THE CASE OF ELUANA ENGLARO
Supreme Court of Cassation

Translation by Stephanie Hess, Rebecca Spitzmiller & Silvia DeConca

ITALIAN REPUBLIC

SUPREME COURT OF CASSATION

First Civil Session

(President M. G. Luccioli, Referee A. Giusti)

Judgment 16 October 2007, n. 21748

DEVELOPMENT OF THE PROCESS

1. – With the appeal under Article 732 Code of Civil Procedure, ZZZ YYY, as the guardian of the disabled daughter XXX YYY, asked the Court of Lecco, upon appointment of a guardian ad litem under Article 78 Code of Civil Procedure, the issuing of an order to interrupt the forced feeding by nasogastric tube that has kept alive the ward alive, in a state of irreversible vegetative coma since 1992.

The guardian ad litem, appointed by the President of the Court, agreed to the appeal.

The Court of Lecco, with its decree dated 2 February 2006, declared the appeal inadmissible and adjudged the allegations of constitutional illegitimacy proposed subordinately by the guardian and by the guardian ad litem to be manifestly groundless.

The trial judges established that neither the guardian nor the guardian ad litem have substantive representation, nor therefore procedural representation, of the incompetent person with reference to the request before the court, involving her sphere of personal rights, for which our legal order does not permit representation, if not in a case expressly provided for by the law, not found in the case at bar.

Furthermore, the absence of a normative provision of such representation is perfectly in line with constitutional dictates, and the gap cannot be filled with an interpretation congruous with the constitution.

Besides, even if the guardian or the guardian ad litem were invested of such power, the appeal – in the opinion of the trial judges - would have to be refused, because its acceptance would contrast with the principles expressed by constitutional order. As a matter of fact, in accordance with Articles 2 and 32 of the Constitution, a therapeutic or feeding treatment, even an invasive one, essential to keep alive a person incapable of giving consent, is not only lawful, but obligatory, as the expression of the joint and several obligation placed upon co-members, *a fortiori* when, such as in the case at bar, the subject concerned is not in a condition to manifest her will. Based on Articles 13 and 32 of the Constitution every person, if fully able to understand and to express his/her will, may refuse

any strongly invasive nutritional or therapeutic treatment, even if necessary to her survival, whereas if the person is not capable of understanding and of expressing his/her will, the conflict between the right of liberty and of self-determination and the right to life is only hypothetical and must resolve itself in favor of the latter, since the person is unable to express any will, there is no sign of self-determination or of liberty to protect. Article 32 of the Constitution excludes the possibility to create a distinction between life worthy and not worthy of being lived.

2. – Challenging said decree, the guardian appealed to the Court of Appeals of Milan, seeking – after opportune judicial inquiries regarding both the wishes of XXX (at the time manifested contrary to therapeutic obstinacy) and, where needed, regarding the incidental constitutional issue that may arise in the claim – an order to interrupt the forced alimentation of XXX, as treatment that is invasive of the personal sphere, perpetrated against human dignity.

The guardian ad litem, having appeared, requested the acceptance of the challenge, and he himself also made an appeal, with the same content of the existing appeal.

The Inquiring Judge argued for the rejection of the appeal, agreeing with the arguments put forth by the Court as the basis of the challenged provision.

3. – The Court of Appeals of Milan, with a decree dated 16 December 2006, in amendment of the challenged provision, declared the appeal admissible and has ruled on its merit.

3.1. – The Milanese Court does not share the decision of the Court on the point of the inadmissibility of the request, since the legal representatives of XXX request that the judge order the interruption of artificial alimentation and hydration, upon the presupposition that such a medical defense constitutes an invasive treatment of psychophysical integrity, contrary to the human dignity, not practicable against the will of the incapacitated person or, in any case, absent their consent.

According to the territorial Court, on the grounds of the combined provision of Articles 357 and 424 of the Civil Code, in the power to care for the person, conferred upon the legal representative of the incapacitated person, cannot be considered exclusive of the right-duty of expressing informed consent to the medical therapies. The "care of the person" implies not only the care of financial interests, but also - principally – those of an existential nature, among which health is undoubtedly understood as not only psychophysical integrity, but also a right for which treatment can be required or refused: said right cannot be limited in any way when the concerned person is not in the condition to determine it himself.

The presence in the case – indicated as necessary by the Court of Cassation with ordinance 20 April 2005, n. 8291 – of the guardian ad litem who joined the appeal of the guardian overcomes every problem of possible conflict between the ward and the guardian.

And, in consideration of the state of total incapacity of XXX and of the grave consequences that the suspension of the treatment in action would produce the guardian or, in her place, the guardian ad litem must apply to the judge to obtain the interruption.

3.2. - On the merits, the Court of Appeal observes that XXX – who cannot be considered clinically dead, because death is determined by the irreversible cessation of all brain functions – finds herself in a permanent vegetative state, a clinical condition that, according to medical science, is characteristic of a subject who "ventilates, in whom the eyes can remain open, the pupils react, the reflexes of the trunk and spinal cord persist, but there

isn't any sign of psychic activity and of sharing in the environment and the only motor reflex responses consist in a redistribution of muscular tone." The vegetative state of XXX has been unchanged since 1992 – from when she suffered a cranio-encephalic trauma following a road accident – and is irreversible, while the cessation of alimentation by means of the nasogastric tube would surely lead to her death in the course of very few days.

The territorial Court reports that from the concordant depositions of three friends of XXX – those who had collected her confidences shortly before the tragic accident that reduced her to current conditions – it emerges that she had remained deeply upset after visiting her friend *Tizio* in the hospital, who was in a coma following a road disaster; she had declared believing preferable the situation of another boy, *Caio*, who, in the course of the same accident, had been killed upon impact, rather than remaining immobile in hospital at the mercy of others attached to a tube, and she had manifested such conviction also at school, in an open discussion on the matter with her nun teachers.

According to the judges of the appeal, these should be treated as general declarations, rendered to third parties with reference to facts that occurred to other people, in a moment of strong emotionality, when XXX was very young; she found herself in a state of physical well-being and not in the current state of illness; she was without certain maturity regarding the themes of life and death and neither would she have been able to imagine the situation in which she now lies. It would not be possible therefore to attribute to the declarations of XXX the value of a personal, aware and current volitional determination, matured with absolute cognition of reason. The position of XXX would therefore be comparable to that of any another incapacitated subject that never had declared anything on the merits of care and on the medical treatments to which she must be subjected.

The Court of Appeal does not share the thesis – sustained by the guardian and endorsed by the guardian ad litem – according to which, when faced with medical treatment (the forced feeding by means of nasogastric tube) that maintains XXX in life exclusively from a biological point of view without any hope of improvement, only the verification of a precise will, expressed by XXX when she was conscious, favorable to the pursuit of life at all cost, could allow the inference of evaluating the treatment today being imposed on her as not degrading and not contrary to human dignity.

Above all because, based on the law in force, XXX is alive, given that death occurs with the irreversible cessation of all brain functions. In the second place – beyond all issues inherent to the nature of medical therapy, of therapeutic obstinacy (defined as medical cures unrelated to the hope of the patient's recovery) or of normal means of sustainment that make it possible to give forced alimentation to which XXX is subjected – and it is indisputable that, since XXX is not in a condition to feed herself otherwise and taking nutrition with a nasogastric tube the only way of feeding her, suspension would lead the incapacitated to certain death in the turn of very few days: it would be equivalent, therefore, to an indirect omissive euthanasia.

According to the appeals judges, there would not be any possibility of acceding to distinctions between lives worth and not worth being lived, having to refer only to the right to life constitutionally guaranteed, independently of the same quality of life and of subjective perceptions of said quality that they should be able to have.

"If it is undoubted that, as a result of the right to health and to self-determination in the health field, the competent subject can refuse even indispensable care to keep him alive, in the case of the of incapacitated subject (of whom the will is not certain, as in the case of XXX) for whom in underway only treatment of nutrition, that independently of the invasive

means with which it is carried out (nasogastric tube) is surely indispensable because of the impossibility of the subject to otherwise feed himself and that, if suspended, it would lead him to death, the judge – appointed to decide whether to suspend or lessen said treatment – cannot omit from consideration the irreversible consequences which the named suspension would bring about (death of the incapacitated subject), making it necessary to weigh rights equally guaranteed by the Constitution, i.e. the right of self-determination and dignity of the person and the right to life". Such weighing – as judged by the Court of Appeals – "cannot but resolve itself in favor of the right to life, where it observes systematic collocation (Article 2 of the Constitution) of the same, privileged with respect to the others (contemplated by Articles 13 and 32 of the Constitution), within the constitutional Charter"; a fortiori, in light of national legislation and international conventions, life is a supreme right, the existence of a "right to die" not being configurable (as has recognized the European Court of Human Rights in the judgment 29 April 2002 in the case Pretty v. United Kingdom).

4. – In the appeal to the Court of Cassation of the decree of the Court of Appeal the guardian ZZZ YYY, with the pleading filed 3 March 2007, has presented the challenge on only one, complex ground.

Also the counter-appellant trustee ad litem Attorney Franca Alessio has proposed appeal on the same matter, [thereby being deemed an incidental appellant] based on two grounds.

The appellant and the incidental appellant have both filed pleadings shortly before the hearing.

GROUNDS OF THE DECISION

1. – With the only grounds illustrated with the pleadings - alleging violation of Articles 357 and 424 of the civil code, in relation to Articles 2, 13 and 32 of the Constitution, as well as omitted and insufficient grounds regarding the decisive point of the controversy – the guardian, the principal appellant, calls upon the Court to assert, as principle of law, "the prohibition of therapeutic obstinacy, i.e., that no one should have to undergo invasive treatments of their own person, even if finalized to the artificial prolongation of life, without the utility and the benefit of it being concretely and effectively verified". If such interpretive result were precluded because of Articles 357 Civil Code and 732 of the Code of Civil Procedure, or by other legislation, the appellant declares that it raises a question of constitutional legitimacy of all such legislative norms, for violation of Articles 2, 13 and 32 of the Constitution, from which it assumes the full operativity of the prohibition of therapeutic obstinacy to derive.

According to the appellant, the Court of Appeals of Milan has misinterpreted and completely distorted the meaning it attributes to the indispensability and irrevocability of the right to life. The predicating of the indispensability of the right to life, unlike that which happens by other constitutional and fundamental rights, relates to the fact that, in the mapping of modern constitutionalism, it constitutes a right different from all others: life is an indispensable presupposition for the enjoyment of any sort of liberty of man and, precisely for this reason, cannot allow that the person assign to others the decision about his own survival or that the right comes to an end with its renunciation. And yet, the indispensability and irrevocability of the right to life is guaranteed in order to avoid that subjects different from those who must live, who could be in a state of weakness and disability, arrogate arbitrarily the right to interrupt the life of others; but it would be wrong to construct the indispensability of life in homage to others' interests, public or collective, above and distinct from that of the person who lives.

Moreover – the appellant asserts – the Constitutional Court has specified that in the protection of personal liberty rendered inviolable by Article 13 of the Constitution is postulated the sphere of explanation of the power of the person to dispose of his own body. And the jurisprudence of the Court of Cassation, in recently reestablishing as the source of responsibility of the doctor only the fact of not having informed the patient, or of not having previously solicited and obtained assent for the treatment, has clarified that here we are outside of the case in which the consent of the right holder is considered justification from legal responsibility for whomever has acted administering invasive therapy in the individual sphere: free and informed consent is rather perceived as an intrinsic requisite so that the intervention of whomever even is professionally competent to provide care be per se legitimate.

That fact – in the opinion of the appellant – underlines that the right to life, precisely because it is irreversible and inalienable, belongs to no one but its owner and cannot be transferred to others, that they constrain him to live as they would want.

What the ambrosial Court should have disregarded is that, in the case of XXX YYY as in any other case of treatments administered by the doctor or by others upon the person for maintaining her in life, what is revealed is not the right to life, but "only and exclusively the legitimacy of the decision of a man, who usually and fortunately in our case is a professionally competent doctor, to intervene upon the body of a person in order to prolong life".

In the opinion of the appellant, the guarantee of the right to life is more complex for subjects incapable of intending and of expressing their will, such as XXX YYY, than for those who have consciousness and will. For those who are conscious and capable of expressing will, actually, the first guarantee of the real right to life resides in the liberty of self-determination regarding others' interference, even where it consists of providing therapy in the name of maintaining life.

The same type of guarantee is not sustainable for those in a state of incapacity. Case law has for some time identified, as a criterion of action, the self-legitimization of the medical intervention, since he/she is dedicated to care-giving and equipped specifically with suitable capabilities and professional skills. According to the appellant, the constitutional need would remain that the invasive treatment of the person, when it is not and can not be assented to by the one to undergo it, is administered under the direct control of judicial authority, since it certainly falls within the bounds of application of Article 13 of the Constitution.

The Court of Appeals of Milan has developed, in this respect, a rather contradictory line of reasoning. On the one hand, declaring admissible the appeal of the guardian, the territorial Court has not denied and has in fact admitted the necessity that the treatment of invasive care of the person of XXX is subjected to the control of judicial authority; while, at the same time and on the other hand, the same Court has then refused, adjudging on the merits, to point out every and any limit to the intervention of the doctor, when the therapeutic treatment affects the right to life.

This contradiction, in the opinion of the appellant, would be the result of a radically mistaken formulation, since the self-legitimization of the doctor to intervene, also for treatments affecting the right to life, must cease when the treatments themselves constitute therapeutic obstinacy.

According to the code of medical ethics (Article 14), the doctor must abstain from obstinacy

in treatments from which it is not fundamentally possible to expect a benefit for the health of the sick and/or an improvement of the quality of life. In this, is reflected the idea of not persisting in "futile" treatments, present in the Anglo-Saxon experience, or the regulations of the reform of the French Health Code introduced in law 2005-370 of 22 April 2005, on the suspension and not administering it, because of "unreasonable obstinacy", of treatments that are "useless, disproportionate or not having any another effect than only the artificial maintenance of life".

Therefore, when the treatment is useless, futile and does not serve health, surely it is goes beyond the concept of care and of administering medicine, and the doctor, as a professional, cannot administer it without unjustifiably invading the personal sphere of the patient (Articles 2, 13 and 32 of the Constitution).

The appellant disputes the thesis – made by the Court of Milan – according to which, since the conservation of life is a right in itself, any treatment aimed to such a purpose could not take the form of obstinacy. In fact, in difficult situations that in which XXX finds herself, it is not the fading away, but the prolonging of life to being artificial, and to be the mere product of the action that a man performs in the individual sphere of another person who, only by such a way, becomes, literally, constrained to survive.

It is sustained that also for treatment aiming to prolong the life others, as for any another medical treatment, it must be verified whether they render a benefit or a usefulness to the patient or fall within in the prohibition of therapeutic obstinacy.

In the opinion of the appellant, the prohibition of obstinacy in therapy for which a benefit is not verifiable and verified or an improvement of the quality of life would not be in contradiction with the prohibition of treatments directed to provoke death: because it is one thing that the doctor must not kill, not even under the false pretences of care giving; another thing is that the doctor can and must refrain from those treatments that, even if capable of prolonging life, have been verified as not rendering benefit or usefulness for the patient, in removing him from the natural and fatal result of the state in which he finds himself and in forcing him to maintain some vital functions.

In the appeal it is sustained that the right to life is one – and it is incontrovertible, contrary to what the Milanese Court of Appeal would want – with the guarantee of human individuality from that in Articles 2, 13 and 32 Constitution. The normal way of guaranteeing the individuality of a man is self-determination; but when, as in the case of XXX, self-determination is no longer possible, because the person has irreversibly lost consciousness and will, it is needed at least to ensure that what remains of the human individuality, in which reposes the "dignity" that Articles 2, 13 and 32 of the Constitution discuss, not be lost. And such individuality would not be lost whenever another person, different from that who must live, would be able unlimitedly to interfere in the personal sphere of the incapacitated person by manipulating her end in the innermost, till the point of imposing the maintenance of vital functions otherwise lost.

The prohibition of therapeutic obstinacy – it sustains – arises only from here: so that the intervention of the doctor, artificial and invasive of the personal sphere of one who is incapacitated and therefore defenseless, is within the confines given of self-legitimacy of the doctor as a professional, who, as such, he must care for and hence render a tangible advantage for his patient. Such accurate verification of the usefulness or of the benefit of the treatment for one who undergoes it must be done only and above all when the treatment aims to prolong life, since "only and above all when the treatment itself aims to prolong life, the doctor, as a professional, presses on to the maximum intrusion in the

individual sphere of the other person, even modifying, or at least shifting, the border between life and death."

Certainly we must not permit ourselves, not even and with greater reason for one who is incapacitated or has disabilities, to distinguish between life worthy and not worthy of being lived. This principle does not take away, however, that there are cases in which, because of the artificial prolongation of life, no usefulness or benefit is found whatsoever and in which, therefore, the only result produced from the treatment or from the care is of sanctioning the triumph of medical science in defeating the natural outcome of death. Such a triumph is however an empty triumph, overturned in defeat, if for the patient and her health there is no further effect or advantage.

It is not life in itself, which is a gift that can ever be able to be unworthy; to be unworthy can only be the artificial protraction of living, beyond what it otherwise would have, only thanks to the intervention of the doctor or in any case of another, who is not the person who is compelled to life.

The Court of Appeals of Milan, in the opinion of the appellant, concluded moreover by misrepresenting and distorting the meaning of the judicial effected during the trial, in which it verified, through texts, the conviction of XXX, previous to the accident that has reduced her to a permanent vegetative state, that it would have been "better" to die rather than to have that which "couldn't be considered life." The convictions of XXX would have been asked and would have been the subject of the judicial inquiry not because some could think that these, manifested in a far away time, when XXX was still in full health, are valid today as a manifestation of an appropriate will, comparable to a current dissent to the treatments she is undergoing. The verification of XXX's convictions, when she could still manifest them, would have been requested and made, instead, because the Court of Appeal, in declaring its opinion on the maintenance of artificial hydration and alimentation, can evaluate and ponder every available element.

The permanent vegetative state (PVS) in which XXX lies is a unique condition and different from any another, not approaching in some way the condition of handicap or of minors, or the potentiall reversible conditions of the eclipse of consciousness and will such as the coma. In the condition of PVS, differently from the others, the problem of verifying whatever tangible benefit or usefulness of the treatments or from the care – only aimed to postpone death under the biological point of view – can effectively arise.

2.1. – With the first ground illustrated in the memorial, alleging violation or false application of Articles 357 and 424 of the Civil Code, in relation to Articles 2, 13 and 32 of the Constitution, the guardian ad litem incidental appellant, asks that the prohibition of therapeutic obstinacy be affirmed as a principle of law. Repeating the same arguments contained in the principal appeal, in the incidental appeal underlines how XXX is not in a position of expressing any consent in regard to the acts that take an invasive form into her personal psycho-physical integrity, and appeals to the constitutional case law on the relevance of the tutelage of personal liberty to any interference upon the body or upon the psyche to which the subject did not consent. It places the accent on the protection of human dignity, inseparable from that of life itself, as a constitutional value, and it invokes, *inter alia,* Article 32 of the Constitution, which precludes health treatments that can violate the respect of the human person. It is sustained that, when the treatment is useless, futile and does not serve health, surely it goes beyond every broad concept of care and of the practice of medicine, and the doctor, as a professional, cannot administer it without unjustly invading the personal sphere of the patient.

2.2. – The second grounds of the incidental appeal alleges the omission of and insufficient reasons on the decisive point of the controversy and asks that the Court declare its opinion on the principle that no one should have to undergo treatments invasive of their own person, even if aimed at the artificial prolongation of life, without any usefulness and benefit being concretely and effectively verified. In the opinion of the incidental appellant, the observance of the prohibition of therapeutic obstinacy should have been assured by the Court of Appeal of Milan in the accepted meaning of the prohibition of activity unrelated to the hope of recovery of the patient, independently of the treatment in question being aimed at maintaining life.

Also in the memorial it is underlined that the Court of Appeals erroneously would have, after having admitted, held irrelevant the testimony of the friends of XXX. According to the incidental appellant, any declaration about her own will to not be kept alive during the permanent vegetative state cannot be expressed *ex ante*, from one who found herself still in full health and perfectly able to understand and to express will, not having any relevance to the fact that the girl, then, was at a young age. The judgment of the Court of Appeals would not be agreed to in holding that the determinations of XXX would have had value only if made at the moment of the illness.

3. – The principal appeal and the incidental appeal must be joined, on the grounds of Article 335 Code of Civil Procedure, both challenges being proposed against the same decree.

4. – Dealing with challenges of a measure filed the 16 December 2006 – therefore falling within legislative decree 2 February 2006, no. 40 (Modifications to the Code of Civil Procedure in matters of nomofilattic and arbitration cassation procedure according to Article 1, paragraph 2, of the law 14 May 2005, n. 80), based on the temporary regulation attributed to Article 27, paragraph 2 - the appeal to cassation for violation of law includes the possibility alleging, also, the fault of omission, insufficient or contradictory ground about a controversial and decisive fact through the decision, on the grounds of revised *[novellato]* Article 360 Code of Civil Procedure.
The challenges proposed must therefore be scrutinized even where they allege a fault indicated by number 5 of the cited Article 360 of the Code of Civil Procedure.

5. – The grounds stated in the principal appeal and the incidental appeal, on account of their strict connection, can be examined jointly.

They invest the Court – other than with the question of whether the therapy administered to the body of XXX YYY, consisting of artificial alimentation and hydration by means of nasogastric tube can qualify as a form of therapeutic obstinacy, given the asserted importance that is given in this case of invasive treatment the person, without any benefit or usefulness for the patient and exceeds the forced prolongation of life, because objectively aimed to preserve a purely mechanical and biological functionality – also with the question of whether and within which limits, in the given situation, that administration is able to be interrupted, where the request in the matter presented by the guardian corresponds to the opinions expressed in the past by XXX on situations close to that in which she then came to find herself, and more in general, to her convictions on the significance of the dignity of the person.

This last question is preliminary in logical order. From the examination of it, therefore, it is best to begin.

6. – It must be premised that informed consent constitutes, normally, legitimization and the basis of health treatment: without informed consent the intervention of the doctor is surely

illicit, even when it is in the interest of the patient; the application of free and informed consent represents a form of respect for the liberty of the individual and a means for the pursuit of his best interests.

The principle of informed consent – which expresses a choice of value in the way of conceiving of the relationship between doctor and patient, in the sense that said relationship appears based first in the rights of the patient and upon his liberty of therapeutic self-determination and then on the duties of the doctor – has a secure foundation in the norms of the Constitution: in Article 2, which protect and promote the fundamental rights of the human person, of her identity and dignity; in Article 13, which proclaims the inviolability of personal liberty, in which "the sphere of explication of the power of the person of preparing of his own body is postulated" (Constitutional Court judgment n. 471 of 1990); and in Article 32, which protects health as a fundamental right of the individual, and as an interest of the general community, and provides the possibility of obligatory health treatment, but they subject them to a constitutional guarantee ["reserve of law"], qualified by the necessary respect of the human person and further specified with the requirement that the legislator provide every possible preventive precaution, aimed to avoid the risk of complications.

In legislative norms, the principle of informed consent at the basis of the relationship between doctor and patient is enunciated in numerous special laws, set out by the law instituting the National Health Service (law 23 December 1978, n. 833), which, after having premised, in Article 1, that «The protection of physical and psychic health must take place with respect for the dignity and of the liberty of the human person», ratifies, in Article 33, the generally voluntary character of the norm of [diagnostic] exams and of health treatments.

At the level of supranational sources, the same principle finds recognition in the Convention of the Council of Europe on the rights of man and on biomedicine, made at Oviedo the 4 April 1997, rendered executive with the law of authorization to the ratification 28 March 2001, n. 145, which, to Article 5 places the following "general rule" (according to the index of the disposition): «An intervention in the domain of health can not be effected after the person concerned has given his free and clear consent». *[French excerpt]*

In the Charter of the Fundamental Rights of the European Union, adopted in Nice the 7th of December 2000, provides that the free and informed consent of the patient to the medical act must be considered not only under the profile of the lawfulness of the treatment, but first of all as a true and proper fundamental right of the European citizen, affirming the more general right to the integrity of the person (Chapter I, Dignity; Article 3, Right to the integrity of the person).

In the code of medical ethics of 2006 it is repeated (Article 35) that «The doctor must not undertake diagnostic and/ or therapeutic activity without the acquisition of the explicit and informed consent of the patient».

The principle of informed consent stands firm in the jurisprudence of this Court.

In the decisions of the III Civil Section 25 January 1994, no. 10014, and 15 January 1997, no. 364, it is stated that from the self-legitimization of medical activity the conviction cannot be drawn that the doctor may – as a rule and except in some exceptional cases (when the patient is not in a position, because of his condition, to give consent or dissent, or, more generally, where the conditions of the state of necessity exist provided for in Article 54 of the Penal Code) – intervene without the consent or in spite of the dissent of the

patient. More recently, Civil Cassation, Section III, 14 March 2006, n. 5444, has specified that "the correctness or lack thereof of the treatment does not assume any importance to the ends of the existence of the tort for violation of informed consent, being completely indifferent to the ends of the formation of the harmful omissive conduct and of the injustice of the damage, which exists for the simple reason that the patient, because of the deficit of information, was not put in the condition to assent to the health treatment with a consciousness aware of its implications": the treatment executed without prior provision of valid consent is in violation "as much of Article 32, second paragraph, of the Constitution, as it is of Article 13 of the Constitution and Article 33 of law no. 833 of 1978, because of the injury to the legal position of the patient regarding health and physical integrity". "The legitimacy itself of the medical activity – reiterates Penal Cassation Section IV, 11 July 2001-3 October 2001 – demands for its validity and concrete lawfulness, in principle, the manifestation of consent of the patient, which constitutes a presupposition of lawfulness of medical-surgical treatment. Consent is tied to the moral liberty of the subject and to his self-determination, as well as to his physical liberty defined as the right to the respect of his own corporeal integrity, which are all aspects of the personal liberty proclaimed inviolable by Article 13 of the Constitution. From there it derives that a general 'right of care giving' is not attributable to the doctor; faced with such a right, the will of the sick – who find themselves in a position of 'subjection' by which the doctor could intervene at liberty, with only the limit of his own conscience – would have no importance; recognition of the doctor's faculty or the power of care-giving, instead, appears to be in accordance with the principles of the legal system; these subjective situations deriving from qualification to exercise the medical profession generally need, however, the consent of the person who must subject himself to the health treatment to express themselves."

6.1. – Informed consent has not only the correlated faculty of choosing among different possibilities of medical treatment, but also of eventually refusing the therapy and consciously deciding to interrupt it, in all phases of life, even in the terminal phase."

This conforms to the personalistic principle that animates our Constitution, which sees in the human person an ethical value in itself; it forbids instrumentation of the same for some heteronymous and absorbing end; it conceives social intervention and that of solidarity in function of the person and his development and not vice versa; it considers the limit of «respect of the human person» in reference to the single individual, in whatever moment of his life and in the totality of his person, in consideration of the bundle of ethical, religious, cultural and philosophical convictions guiding his volitional determinations.

And it is also consistent with the new dimension that health has assumed: it is no longer considered as simply the absence of illness, but as a state of complete physical and psychic well-being, and therefore also involving, in relation to the perception that everyone has of themselves, also the interior aspects of life as informed and lived by the subject in his experience.

The patient's right to therapeutic self-determination can not meet a limit when it leads to the sacrifice of the gift of life.

Although it has sometimes been thought that the individual has the obligation of acting for the benefit of his own health or that the individual can not refuse treatments or omit behaviors thought to be advantageous or absolutely necessary for the maintenance or the reestablishment of it, the bench holds that the health of the individual can not be subjected to authoritative-coactive impositions. In the framework of the "therapeutic alliance" that unites patient and doctor in the search for what is appropriate, respecting everyone's cultural paths, there is space, when faced with the refusal of care by the party concerned,

for a strategy of persuasion – because the aim of the regulation is also to offer the support of maximum and concrete solidarity in the situations of disability and suffering. Even before this, there is, furthermore, the duty of verifying that said refusal is an informed, authentic and genuine one. If refusal has such connotations it can not be disregarded in the name of the duty of caring for oneself as a principle of public order.

Under the same text of Article 32 of the Constitution, health treatments are obligatory only in the cases expressly provided for by the law, if the measure that it imposes is aimed at preventing that the health of the individual can cause damage to the health of others and that the intervention provided for is not damaging, but is instead useful to the health of the one undergoing it (Constitutional Court, decision no. 258 of 1994 and n. 118 of 1996).

Only in these limits is it constitutionally correct to allow limitations to the right of the individual to health, which, like all the rights of liberty, implies the protection of its negative side: the right of losing health, of falling ill, of not being treated, of living the final phases of one's own existence according to the interested party's own canons of human dignity, even of letting oneself die.

The refusal of medical surgery therapy, even when it leads to death, cannot be exchanged for the case of euthanasia, or rather for an action intended to shorten life, positively causing death, because such a refusal expresses an attitude of choice on the part of the ill person that the illness follow its natural course. And on the other hand it must be repeated that the liability of the doctor for omitting care exists because the doctor has the legal obligation to administer or continue the therapy and to terminate it when the obligation ceases: and the obligation, based on the consent of the patient, ceases – creating the legal duty of the doctor to respect the will of the patient to not be treated – when the consent ceases after the patient refuses therapy.

Such an orientation, prevalent in the trends of legal thought, including constitutional law, is already present in the case law of this Court.

The judgment of I Penal Session 29 May 2002-11 July 2002 asserts that, "in the presence of an authentic and genuine determination" of the interested party in the sense of the refusal of the care, the doctor "must stop, even if the omission of the therapeutic intervention might cause the danger of a worsened state of health of the infirm and even death." Clearly – it specifies in the cited pronouncement– it is a case of extremes, "that in practice seldom occurs, if only because those in peril of life or grave danger, due to the inevitable disturbance of the conscience generated by the illness, is rarely in a position of freely manifesting his intention": "but if this is not the case, the doctor that fulfills his moral and professional obligation of putting the patient in a position to make his choice and verifies the freedom of that choice, can not be called upon to respond for anything, since when faced with an action manifesting the exercise of a true and proper right, his abstention from any initiative to the contrary becomes a duty. Not fulfilling this duty could, on the other hand, take on the characteristics of a crime."

The solution, drawn from constitutional principles relative to the refusal of care and to the duty of the doctor to refrain from every diagnostic or therapeutic activity absent the consent of the patient, even if such an abstention can provoke death, finds confirmation in the precepts of the code of medical deontology: according to the cited Article 35, "in the presence of documented refusal from the capable person," the doctor must "in every case" "desist from consequent diagnostic and/or curative acts, because no medical treatment is allowed against the will of the person." Furthermore such a solution is legislatively sanctioned in other European regulations. Significant in this direction is Art. 1111-10 of the

French Code of Public Health, inserted in law n. 2005-370 of 22 April 2005 relative to the right the sick and at the end of life, according to which «When a person, in an advanced or terminal phase of a grave and incurable ailment, whatever the cause might be, decides to limit or to stop all treatment, the doctor [shall] respect(s) his will after having informed him of the consequences of his choice. The decision of the sick person is written in his medical record». *[French excerpt]*

Neither can the formation of a duty of the individual to health, which would create a duty of the patient to not refuse care and therapy to allow for the maintenance of life, be deduced from the judgment of the European Court of Human Rights 29 April 2002, in the case Pretty *v.* United Kingdom. The Court of Strasburg asserts that Article 2 of the Convention for the Protection of the Human Rights and of the Fundamental Freedoms protects the right to life, without which the enjoyment of each of the other rights or liberties contained in the Convention become useless. It specifies that such a disposition, on the one hand, cannot, without distorting the letter of the law, be interpreted in the sense that is attributed to the diametrically opposed right, that of a right of to die, nor, on the other hand, can it create a right of self-determination in the sense of attributing to an individual the faculty of choosing death rather than life. Such a principle – that the bench shares fully and makes its own –is utilized by the Court of Strasburg not to deny the admissibility of the refusal of care by the interested party, but to judge as not detrimental to the right to life the criminally sanctioned prohibition of assisted suicide provided for by national English legislation and the refusal on the part of the Director of Public Prosecutions, to guarantee immunity from the penal consequences to the husband of a paralyzed woman affected by a degenerative and incurable illness, desirous of dying, in the case in which he should lend her aid in committing suicide. Consistent with such an imposition, the same judgment of the European Court has been careful to underline that, in the health field, the refusal of accepting a particular treatment could, inevitably, lead to a fatal outcome, and above all the imposition of a medical treatment without the consent of an adult and mentally aware patient would interfere with the physical integrity of a person in a manner such as to be able to involve the rights protected by Article 8.1 of the Convention (right to private life); and that a person could expect to exercise the choice of dying by refusing to consent to a treatment potentially suitable for prolonging life.

Likewise, according to the judgment of 26 June 1997 of the Supreme Court of the United States, in the case Vacco et al. V. Quill et al., everyone, regardless of physical condition, is authorized, if competent, to refuse an undesired treatment given for the maintenance of life, while no one is permitted to lend assistance in suicide: the right of refusing health treatments is based upon the premise of the existence, not from a general and abstract right to accelerate death, but of the right to the integrity of the body and to not undergo undesired invasive interventions.

7. – The overall framework of the values in play herein described, essentially based upon the free availability of good health on the part of the party directly concerned in the possession of her capacity to understand and to express will, presents itself differently when the adult subject is not in a position to manifest his own will because of his state of total incapacity and that adult had not, before falling into such a condition, when he was in full possession of her mental faculties, specifically indicated through declarations of will made earlier which therapies she would have wanted to receive and which she would have intensely refused in the case that he would come to find himself in a state of unconsciousness.

Even in such a situation, even faced with the current lack of a specific legislative discipline, the primary and absolute value of the rights involved require their immediate tutelage and

imposes upon the bench the delicate work of reconstruction of the rule of justice in the framework of the constitutional principles (cfr. Constitutional Court, judgment no. 347 of 1998, point no. 4 of the *"Considerato in diritto"* [the court's legal reasoning, or "considered in law" section of the judgment] section.

7.1. – It is clear from pleadings of the case that XXX YYY finds herself in the situation indicated, lying in a persistent and permanent vegetative state following a grave cranial-cephalic trauma suffered following a road accident (occurring when she was twenty years old), and had not predisposed, when she was in possession of the capacity of understanding and of expressing will, any advance declaration on treatment *[dichiarazione anticipata di trattamento].*

This clinical condition has persisted unchanged since January 1992.

By reason of her condition, XXX, even if able to breathe spontaneously, and even conserving cardiovascular, gastrointestinal and renal functions, is radically incapable of living cognitive and emotive experiences, and therefore of having any contact with the external environment: her reflexes of the trunk and spine persist, but there is not any sign of psychic activity or of participation in the environment, nor is there any capacity of voluntary behavioral response to external sensorial stimuli (visual, auditory, tactile, pain), her only motor reflex activity consisting of a redistribution of muscular tone.

The physical survival of XXX, which is in a stable state but not progressing, is assured through the artificial alimentation and hydration administered through a nasogastric tube.

XXX has been declared incompetent and the father has been appointed guardian.

7.2. – In case of incapacity of the patient, medical dutifulness finds its own legitimate grounds in the constitutional principles inspired by solidarity, which allow and impose the carrying out of those urgent interventions that result in the best therapeutic interest of the patient.

And yet, even in such eventualities, once the urgency of the intervention deriving from the state of necessity is passed, the personalistic claim to the foundation of the principle of informed consent and to the principle of parity of treatment amongst individuals, regardless of their state of capacity, requires the recreation of the dualism of the subjects in the process of elaboration of the medical decision: between the doctor who must inform regarding the diagnosis and the therapeutic possibilities, and the patient who, through the legal representative, is able to accept or refuse the prospective treatments.

Central in this matter is the disposition of Article 357 of the Civil Code, which – read in connection with Article 424 Civil Code – provides that "The guardian has the care of the person" of the incapacitated, thus investing the guardian with the legitimate position of interlocutory subject with the doctors in deciding health treatments to administer to the incapacitated person. Powers of care of the disabled also belong to the person appointed support administrator (Articles 404 et seq. of the Civil Code, introduced by law 9 January 2004, no. 6), because the decree of appointment must contain the indication of the acts that this person is authorized perform in the protection of the interests, also of a personal nature, for the beneficiary (Article 405, fourth paragraph, Civil Code).

Confirming such a reading of the norms of the code we can recall judgment 18 December 1989, n. 5652, of this Section, with which it states that the incapacity of providing for one's own interests, in accordance with Article 414 of the Civil Code, is to be considered also from

the perspective of protecting non financial interests, since the possibility exists of an absolute necessity to substitute the will of the subject with that of the person appointed guardian even in absence of property to protect. This occurs – it is the same decision to specify it – in the case of the subject "whose survival is put in danger by his refusal (caused by psychic infirmity) and external interventions of assistance such as admission in a safe and healthy place or also admission in hospital" for health treatments: here the recourse to interdiction (then the only institution) is justified in view of the need to substitute the appointed subject to express the will with regard to the proposed treatment. Continuing in this line of thought, we recall the first applications of the judges on this matter regarding the similar institution of the support administrator, sometimes utilized in the medical-health field, to support the exercise of autonomy and to allow the manifestation of an authentic will where the condition of cognitive decay would impede expressing a truly conscious consent.

And above all the normative fabric contains significant dispositions on legal representation in matters of care and health treatments.

According to Article 4 of the legislative decree 24 June 2003, n. 211 (implementation of directive 2001/20/CE relative to the application of clinical good practices in the execution of clinical experimentations of medicines for clinical use), clinical experimentation on incapacitated adults who have not given or have not refused their informed consent before the incapacity arose, is possible on the condition, *inter alia*, that "the informed consent was obtained from the legal representative": a consent – continues the norm – that "must represent the presumed will of the subject."

Again, Article 13 of the law on social protection of maternity and on the voluntary interruption of pregnancy (law 22 May 1978, n. 194), regulating the case of the woman interdicted for mental infirmity, provides: that the request of voluntary interruption of the pregnancy be between the first ninety days and that if such a period lapses, it can be presented, other than from the woman personally, also from the guardian; that in the case of request advanced by the interdicted, the opinion of the guardian must be heard; that the request formulated from the guardian must be confirmed by the woman.

More directly – and with a norm that, being relative to all health treatments, exhibits the character of the general rule – *Article* 6 of the cited Convention of Oviedo – indexed under Protection of people not having the ability to consent – provides that «When, in his opinion, an adult does not have by reason of mental handicap, illness or on account of a similar cause, the ability to consent to an intervention, these things can not be effected without the authorization of his representative, by an authority or by a person or instance appointed for him», specifying that «an intervention can not be effected on a person without the ability to consent, except for his direct benefit». *[French excerpt]* And – as the explanational report to the Convention states – when it utilizes the expression «on account of a similar cause», *[French excerpt]* the cited Article 6 refers to the situations, such as comatose states, in which the patient is incapable of formulating his wishes or of communicating them.

Now, it is noted that, although the Parliament has not authorized the ratification with the law 28 March 2001, n. 145, the Convention of Oviedo has not yet been ratified by the Italian State. But from that it doesn't follow that the Convention is deprived of any effect in our legal system. In fact, an agreement that is valid on the international plane, but which has not yet executed within the State, can be assigned – even more so after the parliamentary law authorizing ratification – an auxiliary function on the interpretative plane: it will have to yield if faced with a contrary internal norm, but can and must be utilized in the interpretation of internal norms to the end of giving to these the most conforming possible reading. Moreover, the Constitutional Court, in granting the requests of

referendum on certain norms of the law 19 February 2004, n. 40, concerning medically assisted procreation, has specified that the eventual lacuna consequent to the referendum would not be put in any way in conflict with the principles laid down by the Convention of Oviedo of 4 April 1997, reciprocated in our legal system with law 28 March 2001, n. 145 (Constitutional Court, judgments no. 46, 47, 48 and 49 from 2005): with it implicitly confirming that the principles from it are already part of the system today and that it cannot depart from them.

7.3. – Having ascertained that the guardian's duties of care for the person consist in the providing of informed consent to the medical treatment to be administered to the person in the state of incapacity, the issue lies in establishing the limits of the intervention of the legal representative.

Such limits are ingrained in the fact that health is a highly personal right which – as this Court has specified in order of 20 April 2005, n. 8291 – the liberty of refusing care "presupposes the recourse to the evaluations of life and of death that find their foundation in conceptions of ethical or religious, and in any case of an extra-juridical nature," so therefore exquisitely subjective".

In the opinion of the bench, the highly personal character of the right to health of the incapacitated person requires that the reference to the institution of legal representation does not transfer to the guardian, who is invested with a function of private law, an unconditional power to provide for the health of the person in a state of total and permanent unconsciousness. In consenting to medical treatment or in dissenting from the prosecution of the same upon the incapacitated person, the representation of the guardian is subjected to a two-fold order of constraints: he must, above all, act in the exclusive interest of the incapacitated person; and, in search of the best interest, must decide not "in the place" of the incapacitated person nor "for" the incapacitated, but "with" the incapacitated person: therefore, reconstructing the presumed will of the unconscious patient, who was already adult before falling into such a state, taking into account the wishes expressed by him before the loss of consciousness, or inferring that will from his personality, from his lifestyle, from his inclinations, from his basic values and of his ethical, religious, cultural and philosophical convictions.

Both constraints to the representative power of the guardian have, as has been seen, a precise normative reference: the first in Article 6 of the Convention of Oviedo, that imposes the correlation between the «direct benefit» of the interested party and the therapeutic choice effected by the representative; the other, in Article 5 of legislative decree no. 211 of 2003, according to which the consent of the legal representative to the clinical experimentation must correspond to the presumed will of the incapacitated adult.

There is no doubt that the choice of the guardian must be a guarantee to the incapacitated subject, and therefore aimed, objectively, at preserving him and at protecting his life.

But, at the same time, the guardian may not neglect the idea of dignity of the person, as manifested by that very person before falling into a state of incapacity, when faced with problems of life and death.

7.4. – This attention to the peculiar circumstances of the concrete case and, above all, to the convictions expressed by the subject concerned when she was in the condition of capacity, is constant, both in the diversity of the arguments followed and in the decisions adopted in other legal systems by the Courts in controversies regarding the suspension of care (and also that of artificial alimentation and hydration) for the sick in a permanent

vegetative state, in situations without living wills.

In the leading case In re Quinlan, the Supreme Court of New Jersey, in the decision of 31 March 1976, adopted the doctrine – followed by the same Court in the decision of sentence 24 June 1987, In re Nancy Ellen Jobes – of the substituted judgment test, in emphasizing that this approach is intended to ensure that whoever decides in place of the concerned party takes on, as much as possible, the decision that the incapacitated patient would have taken if capable. When the wishes of a capable person are not clearly expressed, whoever decides in her place must adopt as line of orientation the personal system of the life of the patient: the substitute must consider the previous declarations of the patient on the subject and her reactions when faced with medical problems, as well as all aspects of the personality of the patient familiar to the substitute, obviously with particular attention to her values of a philosophic, theological and ethical nature, all to the end of identifying the type of medical treatment that the patient would prefer.

In the decision of 25 June 1990 in the Cruzan case, the Supreme Court of the United States rules that the Constitution of the United States does not prohibit the State of Missouri from establishing "a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent."

In the judgment of 17 March 2003, the Bundesgerichtshof *[German for "federal court of justice", the highest appeals court in Germany for civil and criminal law cases]* – after having premised that if a patient is not capable of giving consent and his illness has begun a mortal, irreversible course, he needs to be spared acts to prolong life or to maintain him in life if such cures that are contrary to his will expressed previously under form of the so-called disposition of the patient (in consideration of the fact that the dignity of the human being human imposes respect for his right to self-determination, exercised in the situation of capacity to express his consent, even in the moment when they are no longer in a state of making conscious decisions) – asserts that, whenever it is not possible to verify such a clear will of the patient, one can appraise the admissibility of such measures according to the presumed will of the patient, which therefore must be, at times, identified also on the basis of the decisions of the same patient himself regarding his life, values and convictions.

In the Bland case, the House of Lords 4 February 1993, utilizing the different test of best interest, reaches the conclusion (stated in detail in the opinion of Lord Goff of Chieveley) by which, in absence of authentically curative treatments, and given the impossibility of recovering consciousness, it is contrary to the best interest of the patient to protract artificial nutrition and hydration, deemed unjustified invasive treatments of the corporeal sphere.

7.5. – One living in a permanent vegetative state is, to all effects, a person in the full sense, who must be respected and protected in their fundamental rights, starting with the right to life and the right to sanitary services, *a fortiori* because of the condition of extreme weakness and not able to provide for oneself autonomously.

The extreme tragedy of such a pathological state – which is inherent in the biography of the sick and which detracts nothing from their dignity as a human beings – does not justify in any way a weakening of the care and solid support that the Health Service must continue to offer and that the sick, equal to every other being belonging to human society, has the right to expect even up to the occurrence of death. The community must place at the disposal of those who need it and ask for it for all the best care and protections that medical science provides to face the struggle to remain alive, regardless of how precarious the life is and how much hope there is of recovering cognitive functions. This principle is asserted as

much by the idea of one, universal equality among human beings as by the equally universal duty of solidarity with regard to those who, among them, are the most fragile subjects.

But – for every one who believes that it is in his own best interest to be kept artificially alive as long as possible, even if lacking consciousness – there is another who, tying indissolubly his own dignity to a life of experience and that to consciousness, believes that it is absolutely contrary to his own convictions to survive indefinitely in a condition of life deprived of the perception of the external world.

A State such as ours – organized by fundamental choices written into the constitutional Charter based on pluralism of values, and placing the principle of self-determination and the freedom of choice at the center of the relationship between patient and doctor – must also respect the latter choice.

The legal system gives to the individual – who, before falling into the state of total and absolute unconsciousness, typical of the permanent vegetative state, had manifested, in express form or even through his own convictions, his own lifestyle and the basic values, the per se unacceptability of the idea of a body destined, thanks to medical therapy, to outlive the brain – the possibility to make her voice heard regarding the deactivation of this treatment through the legal representative.

In the opinion of the bench, the functionality of the power of representation, necessarily aimed at the tutelage of the right to life of the person represented, permits reaching the interruption of care only in extreme cases: when the condition of the vegetative state is, based on a rigorous clinical appraisement, irreversible and there is not any medical foundation, according to the scientific standards recognized at the international level, that permits assuming that the person might have even the least possibility of some, even if faint, recovery of consciousness and of returning to a life consisting also of perception of the external world; and only when such a condition – keeping in mind the will expressed by the interested party before falling into such a state or from his basic values and convictions – is incompatible with the representation of one's self upon which he constructed his life up until that moment and is contrary to his way of understanding the dignity of the person.

On the other hand, the search for the presumed will of the person in a state of unconsciousness – reconstructed, based on clear, univocal and convincing elements of proof, not only in light of previous wishes and declarations from the interested party, but also upon the basis of his lifestyle and character, of his sense of integrity and of his critical interests and experience – ensures that the choice in question is not expression of the representative's judgment on the quality of the life, even if belonging to the same familiar circle of the represented party, and that it is not in any way conditioned by the particular seriousness of the situation, but is aimed, exclusively, to giving substance and coherence to the complete identity of the patient and to his way of conceiving of, before falling into a state of unconsciousness, the very idea of dignity of the person. The guardian therefore has the duty of completing this comprehensive identity of the patient's life, reconstructing the hypothetical decision that he himself would have taken if he had been made in a capable state; and, in this duty, human more than juridical, he must not ignore the sick person's own past, in order to allow his authentic and most genuine voice emerge and represent it to the judge.

From the above it is derived that, in a chronic situation of objective irreversibility of the clinical picture of absolute loss of consciousness, the interruption of the medical treatment that keeps him alive artificially is able to be carried out, as an extreme gesture of respect

for the autonomy of the sick person in a permanent vegetative state, upon request brought by the guardian who represents him, when that condition, absent of sentiment and experience, of contact and of consciousness – only prompted by the will expressed before falling into such a state and taking into account the values and the exact convictions of the person in a state of incapacity – reveals itself, in the absence of any prospect whatsoever of regression of pathology, harmful to his way of understanding the dignity of life and the suffering in life.

7.6. – There is no doubt that artificial hydration and alimentation with a nasogastric tube constitutes a health treatment. These, in fact, integrate a treatment that underlies scientific knowledge, that is created by doctors, even if it is then followed by non doctors, and consists in the administration of preparations such as chemical compounds implicating technological procedure. Such a characterization is, moreover, corroborated by the international scientific community; finding support in the case law in the Cruzan case and in the Bland case; it is in line, finally, with the orientations of constitutional law, which includes the drawing of blood – this also a "medical practice of ordinary administration" – among the measures of "restrictions to the personal liberty when coactive execution becomes necessary because the person undergoing the expert examination has not consented spontaneously to the drawing" (judgment no. 238 of 1996).

8. – Differently from what is shown to be believed by the appellants, the judge can not be requested to order the detachment of the nasogastric tube: such an expectation is not possible when faced with health treatment, such as that of the case at bar, which, in itself, does not objectively constitute a form of therapeutic obstinacy, and which represents, rather, a defense proportionately aimed at the maintenance of life, without which, in the imminence of death, the organism is no longer able to assimilate the substances provided or a state of intolerance clinically proven to be connected to the particular form of alimentation occurs.

Rather, the intervention of the judge expresses a form of control of the legitimacy of the choice in the interest of the incapacitated person; and, as a result of a judgment effected according to the horizontal logic composed of reasonableness, which postulates an ineliminable reference to the circumstances of the concrete case, it expresses itself in the authorizing or not of the choice performed by the guardian.

Upon the basis of the considerations above, the decision of the judge, given the involvement in the case of the right to life as supreme (good), can be favorable to authorization only (a) when the condition of a vegetative state is, on the grounds of a rigorous clinical judgment, irreversible and there is no medical foundation whatsoever, according to the scientific standards recognized at the international level, that allows the supposition that the person would have at least the minimum possibility of any, even if it is faint, recovery of the consciousness and returning to a perception of the external world; and (b) on the condition that such a request be truly expressive, based on clear, concordant and convincing elements of proof, from the voice of the represented person, drawn from his personality, from his lifestyle and from his convictions, corresponding to his way of understanding, before falling into a state of unconsciousness, of the very idea of dignity of the person.

Whenever one or the other condition is lacking, the judge must deny the authorization, and is obliged then give unconditional prevalence to the right to life, independently of the level of health, autonomy and capacity to understand and to express the will of the concerned subject, from the perception that others could have of the quality of life itself, as well as from mere utilitarian logic of costs and benefits.

9. – Within the limits just defined, the contested decree does not escape the censures of the appellants.

It has omitted to reconstruct the presumed will of XXX and to give importance to the wishes previously expressed by her, to her personality, to her lifestyle and to her most intimate convictions.

Under this point of view, the territorial Court – faced with the judicial inquiry, in which it was confirmed, through witnesses, that XXX, expressing herself in regards to a situation close to that in which she would come to later find herself, had manifested the opinion that it would have been for her preferable to die than to live artificially in a situation of a coma – limited itself to observe that those convictions, manifested in a distant time, when XXX was still in full health, could not be considered as a manifestation of a will suitable, comparable to a dissent in the present regarding treatments administered upon her body.

But the judges on appeal did not verify whatsoever whether such declarations – whose credibility have moreover no doubt, held them unfit to formulate themselves as a testament of life, were valid in any case to define, together with the other results of the judicial inquiry, the personality of XXX and her way of conceiving of, before falling into a state of unconsciousness, the very idea of dignity of the person, in light of her basic values and ethical, religious, cultural and philosophic convictions orienting her volitional decisions; and therefore they omitted verifying whether the request to interrupt the treatment formulated by the father in capacity of guardian reflected the orientations of the life of the daughter.

Such a verification will have to be effected by the judge on remand, taking into account all the elements that emerged from the judicial inquiry and of the convergent positions assumed by the parties in the trial (guardian and guardian ad litem) in the reconstruction of the personality of the girl.

10. – Having absorbed the examination of the question of constitutional legitimacy, the appeals are granted, according to the reasoning and within the limits indicated in it.

From there ensues the cassation of the challenged decree and the remand of the case to a different Section of the Court of Appeals of Milan.

Said Court will rule conforming itself to the following principle of law:

«Where the sick person lingers for very many years (in the case, more than fifteen) in a permanent vegetative state, with consequent radical incapacity of relating to the external world, and is kept artificially alive by means of a nasogastric tube that provides to her nutrition and hydration, upon request of the guardian who represents her, and in the debate with the guardian ad litem, the judge may authorize the deactivation of such a health defense (except the application of the measures suggested by science and medical practice in the interest of the patient), only in the presence of the following presuppositions: (a) when the condition of the vegetative state is, on the basis of a rigorous clinical judgment, irreversible and there isn't any medical foundation whatsoever, according to scientific standards recognized at the international level, allowing the assumption of the minimum possibility, even if faint, of the recovery of consciousness and of returning to a perception of the external world; and (b) on the condition that such an appeal is truly expressive, on the grounds of clear, univocal and convincing elements of proof, of the voice of the patient herself, drawn from her previous declarations or from her personality, from her lifestyle and from her convictions, corresponding to her way of conceiving, before falling into a state of

unconsciousness, of the very idea of dignity of the person. Where one or the other presupposition does not exist, the judge must deny the authorization, with unconditional prevalence having then to be given to the right to life, independently of the degree of health, autonomy and capacity to understand and to express the will of the interested subject and from the perception, that others are able to have, of the quality of life itself».

11. – Applying the presuppositions of those in Article 52, paragraph 2, of the legislative decree of 30 June 2003, no. 196 (Code on the subject of protection of personal data), to the protection of the rights and of the dignity of the persons involved it must be set forth, in case of reproduction of the present judgment in any form, for the purpose of juridical information in juridical reviews, electronic media or by means of networks of electronic communication, the omission of the indications of the generalities and of other given data identifying the interested parties reported in the judgment.

FOR THESE REASONS

The Court, having joined the appeals, grants them in accordance with the limits of the above reasoning; cancels the impugned decree and remands the case to a different Section of the Court of Appeals of Milan.

It provides that, in case of diffusion of the present judgment in any form whatsoever for the purpose of juridical information in juridical reviews, electronic media or by means of networks of electronic communication, the indications of the generalities and of other given data identifying the interested parties reported in the judgment be omitted.