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LEGISLATORS, CONSTITUTIONAL COURTS AND MEDICALLY ASSISTED DEATH: REMARKS ON ITALY AND PORTUGAL*

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1. *Introduction*

The legal issues related to the end of life – «the dignified death»[1], as recently defined – are particularly complex. This is a transversal and interdisciplinary area where the legal dimension is strongly conditioned by pervasive ethical options that influence from different directions the forms of manifestation of parliamentary will. New

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[1] On the right to die with dignity, see C. TRIPODINA, *Diritti alla vita e Costituzione*, in *BioLaw Journal – Rivista di Biodiritto, Special Issues*, 2/2019, 405 ff. On the meaning of the concept of dignified death, see G. ARCONZO, *Il diritto a una morte dignitosa tra legislatore e Corte costituzionale*, in *Rivista Gruppo di Pisa*, 1/2023, 60 ff.

technological resources and progress in the scientific field have entailed that life and death are no longer considered «indisputable facts»[2]. An example is the distinction between three concepts of death (respiratory, cardiac, and cerebral)[3]. Legislative developments have clarified the moment of assignment and extinction of legal capacity, but it is undeniable that scientific progress in the medical field has created gray areas between *bios* and *thanatòs*[4] with the introduction of machines capable of postponing, artificially, the moment of death. Now the individual can make choices that are consistent with different material and spiritual needs; choices based on the principle of self-determination of the person and respect for human dignity[5].

Although the debate around the need of parliamentary intervention is still ongoing[6], it is worth noting that in this field we are witnessing an «indirect» or «asymmetrical» collaboration between the legislative and the judicial. We see, in fact, a succession of jurisprudential interventions in controversial cases and different attempts by the legislator to regulate the matter[7]. This complex relationship is connected to the (broad) topic of the «new rights»[8]; that is, rights that are not explicitly recognized in the laws or in the Constitution, but that are acknowledged as such by the judges. Judicial intervention and its well-known critical issues[9] have assumed a primary role in the interpretation of the questions related to the end of life. Frequently, the initial elaboration of the possible regulatory scenarios is defined through the mediation of the courts. The task of solving the problematic knots and filling the spaces left by the legislator is thus entrusted to judges of different levels (constitutional, appeal, etc.). This discussion between judge and

[2] G. M. FLICK, *Dovere di vivere, diritto di morire, oppure…?*, in *federalismi.it*, 2/2011, 3; F. G. PIZZETTI, *Alle frontiere della vita: il testamento biologico tra valori costituzionali e promozione della persona*, Milano, 2008, 375.

[3] A first definition of cerebral death is in H.K. BEECHER, *A Definition of Irreversible Coma: Report of the Ad Hoc Committee at Harvard Medical School to Examine the Definition of Brain Death*, in *Journal of the American Medical Association*, 1968.

[4] S. ACETO DI CAPRIGLIA, *Fine vita tra riforme legislative straniere e la proposta referendaria italiana: un confronto tra modelli*, in *federalismi.it*, 14/2022.

[5] On dignity as «concetto semanticamente aperto e indeterminabile *ex ante*», see A PIROZZOLI, *Dignità. Le contraddizioni*, in AA. VV., *Scritti in onore di Gaetano Silvestri*, Torino, 2016, 1785; for more references on the topic, see U. ADAMO, *Costituzione e fine vita. Disposizioni anticipate di trattamento ed eutanasia*, Padova, 2018, XXV, nt. 49.

[6] On the topic, see G. U. RESCIGNO, *Dal diritto di rifiutare un determinato trattamento sanitario secondo l'art. 32, c. 2, Cost., al principio di autodeterminazione intorno alla propria via*, in *Diritto pubblico*, 1/2018, 85-112. The author suggests that: il raggio d'azione diretto dell'art. 32 Cost., senza la mediazione di una legge (o comunque di una norma ricavabile dal sistema), è limitato e non risponde proprio ai casi più drammatici che sempre più si impongono all'opinione pubblica»; on the law as limit to legal uncertainty, see A. PATRONI GRIFFI, *Le regole della bioetica tra legislatore e giudice*, Napoli, 2016, 35; on the constitutional premises of the criminal rules, see S. STAIANO, *Legiferare per dilemmi sulla fine della vita: funzione del diritto e moralità del legislatore*, in *federalismi.it*, 9/2012, 5 ff.

[7] A. D'ALOIA, *Introduzione. Il diritto e la vita: percorsi paralleli*, in ID. (ed.), *Il diritto e la vita. Un dialogo italo-spagnolo su aborto ed eutanasia*, Napoli, 2011, VII.

[8] For one of the first reflections on this topic, see F. MODUGNO, *I nuovi diritti nella giurisprudenza costituzionale*, Torino, 1995. On the end of life, see M. DONINI, *La necessità di diritti infelici. Il diritto di morire come limite all'intervento penale*, in *Diritto Penale contemporaneo*, 3/2017. On the right to die, see C. CASONATO, *I limiti all'autodeterminazione individuale al termine dell'esistenza: profili critici*, in *Diritto Pubblico comparato ed europeo*, 1/2018; G. RAZZANO, *Il diritto di morire come diritto umano? Brevi riflessioni sul potere di individuazione del* best interest, *sull'aiuto alla dignità di chi ha deciso di uccidersi e sulle discriminazioni nell'ottenere la morte*, in *L-Jus*, 2018.

[9] See also S. STAIANO, *In tema di teoria e ideologia del giudice legislatore*, in *federalismi.it*, 17/2018.

legislator, as a desirable way[10], sometimes produces positive results: the law implements the solutions suggested by the judicial with focus on the needs arisen in concrete situations. Other times, however, judge and legislator are the protagonists of a heated confrontation, in which both parties question each other with regard to method and competence.

In this contribution the authors reflect on the topic considering the Italian case in section 2 and the most recent Portuguese experience in sections 3 and 4. Both cases are particularly interesting as they show the dichotomy between legislator and constitutional judges in this field. Finally, the authors provide some concluding remarks in section 5, shedding light on the use of the comparative method by the constitutional judges and pointing out that the possible outcomes in this debate depend also on the structure of the constitutional system: for example, the most recent developments in Portugal have been affected by the possibility of preventive access to the Constitutional Court by the President of the Republic.

2. *The recent decisions of the Italian Constitutional Court*

In recent years, the Italian Constitutional Court has intervened several times on questions related to the end of life. Several provisions of the penal code have been subject to its assessment and the Court has acted in different roles.

With ordinance n. 207 of 2018, acting as judge of constitutionality, the Court reviewed the legitimacy of article 580 of the penal code on instigating or assisting suicide, under two distinct perspectives: the scope of application of the contested provision, which also includes behaviors that do not contribute to determining or strengthening the victim's intention, and the severe disciplinary treatment, not differentiated from the more serious behavior of inciting suicide. The Court, although not sharing the interpretation put forward by the *giudice a quo* in its entirety, in consideration of the need to protect those who could easily be induced to end their life prematurely, decided to postpone the judgment to the hearing of 24 September 2019. The question of legitimacy, therefore, was an opportunity for the Constitutional Court to inaugurate a new decision-making technique: an unprecedented type of ruling of «ascertained but not declared unconstitutionality»[11], which is in tension with the main aspects of the Italian incidental

[10] On the topic, with reference to bio-legal issues, A. SANTOSUOSSO, *Corpo e libertà*, Milano, 2001, 302 ff.

[11] A. ANZON DEMMING, *Un nuovo tipo di decisione di "incostituzionalità accertata ma non dichiarata"*, in *Giurisprudenza costituzionale*, 6/2018, 2459 ff.; F. BIONDI, *L'ordinanza n. 207 del 2018: una nuova soluzione processuale per mediare tra effetti '*inter partes*' ed effetti ordinamentali della pronuncia di incostituzionalità*, in *www.forumcostituzionale.it*, 4/2019; P. CARNEVALE, *Incappare in... Cappato. Considerazioni di tecnica decisoria sull'ordinanza n. 207 del 2018 della Corte costituzionale*, in *www.giurcost.org*, 2/2019; G. P. DOLSO, *Profili processuali dell'ord. n. 207 del 2018*, in *www.forumcostituzionale.it*, 6/2019; V. MARCENÒ, *Una tecnica controversa: l'ordinanza interlocutoria con rinvio a data fissa*, in *Giurisprudenza costituzionale*, 1/2022.

procedure and which has also found application in subsequent cases[12]. With ruling n. 207 of 2018, the Court thus decided to point out the constitutional criticalities of the current regulation of assisted suicide, at the same time respecting the legislator's competence on such a complex and delicate issue.[13] Hoping a fruitful dialogue with Parliament, the Court postponed its decision, providing a series of precise indications for legal amendment and a suitable time framework, to stimulate and promote a new political process[14].

However, the new decision-making technique has not produced the desired effects, and with decision n. 242 of 2019, the Court decided to intervene with a rich and articulated motivation[15]. From the Court's perspective, the need to guarantee constitutional legality must prevail over that of leaving space for the legislator's intervention[16]. This led the Court to declare the illegitimacy of article 580 of the penal code, in the part in which it does not exclude the punishment of those who facilitate the suicidal intention of a person who is affected by an irreversible pathology, a source of intolerable suffering, and that, at the same time, remains fully capable of making a free and informed decision. All this, provided that the assisted suicide is in compliance with the methods set out in law n. 219 of 2017 and provided that the methods of execution have been verified by a public structure of the national health service, subject to the opinion of the territorially competent ethics committee – while an involvement in a path of palliative care must be a pre-requisite for the choice of any alternative path by the patient.[17] The Court concluded with an explicit warning, vigorously reaffirming «the wish that the matter will be subject to prompt and complete discipline by the legislator, in accordance with the principles set out above»[18].

In spite of this, the Parliament did not intervene, and most likely this legislative inertia fostered the request for a referendum promoted by the «Luca Coscioni Association» for the repeal of article 579 of the penal code on homicide of a consenting person. This crime is clearly different from the crime described in article 580, that is,

[12] See Italian Constitutional Court, ord. n. 132 of 2020 on the legitimacy of prison sentence in case of defamation in the press; ord. n. 97 of 2021 and ord. n. 122 of 2022 on the legitimacy of the provisions on impediment to life imprisonment.

[13] *Ex aliis*, see M. RUOTOLO, *L'evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale. Per un inquadramento dell'ord. n. 207 del 2018 in un nuovo contesto giurisprudenziale*, in *Rivista Aic*, 2/2019, 662; According to R. DICKMAN, *Considerazioni sui profili funzionali processuali e 'politici' delle ordinanze monitorie di rinvio della Corte costituzionale*, in *federalismi.it*, 22/2021, 35, this decision is «strumento di collaborazione istituzionale tra Corte e Camere». Some disagree with this position: see, for example, A. RUGGERI, *Fraintendimenti concettuali e utilizzo improprio delle tecniche decisorie nel corso di una spinosa, inquietante e ad oggi non conclusa vicenda (a margine di Corte cost. ord. n. 207 del 2018)*, in *Consulta on line*, 1/2019; ID., *Venuto alla luce alla Consulta l'ircocervo costituzionale (a margine della ordinanza n. 207 del 2018 sul caso Cappato)*, in *Consulta on line*, 3/2018.

[14] G. CAMPANELLI, *Intervento*, in AA. VV., *Il forum sull'ordinanza Cappato, in attesa della pronuncia che verrà*, in *Rivista Gruppo di Pisa*, 7 May 2019.

[15] C. TRIPODINA, *La "circoscritta area" di non punibilità dell'aiuto al suicidio. Cronaca e commento di una sentenza annunciata*, in *www.cortisupremeesalute.it*, 2/2019.

[16] These words opened the press release of 22 November that accompanied the filing of the decision.

[17] Italian Constitutional Court, decision n. 242 of 2019, pt. 2.4 in *considerato in diritto*.

[18] *Ibidem*, pt. 9 in *considerato in diritto* (our translation).

instigating or assisting suicide[19]. In this occasion, the Constitutional Court acted as judge of admissibility of the referendum (article 2 of constitutional law n. 1 of 1953). The referendum intended to modify the rules on homicide of a consenting person through the repeal of lexical fragments of article 579 of the penal code and the consequent welding of the remaining linguistic passages. The objective was, therefore, to partially eliminate from the law the criminal significance of the behavior of homicide of a consenting person, without prejudice to some specific cases for which the criminal sanction referred to in article 575 of the penal code remained unchanged[20]. The Constitutional Court, however, found the question inadmissible: the partial abrogation of article 579 of the penal code, making lawful the murder of anyone who gives valid consent to this end, deprives life of the minimum protection required by the Constitution. The Court criticized the thesis of the promoters according to which the consent to homicide, if legalized, would have been automatically regulated by law n. 219 of 2017[21]. At the same time, the Court recalls the choice of the Central Office for referendum at the Court of Cassation to not insert the word «euthanasia» in the name of the referendum question. This wording, in fact, would not have respected the nature of an abrogative referendum and would have invaded a competence that belongs to the legislator[22]. From the Court's perspective, the referendum was inadmissible due to the «constitutionally necessary» nature of the legislation concerned[23]: repealing it would affect the protection of the right to life, implicitly recognized by article 2 of the Italian Constitution. As the Court explains, this value is central among the fundamental rights of the person[24].

Indeed, with this ruling, the Court has carried out a sort of anticipated judgment on the constitutional legitimacy of the normative effects of the resulting legislation. Some have stated that this is a paradigmatic case of a functional misuse of the procedure, which

[19] R. CONTI (ed.), *Il referendum per l'eutanasia legale, Forum di Giustizia Insieme*, interviste a V. Onida, A. Pugiotto, P, Veronesi, I. Nicotra, G. Cricenti, in *www.giustiziainsieme.it*; G. BRUNELLI, A. PUGIOTTO, P. VERONESI (ed.), *La via referendaria al fine vita. Ammissibilità e normativa di risulta del quesito sull'art. 579 c.p.*, (Ferrara, 26 November 2021), XXX-235, in *Forum di Quaderni Costituzionali*, Rassegna, 1/2022; M. D'AMICO, B. LIBERALI (ed.), *Il referendum sull'art. 579 c.p.: aspettando la Corte costituzionale*, in *Rivista Gruppo di Pisa*, 2021, Quaderno n. 4, fascicolo speciale monografico.

[20] 1-person under the age of 18; 2-person who is mentally ill, or who is in a state of mental deficiency, due to another infirmity or due to the abuse of alcohol or drugs; 3-person whose consent was extorted by the offender with violence, threat, suggestion, or by deception.

[21] Italian Constitutional Court, decision n. 50 of 2022, pt. 3.3 in *considerato in diritto*.

[22] Before the deposit of the motivation, in the press conference held after the council chamber, President Amato, informing about the decision, mentioned the incongruity of the word «euthanasia»: https://www.sistemapenale.it/it/video/corte-costituzionale-referendum-conferenza-stampa-16-febbraio-2022

On the topic, see G. RAZZANO, *Le incognite del referendum c.d. «sull'eutanasia», fra denominazione del quesito, contenuto costituzionalmente vincolato e contesto storico*, in *Consulta Online*, III/2021.

[23] Italian Constitutional Court, decision n. 50 of 2022, pt. 5 in *considerato in diritto*. On the distinction between laws with constitutionally restricted content and laws that are constitutionally necessary, see A. ALBERTI, *L'omicidio del consenziente come norma a contenuto costituzionalmente vincolato o a contenuto necessario/obbligatorio? Brevi note alla sent. n. 50 del 2022*, in *federalismi.it*, 14/2022.

[24] On the relationship availability/unavailability of life, see the debate in M. BOTTO, C. LALLI, M. PICCINNI, A. RUGGERI, V. ZAGREBELSKY, N. ZAMPERETTI, *A proposito della sentenza n. 50 del 2022*, in *BioLaw Journal - Rivista di Biodiritto*, 2/2022.

attributes to the referendum question omissive faults that does not belong to the question itself[25].

In conclusion, in the Italian experience, the relationship between legislator and Constitutional Court on issues concerning the end of life is quite complex. It is undeniable, however, that it is difficult to find political compromises on this topic, although this is a natural outcome of the democratic debate[26]. In March 2022 the Chamber of deputies approved a unified text on medically assisted death, regulating the right to request medical assistance to voluntarily and independently put an end to life, when specific conditions occur[27]. However, the text stopped in the Senate, also because of the premature end of the legislature[28].

3. *The first two stages of the Portuguese experience: decree n. 109/XIV; decision n. 123 of 2021 of the Constitutional Court; decree n. 199/XIV*

So much has happened in Portugal in the past two years in terms of medically assisted death. This relatively short but still intense journey can be divided into four stages, according to which parliamentary decree is concerned.

The first, decree n. 109/XIV, has been approved in February 2021[29]. After more than one year of debate, the Portuguese Parliament attempted to regulate and de-criminalize medically assisted death by introducing in the provisions of the penal code on homicide at the request of the victim (article 134) and on aiding and abetting suicide (article 135) a specific rule according to which behaviors falling within these crimes were not punishable when committed according to the conditions set by the decree. A central provision was article 2, which clarified the essential conditions requested to be allowed legal access to medically assisted death. In brief: the decision of an adult, Portuguese citizen or legally resident in Portugal, whose will had to be current, repeated, serious, free, and clear; a situation of intolerable suffering caused by a definitive injury of extreme gravity according to scientific consensus, or by an incurable and fatal disease; the participation of a healthcare professional, who would carry out the procedure or provide help[30].

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[25] A. PUGIOTTO, *Eutanasia referendaria. Dall'ammissibilità del quesito all'incostituzionalità dei suoi effetti: metodo e merito nella sent. n. 50/2022*, in *Rivista AIC*, 2/2022.

[26] E. GROSSO, *Il rinvio a data fissa nell'ordinanza n. 207/2018. Originale condotta processuale, nuova regola processuale o innovativa tecnica di giudizio?*, in *Quaderni costituzionali*, 3/2019, 542-543. More general on the topic, see N. ZANON, *I rapporti tra la Corte costituzionale e il legislatore alla luce di alcune recenti tendenze giurisprudenziali*, in *federalismi.it*, 3/2021; R. ROMBOLI, *Il «caso Cappato»: una dichiarazione di incostituzionalità «presa, sospesa e condizionata», con qualche riflessione sul futuro della vicenda*, in *Foro italiano*, 6/2019.

[27] A.C. T.U. 2 e abb.

[28] A.S. 2553. See G. ARCONZO, *Il diritto a una morte dignitosa tra legislatore e Corte costituzionale*, cit., 80 ff., who provides a complete overview of the political process on this field.

[29] For a thorough analysis of this first stage, see A. M. ABRANTES, *La sentenza 123/2021 della Corte costituzionale del Portogallo sulla morte medicalmente assistita: analisi e confronto con il caso Cappato*, in *Corti supreme e salute*, 2/2021.

[30] *Ibidem*, 278-279.

The result intended by the decree was that both active euthanasia and assisted suicide would no longer be criminally punishable as homicide at the request of the victim and abetting suicide. The final act of the complex procedure could consist both in the self-administration of lethal drugs (assisted suicide), or in the administration by health professionals (active euthanasia). In brief, the decree admitted and regulated together these two different alternatives, leaving the choice to the patient's responsibility[31].

Soon after approval, the President of the Republic, before promulgation, sent decree n. 109/XIV to the Constitutional Court for a preventive assessment of constitutionality. He contested, referring to the formulation of the above-mentioned article 2, the nature of the concept of intolerable suffering and the lack of precision when defining definitive injury of extreme gravity and scientific consensus. These concepts, according to the President, did not provide the doctors involved in the procedure with secure legislative criteria able to guide them. Since the precise content of these expressions required further definition by the doctors, the decree seemed to violate the principle of prohibition of delegation.[32] Interestingly, the Head of State specified that the legal problem was not whether de-criminalization of medically assisted death was, in itself, consistent with the Constitution; the legal question was, instead, focused on how the topic was concretely regulated by the legislator, specifically in article 2[33].

In March 2021, with decision n. 123 of 2021, the Court declared the unconstitutionality of article 2, n. 1, based on the violation of the principle of determinability of the law as a corollary of the principles of the democratic rule of law and reserve of parliamentary law, arising from the combined provisions of articles 2 and 165, n. 1, letter b, of the Portuguese Constitution, by reference to the inviolability of human life enshrined in article 24, n. 1 of the Constitution[34]. More specifically on the criteria in the provision, the notion of incurable disease that causes intolerable suffering has been confirmed to be consistent with the Constitution; instead, the Court partially criticized the formulation of definitive injury of extreme gravity causing intolerable suffering, specifically for its indeterminacy. Therefore, a greater precision and legislative specification of these concepts were needed[35].

In addition, the Court confirmed once and for all, and despite the limitation of scope in the President's request, the compatibility of medically assisted death with the right to life, claiming its own legitimacy to assess this abstract legal question in addition to the specific legal problem concerning article 2 of the decree. Since the latter set the essential conditions that allowed de-criminalization of specific life-related crimes, its constitutionality ultimately depended on the abstract compatibility of the described procedures with the fundamental right to life set by article 24 of the Constitution[36].

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[31] *Ibidem*, 279.

[32] A. H. CARNEIRO, R. CARNEIRO, C. SIMÕES, *A morte que ocorre por decisão da própria pessoa: Reflexão crítica sobre os termos e conceitos do decreto nº 199/XIV da Assembleia da República*, in *Medicina Interna*, vol. 29, 1/2022, 64.

[33] A. M. ABRANTES, *La sentenza 123/2021 della Corte costituzionale del Portogallo*, cit., 281.

[34] Portuguese Constitutional Court, decision n. 123 of 2021, III. As a consequence, also articles 4, 5, 7 and 27 of decree n. 109/XIV were declare unconstitutional.

[35] A. M. ABRANTES, *La sentenza 123/2021 della Corte costituzionale del Portogallo*, cit., 299.

[36] *Ibidem*, 282-283.

In November 2021, the Parliament tried again, approving decree n. 199/XIV. This piece of legislation aimed at solving the legal limits previously encountered by the Constitutional Court. However, by introducing new provisions, it created additional problems related to the definition of specific concepts as criteria. Again, the President of the Republic decided not to sign the decree. This time, he sent it back to the legislative assembly requesting clarification whether or not a fatal disease was a requirement for medically assisted death and, if not, whether the requirements of a serious disease and an incurable disease were alternative or cumulative. In addition, he invited the Parliament, in case a fatal disease was no longer required in the new version of the law, to assess whether the modifications between the two versions decided in only nine months corresponded to a change of values in the context of the Portuguese society[37].

4. *Third and fourth stages of the Portuguese experience: decree n. 23/XV; decision n. 5 of 2023 of the Constitutional Court; decree n. 43/XV*

Following the remarks described in the previous section, the Portuguese Parliament approved decree n. 23/XV. Once again, however, the President of the Republic submitted it to the Constitutional Court for a preventive assessment of constitutionality[38].

The central provision in this decree is article 3, which defines the concept of non-punishable medically assisted death as the death that happens «by decision of the person, of age, whose will is current and reiterated, serious, free and clear, in a situation of suffering of great intensity, with definitive injury of extreme gravity or serious and incurable disease, when practiced or helped by health professionals»[39]. The President pointed out that, while attempting to solve the issues encountered in the previous versions, decree n. 23/XV opted for a less restrictive regime where the concept of fatal disease and the allusion to an anticipation of death are removed. In the new version, the two legitimizing situations (specified in article 3) are a definitive injury of extreme gravity and a serious and incurable disease[40]. Article 2 defines the latter as «a disease that threatens life, in an advanced and progressive stage, incurable and irreversible, which causes suffering of great intensity»[41]. The Head of State questioned whether this definition is consistent with the principle of determinability required by the Constitutional Court with decision n. 123 of 2021. He also stressed that it is not clear whether the requirement to verify a situation of severe suffering occurred both in cases of serious and

[37] The President's message can be read in: https://www.presidencia.pt/atualidade/toda-a-atualidade/2021/11/presidente-da-republica-devolve-sem-promulgacao-decreto-da-assembleia-da-republica-sobre-morte-medicamente-assistida.
See also A. H. CARNEIRO et. al., *A morte que ocorre por decisão da própria pessoa*, cit., 64. The authors focus specifically on the problematic concepts adopted in the decree.

[38] The President's remarks can be read in: https://www.presidencia.pt/atualidade/toda-a-atualidade/2023/01/presidente-da-republica-submete-eutanasia-ao-tribunal-constitucional

[39] Decree n. 23/XV, article 3, n. 1 (our translation).

[40] See decree n. 23/XV, article 3, n. 3, letters a and b.

[41] Decree n. 23/XV, article 2, letter d (our translation).

incurable disease and of definitive injury of extreme gravity: when defining the expression definitive injury of extreme gravity[42], the decree does not refer to suffering of great intensity[43], whereas the requirement appears in the general definition of medical-assisted death set by article 3, as mentioned above. Once again, the main issue is the conceptual vagueness of the law.

In detail, the President of the Republic contested the specific definition contained in article 2, letter d (serious and incurable disease). In addition, the definitions in letters e and f (definitive injury of extreme gravity and suffering of great intensity) were questioned when read together with the above-mentioned provisions in article 3 (n. 1 and n. 3, letter b), since these determine in which cases medically assisted death may be de-criminalized. The same provisions in article 3 were contested by themselves, but without motivation, whereas articles 5 (advising physician's opinion), 6 (confirmation by specialist doctor), 7 (confirmation by a specialist in psychiatry), and 28 (changes in the criminal code), instead, were questioned on a consequential basis, since they were within the scope of the directly contested provisions. As for the parameters violated, the President referred to the principle of legal determinability, linked to the principles of democratic rule of law and reserve of parliamentary law, which result from articles 2 and 165, n. 1, letter b of the Portuguese Constitution, with reference to article 24, n. 1 (inviolability of life)[44].

The Constitutional Court decided on the matter with decision n. 5 of 2023. It is interesting to note that, before assessing the constitutionality of the provisions contested, the Court reflects on the use of indeterminate legal concepts by the legislator and on the possible consequences in terms of interpretation and application of the law. The Court clearly distinguishes between provisions with explicit and certain content and provisions with vague or indeterminate content without a self-sufficient meaning. The indeterminate nature of the latter affects the interpretation and thus the practical application of the rule, giving those (administration, judges) who will apply them a certain margin of choice when completing and integrating the provisions. The risk is that the legislator is, in practice, replaced. The Court sees a tension between the use of indeterminate legal concepts and the principle of democratic rule of law: a concept that is not well defined may lead not only to the violation of the law itself, but also to the alteration of the organizational scheme established by the Constitution, according to which the legislative assembly approves the law. This risk is particularly serious in an area such as de-criminalization of medically assisted death[45].

Analyzing the provisions contested by the President of the Republic, the Court admits that the expression «serious and incurable disease» in article 2, letter d, is without doubt an indeterminate legal concept. However, accepting that it is not possible to list all serious and incurable clinical conditions in the law, the Court recognizes that this specific concept, although indeterminate, is not manifestly vague: it can be filled with content by

[42] See decree n. 23/XV, article 2, letter e.
[43] This expression is defined in decree n. 23/XV, article 2, letter f.
[44] On this, see Portuguese Constitutional Court, decision n. 5 of 2023, C, 10.1.
[45] *Ibidem*, D, 11.

law enforcers without the danger of taking political decisions that goes against the will of Parliament. The provision, therefore, is not declared unconstitutional[46].

Moreover, the Court disagrees with the President that it is not clear from the decree whether the requirement to verify a situation of severe suffering occurs both in cases of serious and incurable disease and in cases of definitive injury of extreme gravity (constitutionality of article 2 letters e and f read together with article 3 n. 1 and n. 3 letter b). The Court classifies this incongruity as an example of «bad legislative technique» but concludes that the formulation does not compromise the understanding of the rule wanted by the legislator. The text of article 3 is clear on the point: the requirement of suffering of great intensity refers to the two clinical conditions in which medically assisted death is not punishable[47].

However, the Court questions by its own initiative the definition of suffering of great intensity in article 2, letter f, raising doubts on its precise scope of application. In particular, it focuses on the wording «physical, psychological, and spiritual suffering». The main doubt is whether these three adjectives related to the suffering are cumulative or alternative, because the concrete situations in which it is possible to adopt medically assisted death depends significantly on this clarification. If these adjectives are alternative, one of these types of suffering will be enough to grant access to the procedure; if these are cumulative conditions, instead, the person will be required to suffer in all three dimensions: physically, psychologically, and also spiritually. In the first case, the consequences in terms of applicable situations would be significant: if a psychological or spiritual suffering is sufficient, the provision becomes more tolerant, allowing an easier access to medically assisted death.

The Court tries to find interpretative tools in a «parallel» piece of legislation, that is the act on access to palliative care,[48] but without success: in that case also the family of the sick person has access to palliative care, despite the relevant provision uses the conjunction «and» between the conditions (meaning that, in reality, they are alternatives). Moreover, the Court sees that in the Spanish experience with euthanasia[49], which has exerted a significant influence over the Portuguese legislator, physical and psychological suffering are considered to be alternatives (with the use of the conjunction «or»). Without the possibility to choose one or the other solution as a clear expression of will of the legislator, the Court concludes that the wording «physical, psychological and spiritual suffering» allows two possible interpretations that lead to substantially different practical results in terms of applicable rule[50]. The conclusion is the unconstitutionality of article 2, letter f, of decree 23/XV. Consequently, considering the central role played by letter f, articles 5, 6, 7 and 28 are declared unconstitutional as well.

Between March and May 2023 there was another important development in the Portuguese «saga» on medically assisted death: the fourth (and current) stage. Firstly,

[46] *Ibidem*, E, 12.1.

[47] *Ibidem*, E, 12.2.1.

[48] *Lei* n. 52 of 5 September 2012. *Diário da República* n. 172/2012, *Série* I 2012-09-05, 5119 – 5124.

[49] *Ley Orgánica* n. 3 of 24 March 2021, on *regulación de la eutanasia*. BOE n. 72, of 25 March 2021 (BOE-A-2021-4628). See article 3.

[50] Portuguese Constitutional Court, decision n. 5 of 2023, E, 12.2.2.

Parliament approved a new decree (n. 43/XV) on the topic. In this version, in order to solve the issues pointed out by the Constitutional Court, the legislator returns to the original version of the contested provision, removing the specification of the different types of suffering of great intensity (physical, psychological and spiritual). In addition, the decree modifies the relationship between assisted suicide and euthanasia, following remarks that could be read in some of the declarations of votes of decision n. 5 of 2012. In particular, in this new version a patient cannot choose anymore between assisted suicide and euthanasia: it is possible to adopt euthanasia only when the patient is physically prevented from committing assisted suicide. Once again, the President of the Republic vetoed the decree returning it to Parliament without promulgation (19 April 2023)[51]. In his view, it is not clear who will recognize such physical incapacity and who will supervise the act of medically assisted death. Thus, once again, there is doubt in terms of concrete application of the law. The Parliament, however, confirmed by an absolute majority of the deputies in office the new version of the decree (12 May 2023) and the President of the Republic was constitutionally forced to promulgate it, as required by article 136 (2) of the Constitution (16 May 2023)[52].

5. *Concluding remarks*

The overview developed in this contribution points out that medically assisted death is an intrinsically delicate topic, no matter the system under observation. The Italian and Portuguese cases, although different in their development, provide interesting starting points for reflecting on the relationship between legislator and constitutional judge in this field. The «constitutional tone» [53] of these events is indisputable. The debate involves principles and values such as, among others, the right to life, freedom of self-determination of the individual and principle of legality in criminal matters, with all its corollaries. In relation to the aspects analyzed, two main considerations emerge, concerning: 1) the use of the comparative method by the Courts; and 2) the impact of the structure of the constitutional system on the development of these experiences.

Firstly, it is necessary to point out the frequency of the use of the comparative method in the decisions of both Constitutional Courts when discussing legal issues related to the end of life. This approach fits well the current trend towards a «circulation of case law», an interesting phenomenon that entails a «migration of constitutional ideas»[54]. A

[51] The President's remarks can be read in: https://www.presidencia.pt/atualidade/toda-a-atualidade/2023/04/presidente-devolve-eutanasia-ao-parlamento/

[52] A brief message can be read in: https://www.presidencia.pt/atualidade/toda-a-atualidade/2023/05/presidente-da-republica-promulga-decreto-da-assembleia-da-republica-sobre-a-morte-medicamente-assistida/

[53] The expression "tono costituzionale" was developed, in relation to the conflict of attribution between State powers, by C. MEZZANOTTE, *Le nozioni di potere e di conflitto nella giurisprudenza della Corte costituzionale*, in *Giur.cost.* 1979, I, 110 ff. The author wanted to point out the use of this tool when defending minor attributions: «questioni minute, di ordinaria amministrazione».

[54] S. CHOUDHRY (ed.), *The migration of Constitutional Ideas*, Cambridge, 2021.

jurisprudential use of the comparative method is particularly relevant when national judges make use of foreign law in their decisions in order to support their motivation[55]. This is an increasingly relevant trend that the Italian Constitutional Court has often followed, making its jurisprudence open to foreign and supranational case law. As seen above, also the Portuguese Constitutional Court has followed this trend when ruling in the field of medically assisted death. Often, as in the cases studied here, foreign law is not used as a binding precedent by judges, but as a «source of inspiration when national law is obsolete, unclear or contradictory»[56]. Here, the «hermeneutic circulation» pushes towards the creation of relationships between systems outside the mechanisms controlled by governments and parliaments[57]. These observations appear particularly relevant when the focus is on ethically delicate issues, such as medically assisted death. It is possible to identify a common cultural space in which the needs shared by different peoples – especially in the area of protection of human rights – tend to obtain similar responses from legislators and judges. Some argue that constitutional and international courts dialogue with each other in order to experiment common solutions to the same problems[58].

With regard to the decisions here analyzed, it is necessary to point out, as an example, that in ord. n. 207 of 2018 the Italian Constitutional Court recalls that the European Court of Human Rights had recognized a wide margin of appreciation to the States, underlining how general incriminations of assisted suicide are present in most of the legislations of the member States of the Council of Europe[59]. The common *raison d'être* of such incriminations is found in the purpose of protecting weak and vulnerable people. In the same way, the Portuguese Constitutional Court explicitly refers to foreign law, noting specific trends in the regulation of issues related to medically assisted death[60].

Secondly, the Portuguese experience shows that the structure of the constitutional system may have a significant impact on the dialogue between legislator and courts. In this case, the President of the Republic has played a pivotal active role in stimulating the dialogue between legislator and constitutional judge by exercising his power to activate a preventive judgement in front of the Constitutional Court. According to article 278 of the Portuguese Constitution, in fact, the President of the Republic may request the Constitutional Court to carry out a preventive assessment of the constitutionality of any provision contained in an international treaty that has been submitted for ratification, of a decree that has been sent for enactment as law or as a decree-law or of an international agreement whose approval decree has been forwarded to him for signature. The Court,

[55] G. SMORTO, *L'uso giurisprudenziale della comparazione*, in *Eur. dir. priv.*, 2010, 1.

[56] F. MARKESINIS, *Giudici e diritto straniero. La pratica del diritto comparato*, Bologna, 2009, 27.

[57] A. LOLLINI, *La circolazione degli argomenti: metodo comparato e parametri interpretativi extra-sistemici nella giurisprudenza costituzionale sudafricana*, in *DPCE*, 1/2008.

[58] G. DE VERGOTTINI, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione*, Bologna, 2010.

[59] Italian Constitutional Court, decision n. 207 of 2018, pt. 7 in *considerato in diritto*. See ECHR, decision 29 April 2002, Pretty vs. United Kingdom; decision 20 January 2011, Haas vs. Switzerland; decision 19 July 2012, Koch vs. Germany.

[60] Portuguese Constitutional Court, decision n. 5 of 2023, II, b, 9 (*A morte medicamente assistida no direito comparado*).

on the other hand, must issue its decision within twenty-five days, a time framework that may also be shortened by the President when there are reasons of urgency.

The main issues contested by the President in the mentioned decrees were linked to the meaning of specific words or expressions. It is worth mentioning that, whereas in the Portuguese system the Court had the chance to interpret the relevant provisions and assess their compatibility with the Constitution in a preventive judgement (that is, before the entering into force of the law), in other contexts, such as in the Italian constitutional system, where preventive judgement is not permitted, the constitutional judge would not have the chance to enter a dialogue with the legislator before referral from a judge who is deciding a concrete case.

This difference is not minor. The interpretation of the specific contested provisions (which entails also understanding of all definitory expressions that they include) is linked to how the operators in the medical field apply those provisions in concrete terms. It is true that it would be unconstitutional if they replaced the legislator by giving content to vague and undetermined provisions; however, it is also true that this would have happened without a preventive assessment by the Court. At the same time, there are no guarantees that any of the definitory problems contested would have been «real» interpretative problems at the moment of concrete application of the law[61]. This is clear in the Italian system, where the Constitutional Court assesses only interpretative issues that are relevant in concrete terms (although the effects of the decisions are *erga omnes*).

In brief, not only the development of the Portuguese «saga» has been significantly determined by the manner in which the constitutional system is structured in Portugal; but this structure has also played a significant role in shaping the debate between legislator and Constitutional Court, finetuning the wording of the law and influencing, inevitably, some of its content. At the same time, however, this has significantly delayed the promulgation of the legislation.

Another aspect of the Portuguese system that emerges in this analysis and that should be mentioned, although briefly, is the use of dissenting and concurring opinion in the decisions of the Portuguese Constitutional Court. Dissenting opinions occur when members of the panel would have decided the case differently as for its outcome and write their individual motivation at the bottom of the decision. The expression concurring opinion, instead, indicates those cases where judges agree with the outcome but justify it in a different manner[62]. It is worth noting that decision n. 5 of 2023 of the Portuguese Constitutional Court presents several declarations of vote by the different judges of the panel, and a remark expressed in some of these (on the relationship between euthanasia and assisted suicide) ended up influencing the new legislation recently approved by Parliament. Again, the complexity of the legal issues related to the topic of medically assisted death clearly emerges, as the internal debate is placed within the wider dialogue between legislator, Court, and society. In the Italian case, instead, where dissenting

[61] Although there is medical literature that points out the issue: see A. H. CARNEIRO et al., *A morte que ocorre por decisão da própria pessoa*, cit.

[62] K. KELEMEN, *Judicial Dissent in European Constitutional Courts: A Comparative and Legal Perspective*, London and New York, 2018, 5.

opinion is not permitted (although the debate on its introduction is still ongoing)[63], the only voice heard is the one that belongs to the majority of the Court. An interesting question for further research is whether and to what extent this aspect may influence how society perceives the topic and understands its legal scope.

[63] See, for instance, B. CARAVITA, *Ai margini della dissenting opinion*, Torino, 2021.