THE CASE OF ELUANA ENGLARO
Constitutional Court

Translation by Rebecca Spitzmiller and Silvia DeConca

HOLDINGS:
On the matter of euthanasia, regarding the case of Eluana, no conflict between the powers of the State emerges from the decisions taken by the judges; they did not use such decisions as mere formal shields to instead exercise legislative functions or to diminish Parliament's legislative power, which remains its holder.

See Court of Appeals of Milan 9/7/08 Corte d'Appello di Milano 9.7.2008.
(source: Altalex Massimario 34/2008) Altalex Massimario 34/2008)-----
FULL TEXT

Constitutional Court
Order 8 October 2008 number 334

THE CONSTITUTIONAL COURT
composed of the Honourable:

- Franco BILE President
- Giovanni Maria FLICK Judge
- Francesco AMIRANTE "
- Ugo DE SIERVO "
- Paolo MADDALENA "
- Alfio FINOCCHIARO "
- Alfonso QUARANTA "
- Franco GALLO "
- Luigi MAZZELLA "
- Gaetano SILVESTRI "
- Sabino CASSESE "
- Maria Rita SAULLE "
- Giuseppe TESAURO "
- Paolo Maria NAPOLITANO "

pronounced the following
ORDER:
in the controversies over the attribution of State powers that arose following the decision of the Court of Cassation no. 21748 of 16 October 2007 and the decree of the Court of Appeals of Milan of 25 June 2008, brought on petitions by the Chamber of Deputies and by the Senate of the Republic filed in the office of the clerk's court on 17 September 2008 and registered with numbers 16 and 17 in the case registry of conflicts between powers of the State 2008, admissibility stage.

Heard in the council chamber by Hon. Judge Speaker Ugo De Siervo on 8 October 2008.

Considering that with the petition filed on 17 September 2008 (regulation of conflict of administrative powers no. 16 of 2008), the Chamber of Deputies brought a conflict of attribution challenge against the Court of Cassation and the Court of Appeals of Milan, alleging that those Authorities "had exercised attributions belonging to the legislative power, and in any case interfering with the prerogatives of the that power";

that, in particular, the decision of the Court of Cassation, section 1 civil, no. 21748 of 2007 and the decree of the Court of Appeals of Milan, section I civil, no. 88 of 25 June 2008 would "create an innovative branch of legal theory, based on assumptions not obtainable from the law in force through any of the criteria of interpretation available to the judicial authority," thus deserving to be reversed by this Court;

that both mentioned measures were adopted following the request of the guardian of a young woman to terminate the treatment (feeding through gastric probe) that maintains the permanent vegetative state in which she has been lying for many years as a consequence of a car accident.;

that such request, already rejected by the Court of Lecco and another section of the Court of Appeals of Milan, was finally granted through the challenged decree, after the pronouncement of the "legitimacy judge" that cancelled the negative measure of the Court of Appeals;

that the Court of Cassation held that the legal representative asking for the termination of vital treatment "must, first of all, act in the exclusive interest of the incompetent; and, in determining the best interest, he/she must decide neither 'in place of' the incompetent nor 'for' the incompetent, but 'with' the incompetent: thus, re-enacting the supposed will of the unconscious patient, who was already an adult before the accident, considering desires expressed by him/her before the loss of consciousness or inferring such will from his/her personality, lifestyle, predispositions, orientation of values and ethical, religious, cultural and philosophical convictions";

that, thus, the termination of treatment can be ordered only: "a) when the condition of vegetative state is, on the basis of a strictly clinical evaluation, irreversible and there is no medical basis, according to scientific standards recognized at the international level, that allows the supposition that the person may have the minimum possibility of any, even if feeble, recovery of consciousness and return to a perception of the external world; and b) provided that such request truly expresses the very idea of personal dignity of the voice of the person represented on the basis of clear, concordant and convincing evidence, obtained from his/her personality, lifestyle and predispositions, corresponding to his/her way of thinking, before falling in the state of unconsciousness, the person's very idea of dignity ";

that the claimant Chamber believes the conflict to be clearly admissible, since its subject would not be a mere "error *in iudicando*" of the judicial Authority: it would, on the contrary, have filled the normative void on which its own decisions are based "through an activity that takes on the substantive characteristics of outright normative production";

that it would be therefore the interest of the Chamber "to restore the constitutional order of the designated powers," because otherwise "the radical overturn of the principle of separation of powers," in violation of articles 70, 101 second paragraph and 102 first paragraph of the Constitution, would result;

that the assumption from which the claimant proceeds is that there is an absence of express legislative authority regulating the case, as stated by the Court of Cassation itself;

that while the latter held it could grant the request, the Chamber asserts that the judge is precluded from doing so, since the "subject matter belongs to the sphere of activity typical of legislative discretion": the judicial authority had, instead, 'proceeded to self-produce the legislative provision'";

that such circumstance would be confirmed in many indications pointed out by the claimant;

that, first of all, the Cassation, drawing on "a mass of references to solutions on the same topic adopted by foreign legal orders and decisions" and extending itself beyond the limitations set out therein, would itself have confirmed "the impossibility of finding in the legal order in force in Italy a specific provision"; furthermore, "the many bills of law proposed on said subject, moreover still pending at the moment of the adoption of the challenged judicial provisions," would be "probative" of the legislative void that, up to now, accompanied the so called "living will"): "on the other hand, it is comprehensible," adds the Chamber, "that in the realms of human experience in which, as is the case here, medical-scientific evolution raises controversial and fundamental ethical/juridical issues, the response of the legislator - whatever it decides – hardly comes immediately, but needs adequate time for reflection, leaving in force in the meanwhile the necessary application of the existing laws";

that, in the presence of such conditions, to justify the intervention of the judge would not "be appropriate to appeal to the impossibility of a "*non liquet*" case, considering that its rationale is not to allow the judge to become a legislator, but rather, aimed at further strengthening the binding nature of the legislative system in force";

that, in fact, in the light of articles 70, 101 and 102 of the Constitution, "no one should disregard that in our Constitution, consistent with our legal tradition, the demand to separate the duties between the legislative power and the judicial power operates, whose essential core cannot be altered or weakened in any way. This demand finds expression in the above articles, which reject the idea objectively emerging from the challenged decisions, that between the legislative and judicial functions there is nothing more than a movable border that each power can freely traverse as needed";

that, for even greater reason, this conclusion should be reaffirmed with reference to the scheme of constitutionally guaranteed rights, since in that case "legislation is the 'preferred' means designated to the configuration" of those rights;

that, the claimant continues, the judicial Authority could not pronounce, in accordance with the Article 12 "dispositions on the law in general" since, on the contrary, Articles 357 and 414 of the Italian Civil Code, regarding the powers of the guardian, already prevented the granting of the request, since the prerogative of "disposing of the life of the protected subject cannot be given to the judiciary, according to the Chamber";

that, similarly, Article 5 of the Italian Civil Code, regarding the acts of disposition of one's own body, and Articles 575, 576, 577, 579, 580 of the Italian Criminal Code, on homicide, would impose the judicial Authority to conclude that in our legal order there is an "inspiring basic principle of the impossibility to dispose of life as a good" protected by Article 2 of the Constitution, in accordance with what has already been shown in a case considered analogous by the Chamber from the Ist civil section of the Court of Rome, with the decision of 15 December 2006;

that, on the other hand, the provision mentioned by the judicial Authority in support of the decisions appear to the claimant "manifestly inappropriate": in fact, the legislative decree no. 211 of 24 June 2003 (reception of directive 2001/20/CE regarding the application of good medical practice in the execution of clinical experimentation of medicines for clinical use), Article 13 of law no. 194 of 22 May 1978 (provisions for the protection of maternity and regarding abortion), the deontological code of doctors, Article 2 of the ECHR, and lastly, the Oviedo Convention would all confirm the opposite principle of protection of the right to life and health of the patient;

that, lastly, not even Articles 13 and 32 of the Constitution would, according to the Chamber of Deputies, support the conclusions reached by the judicial Authority, since "even considering the hypothesis that the constitutional principles are directly applicable in a judicial context, that occurrence must be limited to the case in which their obligatory content is unambiguous and self-standing, and can be an exhaustive criterion to define the case";

that, instead, the above mentioned constitutional provisions could not, alone, provide the judge with the ruling of the case, also because of the "different interpretations to which Article 32 of the Constitution seems subject";

that the judicial Authority, to obtain the result it reached, should have, in the opinion of the Chamber, filed an issue of constitutional legitimacy under Article 357 of the Italian Civil Code: omitting such a filing, instead it proceeded with the "dis-application of the provisions that would have precluded the adopted behaviour," replacing them with "an ex novo dispositive ruling";

that, for those reasons, the Chamber of Deputies asks the Court, after a declaration of admissibility of the case, to declare that it was not up to the judicial Authority to adopt the challenged acts, and, the consequent annulment of those acts.

That, with the appeal filed on 17 September 2008 (regulation of conflicts of administrative powers no. 17 of 2008) the Senate of the Republic brought the conflict of attribution of powers challenge before the Court of Cassation and the Court of Appeals of Milan, regarding the same acts challenged by the Chamber of Deputies, asking this Court to declare that "it was not within the judicial power, and in particular that of the Supreme Court of Cassation: a) to establish the right of a sick person in a permanent vegetative condition to obtain the termination of invasive medical treatments that become a useless therapeutic obstinacy that will certainly bring about death; b) to order the exercise of that highly personal right by the guardian based on and under the supposition of presumed opinions previously expressed by the patient," with consequent annulment of decision no. 21748 of 2007 of the Court of Cassation and of the decree of 25 June 2008 of the Court of Appeals of Milan;

that the factual presumptions of the appeal are the same as those already enunciated by the Chamber of Deputies: the measures of the judicial Authority would have determined an "interference in the area of the attribution of the legislative function", based on a "conscious intention of supplementation aimed at countering a supposed situation of a normative void"; on the contrary, the proposed laws on the subject would bestow such interference the features of an undue intervention "into a precise legislative proceeding taking place in the Parliament";

that, regarding admissibility, the Senate notes that "the only purpose of the appeal is to show that the decision established a legal principle encroaching on the attributions of the legislative power and thus surpassing the limits that the legal order places with the judicial power, not to invite the Cassation to re-examine the logical process followed by the Cassation to reach its decision": it is not about pointing out an error *in iudicando*, but an exorbitance from the "very borders of the

jurisdiction"; from this point of view, the censorship of the "interpretative errors of the judicial organ" would be an "essential passage to emphasize the moment and the method with which the judge" had exceeded his/her own function;

that, on the merits the Senate believes that the Court of Cassation adopted "a substantially legislative act", with which "the authorization to the termination of the life of a sick person in a permanent vegetative condition is introduced in the Italian legal order," and did not obtain that effect with the only possibility open to the judge, i.e., raising the constitutional question of legitimacy under Articles 357 and 424 of the Italian Civil Code, in the part in which they forbid the full protection of the right to health; the Cassation, in other words, "intended to find, in the convolutions of the legal system, a normative pretext allowing the formulation of the principle of a right allowing it to determine the termination of a patient's life"; to do so, the Senate states, "it had to use sporadic decisions of judges belonging to legal orders different from the Italian one and to the Oviedo Convention (…) ignoring that in our legal system provisions applicable to this case already exist, particularly in the criminal code (Articles 579 and 580 Italian Criminal Code)";

that, in this way, the Cassation exceeded its nomofilaptic function [the function, specific to the Supreme Court of Cassation, to grant the exact observance and uniform interpretation of the constitutional rights throughout the Italian territory], violating the attributions assigned to the Parliament by Article 70 of the Constitution: the case should have been decided not through a *non liquet*, but by recognizing the lack of the claim's grounds in the light of the law in force; in fact, it would be up to the Parliament "to adopt an appropriate regulatory scheme aimed at settling the choices regarding the termination of life": the claimant asserts that "leading the topic discussed herein back inside the circuit of Parliament's political representation allows the assurance of participation of the most widely varying components of civil society, including scientific, cultural and religious ones. Under a hardly debatable premise, recourse to legislation permits the respect of the principle of Article 67 of the Italian Constitution in adopting choices in the interest of the entire national community," particularly when dealing law governing guaranteed [*"riservata alla legge"]* fundamental rights;

that the Senate points out then that the judicial Authority stated its provisions in two points, both contestable, i.e. "the right of the patient to obtain the interruption of health treatments" and "the ability of the guardian to exercise this right";

that, regarding the first point, the claimant observes that aided feeding and hydrating are considered therapeutic treatment only by some sources, while others deem them "essential treatments dutifully provided by the health care giver," that should have, also according to the document edited by the national bioethics committee of 18 December 2003, the "duty to proceed"; in any case, in the absence of a "law intended to determine the interruption of treatments for the terminally ill person," the Court of Cassation itself, in a previous decision (order no. 8291 of 2005) and the Court of Rome (decision of 15 December 2006) excluded that the judge could carry out, in this subject, "substantially para-legislative activity";

that, on the contrary, both Article 2 of ECHR (as interpreted by the EHR Court with the decision Pretty vs GB of 29 April 2002), and Article 3 of the Universal Declaration of Human Rights underline, in the opinion of the claimant, "the essentiality of the principle of protection of life", thus tying it to Article 27 of the Italian Constitution and Articles 579 and 580 of the Criminal Code on homicide regarding consensual and assisted suicide: "there are two opposing views regarding consideration of the person and his/her inviolable rights, leading to interpreting the decision to interrupt feeding as a cause of death or as an expression of freedom of decision to terminate an unacceptable therapeutic treatment as disproportionate and useless";

that to decide between the two alternatives the Senate considers the intervention of the legislator necessary. It is the only one to resolve the problem, establishing, *inter alia*, the conditions and nature of the permanent vegetative condition, that are "still subject to uncertainties and differences of opinions as not coinciding with brain death": similarly, law no. 578 of 29 December 1993 (provisions for the verification and certification of death) established that death must be identified with the irreversible cessation of all the encephalic functions;

that the need to legislate finds confirmation in some "international instruments" such as Article 5 paragraph 3 of the Oviedo Convention (the execution of which required the legislative decree provided for in law no. 145 of 28 March 2001 (ratification and execution of the Convention of the Council of Europe for the protection of Human Rights and of dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, signed in Oviedo on 4 April 1997, as well as the additional protocol of 12 January 1998 no 168 on the prohibition of human cloning) and Article 3 paragraph 2 of the Charter of Fundamental Rights of the European Union;

that as for the powers of the guardian, the Senate asserts "the non-existence in our legal order of any power for the guardian to intervene on the subject of an inalienable right to interrupt life and the constitutional regime of rights defined as extremely personal", in the absence of a provision of positive law concerning the so called living will;

that, particularly, the belief expressed by the judicial Authority on the extension of the powers of a guardian outside the field of the financial interests, in the absence of a specific law attributing those powers, would be erroneous: the Cassation itself, in another decision (order no. 8291 of 2005) excluded the "general power of representation regarding so called extremely personal actions";

that, considering this principle, the opposing ideas indicated by the actions involved in this conflict, (Article 4 of legislative decree 211 of 2003 on clinical experimentation; Article 13 law 194 of 1978 on abortion; Article 6 of the Oviedo Convention) would appear to be exceptional and insusceptible of analogous application: the exercise of the right to "dispose of one's own body" and to "decide on one's own cures" could not therefore be entrusted to the guardian;

Considering that the Chambers of Deputies and Senate of the Republic with two different petitions brought a case of conflict of attribution against the judicial Authority, deducing that decision no. 21748 of 2007 of the Court of Cassation and decree of 25 June 2008 of the Court of Appeals of Milan encroached upon, and in any case diminished, the legislative attributions of the Parliament;

that, particularly, those decisions, establishing terms and conditions to terminate the artificial feeding and hydrating treatment to which a patient in permanent vegetative condition is subjected would have used the judicial power to modify, in reality, the legislative system in force, thus invading the area reserved to the legislator;

that the actions should be joined, since they refer to the same event;

that, at this stage of the proceedings, in accordance with Article 37 third and fourth paragraphs of law no. 87 of 11 March 1953, this Court is asked to deliberate, without debate between the parties, only whether the appeal is acceptable, evaluating whether the objective and subjective requirements of a conflict of attribution between powers of the state exist;

that there is no doubt regarding the standing to sue of each branch of the Parliament to defend the constitutional attributions appertaining to it, even if exercised together;

that the Court of Cassation and the Court of Appeals of Milan are both proper defendants to the action, since they are organs that are competent to pronounce, with finality, the determination of the [judicial] power to which they belong in the proceedings before them (*ex plurimis,* order no. 44 of 2005);

that the Court of Cassation, with the decision rendered in these conflicts, stated, during a proceeding of voluntary jurisdiction, the principle of law the judge on remand must comply with in the case he/she is judging and that the Court of Appeals of Milan applied this principle to the case at bar, having previously held manifestly unfounded the hypothetical doubts of constitutional legitimacy;

that, in accordance with the constant case law of this court, in a conflict whose subject is jurisdictional actions, admissibility lies "only when the attributability to the jurisdictional function of the decision or its holdings is challenged, or when allegations are made of encroachment of the limitations – different than the general limitation binding the judge to the law, even constitutional law – that are found within the legal system in order to guarantee other constitutional attributions" (order no. 359 of 1999; in the same line of thinking, among the newest, decisions no. 290, 222 and 150 of 2007);

that the same case law states that a conflict of attributions regarding a jurisdictional action cannot reduce itself to the presentation of a logical-juridical pathway as an alternative to the one censored, since the conflict of attribution "cannot be transformed into an atypical means of encumbrance achieved through the decisions of judges" (order no. 359 of 1999; see also decision no. 290 of 2007);

that, moreover, this Court does not notice the existence of elements in the case showing that the judges used the censored provisions - having themselves all the features of jurisdictional acts and, thus, effective only for this case - as mere formal shields to exercise, instead, legislative functions or to diminish Parliament's legislative power, which remains the holder of said power;

that both the claimant parties, though denying to have alleged *errores in iudicando,* are actually advancing numerous criticisms of the way the Court of Cassation selected and used the legal material important to the decision, or of how it interpreted it;

that the proceeding that originated this action appears not to have yet concluded and that, on the other hand, the Parliament can in any moment adopt a specific law on this subject, based on a balancing of the fundamental constitutional properties involved;

that, thus, the objective requirement for the filing of the conflict does not exist.

FOR THESE REASONS

THE CONSTITUTIONAL COURT

Having joined the petitions,

declares the petitions for a conflict of attribution filed by the Chamber of Deputies and the Senate of the Republic against the Court of Cassation and the Court of Appeals of Milan inadmissible, in accordance with paragraphs three and four of Article 37 of the law 11 March 1953, as in the epigraph.

So stated in Rome, in the seat of the Constitutional Court, *Palazzo della Consulta*, on 8 October 2008.
Signed:
Franco BILE, President

Ugo DE SIERVO, Writer

Giuseppe DI PAOLA, Cancellor

Deposited in chancellery on 8 October 2008.

Director of the chancellery

Signed: DI PAOLA