conducts will be a cooperation with the practice of a constitutional right.

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[22] A good example: Canestrari (2012), pp. 45–49 and 83. The Calabrò Bill states (Article 1 para. 1 c)) that "any form of euthanasia is banned", but it is a norm without content. In fact, the Bill does not give any definition of euthanasia, and the prohibition is a simple link to the norms of the old Criminal Code. To give a definition of euthanasia is impossible in Italy today, for Parliament too, because the meaning is different according to the ideology of the person who writes it. See also Cagli (2011) p. 1819.

[23] Giunta (2008), p. 866.

[24] Only when thinking this could one consider meaningful norms that do not give people the freedom to decide about their lives, even though, from a secular point of view, making available the right to live means not automatically recognising a right to die. This right, as we say later, has potentially very negative consequences.

However, further consequences are the following: to impede the suicide of another person could, in a few cases, establish the crime of violenza privata (private violence) (art. 610 C.C.), and the reaction, also violent, of the suicide victim against the aider should be justified as self-defence. Finally, the hardest consequence: if a person physically prevented from killing himself had the right to die, he could demand the State to help him and the State would have to help him in order not to discriminate the subjects physically able to kill themselves from those who are not able to.[25]

In the Italian debate, the words are thus different. As Zatti affirms,[26] people do not speak about the conflict between a right and a duty to live or to die but about therapeutic self-determination.

To die is an individual experience that concerns the body of the person and is paradoxically more related to the concept of health than to that of life.

The Courts also contributed to this evolution of the meaning of the words, using in their verdicts references to norms that, like the very important Article 32 of the Constitution or other provisions from international agreements, do not speak about euthanasia but specify the limits and contents of the right to health. Whichever is the point of view taken, to debate about the right to health is preferable because nobody doubts it exists, as occurs with the right to die, and it is certainly an available right.

Thus, there are not in this debate those ideological prejudices that impede the development of a fruitful debate about the right to life.[27]

III The starting and ending point norm for all the verdicts about Italian judiciary cases about the end of life is Article 32 of the Constitution.[28] The first sentence of the second paragraph is very important because it states that nobody can be forced to undergo a medical treatment.[29] For this reason, the Italian judges do not discuss if there have been cases of active or passive euthanasia, rather if a refusal of medical treatment or a request for palliative therapies provoked the death of the patient.

Now we will proceed to present the different cases solved in the Italian case law, from the simplest situations that should be called passive euthanasia to the most complex cases of what abroad is still defined as active euthanasia.

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[25] Magro (2012), p. 52.

[26] Zatti (2007).

[27] The references to "dignity", above all to a respectable death, do not help the debate. There is no consent on the meaning of "respectable death", and each person has a different opinion according to his ideological prejudices. Piciocchi (2012), p. 41.

[28] I. The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. II. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person.

[29] The sentence ends with the words "except under the provisions of the law". This reference to norms that impose medical treatments relates to children's vaccinations, to epidemics, and to quarantine (as for public health problems) or to the investigation about fatherhood or biological evidence in the case of crimes.

(a) The simplest case is that of a patient who refuses ab initio a therapy or interrupts it without the need for material help from anyone.

In the face of the right of a person to deny health care or to live the last stages of his life according to a criterion of dignity not imposed by anyone, the physicians have the duty to cure.

The conscious rejection of the treatment by the patient eliminates this duty and turns it into its opposite, that is, the duty to respect the will of the patient. The physician's conduct is atypical and therefore loses any relevance within criminal law.[30]

(b) This case becomes more complicated if the ill person, due to a physical problem, needs the active help of the physician or of another subject to interrupt the therapy. This was the case of Piergiorgio Welby.

Piergiorgio Welby became sick with progressive muscular dystrophy, and in order to end his life he needed the help of an anaesthetist to remove the automatic ventilator that allowed him to live after a respiratory crisis in 1997. In this case, the physician actually carried out an action and did not just make an omission: with his own hands, he interrupted a "life-saving" therapy by intervening on the causal progress of the illness that, without residual obstacles, killed the patient.

The German doctrine speaks in these cases of interruption of a causal rescue process (Abbruch einer Rettungscausalität). German are also the authors who first proposed to interpret such cases as an omission rather than an active action, even if this is evidently a counterintuitive interpretation.

With a normative interpretation of the physician's conduct, these authors invented the juridical type of the crime of omission through active conduct (Unterlassung durch Tun).[31] According to this theory, if the patient asks for it, the active behaviour of the physician is considered an omission, which is not legally prosecutable for the reasons explained in point (a): basically, the respect of the patient's will. It focuses on the patient's will and leaves the difference between active conduct and omission in the background.

The majority of the Italian doctrine refused this theory, which was judged as too overblown because it imposes, in fact, to upset reality.[32]

In the minority doctrine, we recommend the opinion of Maria Beatrice Magro, who declares that in these cases the aliud agere would identify with an omission.

[30] Pulitanò and Ceccarelli (2008), p. 330.

[31] The theory appeared almost 50 years ago, but it acquired new strength just for the solution of complex end-of-life cases; cf. Meyer-Bahlburg (1968), p. 49; Roxin (1969), p. 380; in particular: Schöch (1995), p. 153.

[32] Fausto Giunta considers unclear the reasons for the equivalence between active conduct and omission, which are from the naturalistic point of view very different. Giunta (1997), p. 93. The theory does not deal with the problem of the right of the physician's conscience's objection, who could refuse to act. Cf. supra nt. 17; for all: Donini (2007), p. 911.

According to her opinion,[33] the action of the physician would not be contrary to the normative duties, but it would establish a behaviour with the will of a patient who refuses a therapy. Magro states that there is no difference between the interruption of already-begun therapies and the ab initio refusal because in both situations the physician does not start the natural process that leads to the patient's death, but it is included in a pre-existing and autonomous process. This is, in the opinion of the author, the ontological difference between the situation in which the patient asks to be killed or to be left to die.

In our opinion, the majority of Italian authors refuse this theory because they have simpler reasons to answer the problem. In fact, Article 32 of the Constitution does not make any difference between active conduct and omission because the norm uses the point of view of the patient: the facere or non facere of the physician is not relevant for the interpretation of the norm.[34]

The decision about the case of Piergiorgio Welby is proof of this assertion.

The murder case against the physician ended in a pretrial hearing. The judge considered that the anaesthetist played a role in the causal sequence of the death but his conduct was permissible. In fact, the judge enforced article 51 C.C. (concerning exercise of a right), together with Articles 2, 13, and 32 of the Constitution, the Oviedo Convention, and the case law of the Corte Costituzionale. In other words, the judge considered that the conduct of the physician conformed to what Article 579 C.C. describes as murder by consent (from 6 to 15 years' imprisonment) but was not a criminal offence because the patient's conscious will has to be respected.[35]

Lucia Risicato asserted that in this way Article 32, para. 2 of the Constitution entered the group of provisions justifying Article 51 C.C, not only because it is a case of exercise of a patient's right but also because the physician must perform the duties imposed by the constitutional norm.[36]

In our opinion, the decision of the Roman judge is correct and very important. Magro writes that it is not necessary to use the theory of the justifying act if it is possible to demonstrate that the conduct is not typical (according to the theory of the crime of omission through active conduct). But that means that any relevant fact happened. We do not believe that to remove the automatic ventilator that allowed Welby to live has the same legal meaning as killing a fly. We believe that the conduct of the anaesthetist is licit, but it is nonetheless a relevant conduct. And this is not a simply dogmatic discussion.

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[33] Magro (2012), pp. 59–60; the Author alludes to Engisch (1973), p. 163.

[34] Cupelli (2008), p. 1824.

[35] Sentence GUP Roma, 23.07.2007, supra nt. 17; among others is the same opinion: Donini (2007), p. 902; an alternative but less linear solution is proposed by Gibernat Ordeig (2006), p. 1573. From a technical juridical point of view, the solution would be different in the case of ab initio refusal because in this case there is no typical fulfilment of the penal circumstances and, consequently, the guarantee position of the physician does not work (Article 40, para. II C.C.); along these lines: Brignone (2009), p. 924.

[36] Risicato (2010), p. 250.

(c) Even more complicated is the case of the interruption of care received by an unconscious person.

In a civil law country like Italy, only a law could give a clear answer to these difficult cases and this law does not exist nowadays. Nevertheless, throughout the jurisprudence concerning the case of Eluana Englaro, the Italian high Courts gave partial leanings.[37] In order to do this, they could only resort to the Italian Constitution, even in this case, by directly applying the above-mentioned articles.

Although Eluana Englaro's case has been commented by several criminal law authors, it is substantially a private law case. Within the Englaro 2007 verdict, the Corte di Cassazione fixed the two fundamental requirements to allow the proxy to order the interruption of the therapy: first of all, the fact that the vegetative state of the patient was irreversible and, second, that it is therefore impossible for him to communicate his will and that his better interest could be followed in a subjective and individual perspective.

This means, according to the judges, that the proxy must retrace the patient's will.

Written documents are not necessary in this case: if these are not present, the will could also be retraced through generic and past declarations. Even the declarations made without the awareness that they will have been applied in order to solve future cases of unconsciousness are valid.

We do not comment on the verdict in detail because others have already done so in depth in this book. We only express two considerations.

First: the case of Eluana Englaro established these important principles only because it was a case of private law. Only the courage and the persistence of the girl's parents forced the Italian courts to speak up on this case, and this occurred because in Italian private law the non liquet prohibition is in force.

If, as it often happens even nowadays, the parents had decided to say "enough" shortly after the accident, speaking in the aisle with physicians, Eluana Englaro would have died many years ago and no jurist would have spoken about her case.

If, after years of vegetative state, the parents had cut off the machine in a moment of desperation, they would have been charged with murder. But even if they would have been sentenced to a few years in prison (with all the possible extenuating circumstances), they would certainly have received an absolute pardon from the President of the Republic.[38]

The parents of Eluana Englaro decided to respect the law and to seek justice from the relevant Italian Courts. They did not cut off the machine in hiding, but they

[37] Among the many verdicts about the Englaro case, the most important is the Cassazione Civile, Sezione I, 04.10.2007–16.10.2007, n. 21748, in Rivista italiana di diritto e procedura penale, 2008, p. 384 (a commentary of the decision: Barbieri (2008); see also Iadecola (2008); Viganò (2008); Seminara (2007); one of the most critical commentaries is authored by Eusebi (2008)).

[38] As it happened in 2011, when President Napolitano granted pardons to Calogero Crapanzano, who in 2007 killed his 27-year-old son (suffering from autism) with a rope.

asked from the Italian justice system the authorisation to do so. After 9 years of waiting, the judges gave them this authorisation.

For this reason, Eluana Englaro' s case is not a case of criminal law.

After the girl's death on 9 February 2009, many associations and persons charged the father of Eluana, Beppino Englaro, and the physicians who cut off the machines with murder.

For this reason, on 27 February 2009, the prosecutor began an investigation against them. The medical examination confirmed that Eluana died because of a heart attack due to dehydration, and this was compatible with the sanitary protocol authorised by the judges. The prosecutor consequently asked the investigating magistrate to dismiss the investigation. The request was accepted (GIP Udine, 11 January 2010, unpublished).

(d) The issue of pain relief and palliative care still needs to be dealt with.

Fortunately, Italy nowadays has a law that regulates this matter: Law no. 38 of 15 March 2010, specifically commented on in this book too. Palliative care consists, as is known, in giving very powerful analgesic medicine to patients with inauspicious prognosis. This definition is compatible with the cited law, in particular with Article 2 para. 1 a).

This therapy can have as secondary effect the shortening of the patient's life, and so palliative care is considered active indirect euthanasia.

Law no. 38/2010 does not deal with the issue. Not only does it not use the "banned word" "euthanasia", but it does not modify the criminal law in force either. To change the criminal law or to use the word "euthanasia" would have impeded approval of a law requested and supported by many terminal patients' support groups, many of which are admittedly Catholic. Active indirect euthanasia, in the form of palliative care, is thus legal and has a specific regulation. Even though it is applied every day in many Italian hospitals, it cannot be called by its name. To say whether this is hypocrisy or real politik is not up to the jurist. The penal law author must nevertheless expose the cost of this choice, which is potentially very high.

The lack of penal rules has not caused problems until now because no physician has been sued by a patient's relative.

Let me give an example: two brothers have a sick, incurable father, and they agree with a physician to giving palliative care to him in a hospice. Let's imagine that one of the two brothers lets the other one convince him to give his consent, but after the father's death he changes his mind and decides to sue the physician.

According to the criminal law in force, in these cases there are all the elements in order to condemn the physician, and the easy way to absolve him would be to bring into question, case by case, the certainty of the proof. In a real trial, it would be very difficult to prove that the last dose of anaesthetic, which killed the patient, had only been administered in order to reduce his pain by killing him or if the death was a predictable, but not wished, consequence.

The difficulty of providing proof does not cancel the legal problem: in the absence of a clear legislative position, it is necessary to resort to dogmatic in order to absolve the physician.

Canestrari states that the self-legitimacy of the medical activity performed with the person's consent makes the fact atypical because it is socially useful and adequate for its scope.[39] This argument is nevertheless debatable for the reasons expressed at the end of section 3, sub b).

Magro maintains instead that it is necessary to use the theory of the defences as grounds for excluding criminal responsibility, in particular necessity (Article 54 C.C.) and consensus (Article 50 C.C.).[40] It is an attractive hypothesis, even though the author only dedicates a few lines to it. We unfortunately believe that it is not usable within the law in force. Article 54 C.C., in fact, states that the conduct of the person who acts forced by the need of saving himself or others from a present danger of serious injury is not punishable. It is contrary to logic to state that a person was killed in order to be saved from serious injury. Even Article 50 C.C. does not really help in solving the problem because the concept of consent suffers from all the issues we have discussed at length. In order for consensus to prevail on it, it would be necessary to resort again to the direct application of Article 32 of the Constitution. This is correct, but why meddle with the defence's theory elsewhere?

A third possible solution is based on the content of the intent. In order to exclude the criminal responsibility of the physician, some authors use the principle of the double effect as a practical principle that guides moral reasoning.[41] This principle is used in order to decide upon the goodness of an action in cases in which reaching a good and intended effect on the direct protection of an essential right of a person is necessarily followed by reaching a collateral unintended effect, but which can damage other essential rights. According to these Authors, the double effect principle would be usable in the case in which the physician accepts the risk of shortening the patient's life in order to mitigate his pain. This theory does not seem to be adequate either. In order to state that there is intent, in fact, the Italian interpretation does not retain sufficient that the physician consider the patient's death as a possible or at least probable consequence of his own action nor that the physician accept the risk of causing it.[42]

We believe that a more persuasive solution is within guilt, not in such a specific element like intent but strictu sensu as principle of guilt. We think, in particular, about the inesigibilità principle (Unzumutbarkeit Prinzip).[43]We cannot in fact expect a different conduct from the physician: he has to cure a patient whose destiny consists only in very painful days before death.

[39] Canestrari (2006).

[40] Magro (2012), p. 76.

[41] Miglietta and Russo (2011), p. 922.

[42] Gallo (1951–1952; 1964); Canestrari (1999), passim; Fiandaca and Musco (2009), pp. 367–370.

[43] To suggest an English translation of this word is quite difficult. The origin of the word inesigibilità is the verb esigere, which can be translated as "to expect" or "to require". Thus it could be said: "Principle of unexpectedness".

The physician stands before crossroads: he can either do nothing or, with the knowledge and means at his disposal, limit the pain as much as possible, even shortening the wait for death.

Can the State threaten the physician with a penalty if he decides to intervene? We believe not.

It is a hypothesis[44] that certainly has a weak point in responding to a penal doubt with a principle instead of a specific norm. Nevertheless, we believe that this hypothesis is more adequate than the three ones presented beforehand.

We repeat that the best solution would be a clear and explicit law.

4 "What About the Future?"

I During the last legislature, the Senate of the Republic approved on 26 March 2009 a Draft Bill (S. 10) consisting of 9 articles, with the title "Dispositions on the Subject of Therapeutic Alliance, Informed Consent and Advance Treatment Directives (ATDs)" (Disposizioni in materia di alleanza terapeutica, di consenso informato e di dichiarazioni anticipate di trattamento). It was amended and passed by the Chamber of Deputies on 12 July 2011. To become a law, the Draft (consisting now of eight articles) needed another vote without modification by the Senate. It was discussed in Commission XII as Draft Bill S. 10 B,[45] with the unofficial name of Calabrò Bill (from the name of the first proposer). The dissolution of the Italian Parliament in December 2012 interrupted this process.

In this paper, we are going to write only about the criminal aspects of the Draft Bill, but it is necessary to give some general information.

The core of the Draft is art. 3, "Content and restrictions on the Advance Treatment Directive" (Contenuto e limiti della dichiarazione anticipata di trattamento). In the first sub-paragraph we read: in the Advance Treatment Directive, the declarant expresses his wishes and information about the activation of therapeutic treatments, as long as they are in compliance with the text of this law.

The heart of the new legislation is the rule that imposes to respect the law when writing ATDs. The ATD is, in fact, an act with a strict and heavy procedure to be followed and, at the same time, a document with a lot of restrictions in its contents.

Many norms of the Bill prevent the wishes of the patient from being part of the document that contains the ATDs.

First of all (art. 3, para. 3), the Bill affirms that in the ATD the person cannot express instructions corresponding to the crimes of murder, murder by consent, or assisted suicide (Articles 575, 579, 580 C.C.). The Bill does not introduce new

[44] Thanks to suggestions from the book Fornasari (1990), passim.

[45] Website of Senato della Repubblica. In these last months, we found a few references about this draft bill in itinere: Carusi (2012); Magro (2012), p. 113; Manna (2011); Pelissero (2012); Penasa and Corn (2013).

criminal norms, but it mentions two more times these articles of the Criminal Code: Art. 1, para. 1, al. c) and Art. 6, para. 6.

The first mention is included in the general principles of the Bill, where we read that, according to Articles 575, 579, 580 C.C., every form of euthanasia and every form of help in suicide or assisted suicide is banned. The medical activity can only be aimed at saving and protecting human life and health or alleviating pain.

II The second mention applies to the proxy (fiduciario), who is the person whom the patient can empower to speak with the attending physician when he becomes unconscious. So, Art. 6, para. 6, affirms that the proxy undertakes to carefully check that the patient does not come across a situation corresponding to the crimes of murder, murder by consent, or assisted suicide.

There is a third point where the legislator shows the will to block every action that brings the patient closer to the end of life; it is Art. 7 (Role of the physician), para. 3. It affirms that the physician cannot take into account instructions aimed at causing the death of the patient or, in any case, considered to be against the law or medical ethics. This norm appears to be correct in changing the law that resolved the Welby case.

Moreover, Article 3, para. 4, affirms—again about the restrictions in the contents of the ATDs—that the physicians must maintain nutrition and hydration until the end of life. They can be interrupted only if they are not effective and they no longer give what the patient needs for the most important physiological bodily functions. The person cannot write an ATD about nutrition and hydration.

Besides the contents of the ATDs, it is necessary to consider at which moment the document, in which the subject wrote his wishes, begins to take effect.

Article 3, para. 5, affirms that

> The ATD takes effect in the moment in which the subject is permanently unable to understand information about the medical treatment and its consequences, because of a proved absence of cortical and subcortical brain activity, and for this reason he cannot decide about him/herself.

The original Senate's disposition was not so precisely formulated because it simply referred to subjects in a vegetative state. This point has been strongly criticised because it did not offer a necessary (and clear) definition of one of the most important elements of this project, i.e., what does it mean to be in a vegetative state.

Thus, it seems that the new law will leave out a huge part of the population involved in the problem[46] because the second part of the third article, fifth sub-paragraph, declares that the evaluation of the clinical state of the subject has to be made by a medical board composed of an anaesthetist/resuscitator, a neurologist, the attending physician, and the specialist of the pathology. This process will clearly take much time, and it is evident that the moment in which what the subject wrote will be read will not coincide with the moment in which the subject will lose conscience.

[46] Brignone (2009), pp. 927–928.

Finally, we have to consider that, according to Article 7, para.1, the physician cannot be forced to act according to the will of the subject if he prefers to use different medical treatments. He only has to declare which treatment will be used and the reason for his decision in the medical records, but this cannot be contestable before a judge.

The situation described is complicated. With all these exceptions, we have to ask ourselves what a person can write into his ATDs and in which moment what is written will be taken into consideration.

A healthy person with a good education is hardly able to clearly imagine what medicine he will or will not wish to assume when he will be in a vegetative state (if he will ever be in it), even with the help of a physician. It is easier to imagine that this person is going to wish giving an ATD with general instructions about the treatments over his body when he is going to be unconscious. Not allowing to write dispositions about feeding and hydration is clearly like emptying them of content.[47] The only utility could be to name a proxy, when he is not a relative, for example in the case of common law marriage.

Another question is, which laws could be applied to the situations that are not covered by the Bill?

The enforcement field of this law is really narrow because it only refers to persons who are in a vegetative state, without being in danger of dying. The Italian Health Ministry has declared that it does not know the exact number of these cases but that it supposes it to be nowadays about 3,000. The prestigious review Nature[48] has written that it is just a law for cases like Eluana Englaro's. It is partially true.

In addition, it is clear that a law about ATD should embrace a wider sector of the population. The number of people who nowadays end their lives in Italy due to a serious illness that causes them disability and severe pain is in the tens of thousands. These people, the Corte Costituzionale affirmed, need a clear law, but this is not what the Italian Parliament is doing.[49]

However, the message the media are communicating is quite different. The public opinion is informed about the debate on feeding and hydration, but it thinks that the Parliament has to work on a wider law about the possibilities of listening to the declarations, out of the vegetative state cases.

One more time, the Italian Parliament is doing a "manifesto" law in order to show to the media that it is working on important concerns, but without saying anything or almost anything.[50] The majority of "end of life" situations in Italian hospitals will be resolved exactly like today, i.e. in a "grey area", with the physician and the relatives deciding the destiny of the patient in the corner of a corridor, speaking softly so that people who pass there will not realise the subject of the conversation.

[47] Pulitanò and Ceccarelli (2008), p. 337; Brignone (2009), p. 928.

[48] Our direct source is the newspaper Internazionale (n. 790: 13).

[49] Canestrari (2012), p. 47.

[50] Bobbio Pallavicini (2012).

This is happening despite the messages of the Corte Costituzionale to the Italian Parliament, despite the constitutional principles and of the secular nature of the State of Law, despite the respect of the person's will and despite the flag that everyone claims as their own, i.e., the principle of human dignity.

III From the penal jurist's point of view, penal dispositions limiting the individual freedom of people refer to the distinction between law and ethics.[51]

The situation created by the Calabrò Bill is paradoxical even if we consider the official Catholic Church documents, first of all the 1992 Catechism and especially number 2,278 (therapeutic obstinacy). Transforming the part of the Catechism dedicated to euthanasia[52] into a State law would paradoxically protect people's freedom of choice over the destiny of their life better than the Calabrò Bill.

It is very interesting that, according to what the Jesuit Mario Beltrami (one of the most important experts on this part of Catechism) says, the basis of what is declared in numbers 2,276–2,279 is on purely rational subject matters and not on religious reasons.[53]

The Bill does not introduce new criminal norms, we repeat, but since 1978 (Abortion Act) Italian legislators have not modified the penal norms regarding

[51] In Spain: Mir Puig (2005), p. 129, who speaks about this issue in relation to the principle of exclusive protection of juridic goods; in the Italian interpretation, this principle is a different way to intend an aspect of the principle of the fragmentary nature of criminal law: cf. Fiandaca and Musco (2009), p. 33, following the theories, in Germany, Maiwald (1972), p. 9.

[52] Euthanasia 2276 Those whose lives are diminished or weakened deserve special respect. Sick or handicapped persons should be helped to lead lives as normal as possible. 2277 Whatever its motives and means, direct euthanasia consists in putting an end to the lives of handicapped, sick, or dying persons. It is morally unacceptable. Thus an act or omission which, in of itself or by intention, causes death in order to eliminate suffering constitutes a murder gravely contrary to the dignity of the human person and to the respect due to the living God, his Creator. The error of judgment into which one can fall in good faith does not change the nature of this murderous act, which must always be forbidden and excluded. 2278 Discontinuing medical procedures that are burdensome, dangerous, extraordinary, or disproportionate to the expected outcome can be legitimate; it is the refusal of "over-zealous" treatment. Here one does not will to cause death; one's inability to impede it is merely accepted. The decisions should be made by the patient if he is competent and able or, if not, by those legally entitled to act for the patient, whose reasonable will and legitimate interests must always be respected. 2279 Even if death is thought imminent, the ordinary care owed to a sick person cannot be legitimately interrupted. The use of painkillers to alleviate the sufferings of the dying, even at the risk of shortening their days, can be morally in conformity with human dignity if death is not willed as either an end or a means, but only foreseen and tolerated as inevitable. Palliative care is a special form of disinterested charity. As such it should be encouraged. (Available via http://www.vatican.va/archive/ENG(0015)/__P7Z.HTM).

[53] Beltrami (2008). There are also other official documents in which these concepts are more clearly expressed, for example the declaration on euthanasia Iura et Bona of the Congregation for the doctrine of the faith 1980 (Available via www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_sp.html) and the Charter for health care workers 1995 by the respective Pontifical Council, which affirms para. 120 that artificial hydration and feeding are considered cures and can be suspended when painful for the patient (available via http://www.vatican.va/roman_curia/pontifical_councils/hlthwork/documents/rc_pc_hlthwork_doc_19950101_charter_en.html).

crimes against life. In the opening document to its annual Conference,[54] the prestigious Franco Bricola Association ("Eighty years of the Rocco Code", "Gli ottant'anni del Codice Rocco"—Bologna—19/20.3.2010) wrote that there is a political inability to write norms about these crimes in a new way: this is a meaningful example of the parliamentary sloth about a key topic, in which the tensions between lay and Catholic people represent a historical impasse rather than a will to mediate. If we consider life the most important among universal values, only when we can update its protection according to the needs of history will we be able to rewrite the whole Code, which from that good draws the axiological basis of the hierarchies of the penal system.

The Calabrò Bill was discussed in the Senate Commission XII, but the senators have stopped working on this project since November 2011, shortly before the collapse of the last Berlusconi Government. Now we know that the Calabrò Bill will never become law. In 2012, the priorities of the Government concerned the economy and the parties of the big government coalition had very different ideas about the end of life.

The task of passing a bill on living will directives will be left to the next Parliament, and the subject matter of the new draft will depend on the new majority.

Unfortunately, years of discussion within the Parliament and processes too exposed to the media left deep wounds. The hope is that the new members of Parliament[55] leave their ideologies aside and seek concrete and sharable answers. The hope is that they remember that everyone has a date with death; they too.

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[54] Stortoni and Insolera (2012), pp. 21–22; also Pulitanò (2010).

[55] The new legislature has begun working in the second half of March 2013, and Members of Parliament have already proposed various bills concerning the end of life. Till May 1st, none was inserted in the agenda.

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