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LIFE: RIGHT OR DUTY? REFLECTIONS ON CERTAIN "END OF LIFE" ISSUES THAT HAVE ARISEN IN ITALY[***]

The Italian Constitutional Court declared the popular referendum request for the partial repeal of Article 579 of the penal code inadmissible, but the question was declared inadmissible because, as a result of the repeal, the constitutionally required minimum protection of human life, in general and with particular reference to weak and vulnerable people, would have been lost. The contribution, having made some critical premises on legal paternalism and outlined the liberal-solidaristic system that emerges from the Italian Constitution, deals with the possible normative options available to the legislator to make the holder of the good "life" make well-considered and informed choices and, thus, avoid any self-damaging "errors" in terms of "end of life" choices. The research, in particular, deals with the nudge strategies, useful to direct, in a soft way, the choices of the holder of the "life" good in the direction that the legislator believes desirable, but without prejudice to individual freedom of final option. It emerges that nudge strategies are consistent with anti-paternalistic legislative options and are, in some respects, imposed by a liberal-solidaristic system such as the one designed by the Italian Constitution. The work, therefore, investigates the most recent Italian constitutional jurisprudence on the subject of the "end of life" and the effects on the presumed obligations of penal protection of life, with an overlapping, if any, of the judgement on the "meritability" of punishment to that on the "necessity" of the same, which instead should be referred to the discretionary evaluation of

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the legislator and, a fortiori, to the will of the people in the event of a referendum. The protection of a constitutionally relevant legal asset, including life, is, in fact, a necessary condition, but not sufficient for criminal protection, which requires a further assessment, both of the merits and of the necessity of the penalty, in the same way as the general principle of extrema ratio. The conclusions are aimed at sustaining the lack, in Italy, of constitutional obligations of criminalisation, even to protect life, a fortiori in the matter of euthanasia, because behaviour, even if self-damaging, if not subject to coercion or undue pressure, if not vitiated by a cognitive vulnerability, if the result of a well-informed and well-considered choice, must be left to the autonomy of the individual without forced interference by the State through criminal sanction.

Keywords: *murder of the consenting, protection of human life, paternalism, "critical" function of the legal right, obligations of criminal protection, merits of punishment.*

1. Is life always good and death always bad? Premises and criticism of legal paternalism

Leonida Répaci, a brilliant Calabrian writer, wondered "whether life is a good and death an end" (Repaci, 1932: 340). Literature is capable, far better than law, of explaining in a few words the essence of a question and, often, of suggesting, in a shrewd and seductive manner, its most persuasive resolution. The issue we wish to address is that of the "end of life", of the freedom to choose when and how to die, particularly if those who wish to make such a choice are affected by serious, painful and, often, incurable pathologies. The solution to the many ethical and legal issues related to these situations, in our view, starts from the following question: do "one's own good" and "one's own evil" have an objective and absolute nature, or are they to be left to the subjective and relative assessment of the individual? Répaci, with a secular approach, suggested that what for some or for the majority may be something evil, for others may be seen as something good, and vice versa. If, on the other hand, such choices were objectively rational and absolute options, who should make them instead of the individual? The state? If so, by what legal means would it be legitimised to impose or induce the individual towards such choices? In these cases, in conclusion, can the State legitimately use criminal sanction?

The many questions we have posed find some theoretical answers, not uncontroversial, in the debate that has developed around legal paternalism, that idea according to which the State could use force, against the will of an adult individual, even if his choices are free and rational, in order to protect an interest qualified as the good of the individual himself (Alemany, 2006: 343; Dworkin, 1971: 20; Diciotti, 1986: 557; Kleinig, 1983: 3). The original foundation of this conception can be found in the influence that religious dogmas had on pre-Enlightenment criminal law, with an overlap between the idea of crime and the idea of sin (Schüneman, 2013: 312). In Christian doctrine, no different "truths" were allowed, but only the one dictated by the "creed", and any contrary opinion was denounced as erroneous, capable of giving rise not only to sin, but also to the most serious crime, that of lese majesty divine (Jacobucci, 2005: 179). Saint Augustine considered the "freedom to make mistakes" the worst death of the soul, affirming, instead, that one of the forms of Christian freedom was that from error,

that is, the freedom to be subject to the truth through the gift of faith (Trapè, 1990: 82).

The effort to overcome these theocratic ideas, towards the secularisation of the state, began with secular naturalism, for example Grotius' (Moccia, 1979: 61), and the concept of social harm as the basis of crime, an idea later reaffirmed by the Enlightenment, such as Beccaria and Helvétius, in their further modernising efforts (Beccaria, 1764: 46; Helvétius, 1758: 170). This reflects the teleological character of a certain utilitarian perspective, harm being considered the only justifying criterion for punishment, to the exclusion of the formalistic perspective based on mere disobedience, i.e. on the mere violation of a rule. These thinkers regarded the social contract and the autonomy of the individual as the deontological foundations of criminal law (Schüneman, 2013: 315). Man's freedom was considered the most precious good and included the possibility of disposing of oneself in the way that best suited one's own happiness, subject to respect for the rights of others (Radzinowicz, 1968: 6).

The principles of the Enlightenment constituted the manifesto of the liberal approach, which found development in Anglo-Saxon theorisations. Mill's is well known, according to which the only justification for limiting an individual's freedom of action is to avoid harm to others. The good, physical or moral, of the individual acting is not sufficient justification. One cannot compel him to do or not to do something because it is better for him, because it will make him happier, because, in the opinion of others, it is expedient or even right. [...] Coercion [...] is no longer admissible as a means of doing good to men, and is justifiable only for the safety of others.

In addition to the argument of theological origin, others have been devised in favour of paternalism (Diciotti, 1986: 76). For example, moral perfectionism, which can transcend into a true legal moralism, according to which the state has the task of guiding by persuasion or, if necessary, by force, towards an ideal moral excellence, thus prohibiting even actions deemed morally unacceptable even if they only cause harm to oneself, when this is incompatible with the cultivation of certain virtues (Stephen, 1874: 7; Devlin, 1959: 11; Häyry, 1991: 202; Danesi, 2004: 589). Again, the utilitarian argument has been used in its holistic version, according to which the individual is an inseparable part of society

and, once he or she creates relationships with other individuals, these relationships can no longer be legitimately severed, without causing harm, precisely to others, to the community (Mill, 1997: 92; Padovani, Stortoni, 2006: 51; Dahm, 1938: 225; Schaffstein, 1935: 108).

In the Anglo-American debate of the second half of the twentieth century, on the other hand, ideas against moralism and legal paternalism seem to have prevailed, embodied by the *harm principle* - in some respects comparable to the principle of offensiveness in continental Europe (Fiandaca, Francolini, 2008; Cadoppi, 2008: 83; Francolini, 2008: 282; Micheletti, 2011: 275) - focused on the possibility of sanctioning only as a consequence of harm to others and not also for harm to oneself (Donini, 2010: 41). Basic on this point is Feinberg's refined theoretical construction, which is based on self-determination as a fundamental right, as a value in itself, regardless of whether choices are advantageous, good or bad, according to parameters selected by others or by the community (Feinberg, 1984: 115). Hence the opposition to paternalism, both in its direct form, i.e. when the sanctioning claim is made to counteract actions that affect only oneself; and in its indirect form, i.e. when the situation involves two or more persons, in which one or more subjects perform the action towards the other, with his or her approval or desire, according to the maxim *volenti non fit iniuria* (Feinberg, 1984: 11).

True paternalism, on the other hand, is the one defined as *hard*, i.e. limiting the self-determination of an individual, who is adult, capable and adequately able to take decisions freely; *soft* paternalism, on the other hand, i.e. aimed at limiting self-damaging choices that are not fully or actually voluntary, is not true paternalism (Feinberg, 1984: 12). In the latter case, it is still an anti-paternalistic model, which can be defined as moderate (Feinberg, 1984: 15-16).

Without being able to fully analyse here the various requirements of voluntariness of choice outlined by Feinberg, it can, however, be said that moderate anti-paternalism does not allow the state to use force against the will of an adult and capable individual in order to prevent him or her from causing what is considered to be of harm to themselves, if their will has been formed rationally, is based on knowledge of the relevant facts, and is stable over time and is sufficiently free from compulsion or pressure (Feinberg, 1983: 104). If consent is not

flawed in these terms, the individual's self-determination cannot be restricted if it does not cause harm to others (Maniaci, 2011: 134).

By reasoning in this way, it emerges that even antipaternalism, the moderate kind, admits the possibility of syndicating certain choices with effects only on oneself, on the basis of an ideal paradigm of rationality, and allows, in cases of indirect paternalism, the possibility of sanctioning those who act to the detriment of others on the basis of irrational consent, of a fallacious will. The fundamental problem of moderate anti-paternalism is that of precisely circumscribing the hypotheses in which the state is legitimised to restrict the choices of apparently consenting, rational and competent adults; that of adequately describing an ideal-typical concept of rationality and competence (Arneson, 2005: 275). The considerable difficulties inherent in this, however, on the one hand, do not in themselves permit the denial of the possibility that apparently rational and competent adults have a "flawed" will; on the other, of admitting that any choice made by an allegedly incapable individual is an expression of his or her full, intimate, conscious, free will. The conditioning that each individual receives from the outside, such as cultural and social inductions, as well as his or her deliberative deficiencies due to cognitive limitations or lack of information, make it difficult to deny that there are situations in which individuals, adults and presumptively capable of intending and willing, make choices that, in the absence of these external influences or cognitive deficiencies, they would probably not have made (Hodson, 1983: 43; Micheletti: 2011: 284).

The issue, therefore, lies in the difficulty of discerning choices that are the result of an authentic and full will from those arising from a fallacious, inauthentic intention, since the actual reasons for human conduct remain largely inscrutable (Moccia, 1992: 87; Di Giovine, 2013: 626). On the other hand, in the face of this elusiveness, i.e. in the face of doubt as to whether the will reputed to be self-inflicted is truly genuine, legitimising the penal instrument, with absolute commands or prohibitions, in order to protect what the State considers to be the good of the individual or what should be his authentic rational will, would mean, on the one hand, forcibly imposing a behavioural model in defiance of the freedom of self-determination and, on the other, to assert an objective and universal idea of "good" that is incompatible with a pluralist and secular order.

This does not necessarily mean sharing the idea of classical liberalism, according to which the fundamental reason for individual autonomy is to be found in its instrumentality with respect to the full development and well-being of the person, because reasoning in this way would end up denying that some human behaviours - as will be better explained later - are not always rationally marked by the well-being of the individual who performs them, being instead conditioned by cognitive limitations or external factors (Ghini, 2010, 157). However, admitting the existence of such influences is not the same as denying the inescapable value of individual autonomy, which, instead, can find its justification in the "principle of reciprocity", i.e. in the respect and mutual recognition of the dignity of others as a presupposition of human relations, logically preceding and founding the democratic principle itself (Pulitanò, 2011: 499; Cadoppi, 2011: 228-229). If the ultimate reasons for choices remain unfathomable and if, as a consequence, it is often impossible to understand with certainty whether these choices are the fruit of an authentic will, the value of self-determination must nevertheless be reaffirmed as the ethical, even before the juridical, presupposition of civil coexistence, in the sense that freedom of will must be assumed in others so that others may recognise it in ourselves (Küng, 2010: 92, 227).

Moreover, this ethical need to recognise the freedom of choice, coupled with the acknowledgement of the conditioning that can "vitiate" the decisions of individuals, does not prevent the provision of regulatory instruments - as will be seen below - aimed at ensuring that the self-destructive will is as authentic as possible.

2. The liberal-solidaristic system designed by the Italian Constitution

Remaining within the framework of the classic anti-paternalist construction, which tends to be restrictive of punishability, it can be said that this belongs to the theoretical empyrean and is based on principles addressed to an "ideal" legislator (Feinberg, 1984: 4). In order to attempt to understand how much of this ideality is reflected in a legal system, it is necessary to analyse whether these principles are reflected in positive norms and, first and foremost, in constitutional norms representing the project of a state, the idea of a society of a country.

As far as the Italian Constitution is concerned, there are several norms that interest us. On the one hand, the primacy of the person and his fundamental rights, among which the moral freedom of self-determination stands out, combined with the inviolability of personal freedom enshrined in Article 13, with the right to health *under* Article 32, and the related prohibition of imposing health treatments except in cases provided for by law with respect for the human person emerges there. On the other hand, the typical principles of a secular and pluralist State are evident: the equal dignity of citizens regardless of their different conditions of sex, race, language, religion, political opinions and other personal or social nature (Art. 3, para. 1); religious freedoms (Arts. 7, 8, 18 and 19); freedom to manifest thought (Art. 21) (Romano, 1981: 477; Moccia, 1990: 863; Fiandaca, 1991: 165; Mantovani, 1994: 519; Dolcini, 2009: 1017; Canestrari, 2012: 8; Cavaliere, 2013: 424). Secularism, understood as the protection of pluralism, in Italy therefore represents an inspiring principle of constitutionally oriented criminal legislation, which imposes on the State a neutral position with respect to a certain morality or religion, even in reference to choices considered self-damaging (Rawls, 1994: 168; Canestrari, Cornacchia, 2007: 225).

In this perspective, the liberal and anti-dogmatic matrix of the Italian Constitution is clear, in which there is no room for a presumption of absolute truth typical of the totalitarian monopoly. In the words of Einaudi, an eminent Italian constitution-maker, it can be said that the method of freedom "recognises from the outset the power to pour into error" (Einaudi, 1959: 60). Pluralism, considered a meta-value (Zagrebelsky, 1992: 11), if it does not imply acquiescence to any assertion, it does, however, start from the idea that no one is the repository of the only truth. The pluralist "compass" in a personalist key, represented by the Italian Constitution, outlines an open system that, therefore, eschews a tyranny of someone's values over others (Zagrebelsky, 1988: 26). Pluralism, being a meta-value, does not in itself allow for a stable balance between contradictory principles, which instead interact. Their composition must be found by the legislator within, however, the limit of the Constitution, which from this point of view lays down "the inalienable points of any combination" (Zagrebelsky, 1992: 127).

In the Italian Constitution, therefore, the liberal principle must be harmonised with the solidaristic principle expressed in Articles 2 and 3, aimed at the fulfilment of duties of solidarity and the removal of obstacles of an economic and

social nature that effectively limit the freedom and equality of citizens (Barbera, 1975: 50). This is the combination of principles in the light of which one must assess whether the legislator is justified in enacting paternalistic criminal legislation. The axiological "cardinal points", therefore, are: person, liberty, solidarity and equality; references that are not classical liberal, but which are enriched with an egalitarian solidaristic component, compatible with the concept of moderate anti-paternalism, a component that, on the other hand, does not seem to offer the room for forms of true paternalism. Solidarity and the removal of obstacles mean recognising everyone's right to pursue "their own good", even through the help offered by the state, freely accepted, but do not represent an obligation to accept the "true good" according to others, through the imposition of supposed help (Cavaliere, 2013: 425, 426).

The liberal-solidaristic perspective assumed by the Italian Constitution is useful, as we have anticipated, to legitimise moderate anti-paternalism and, in particular, those norms aimed at regulating situations in which it appears consistent with constitutional principles to "contain", up to a certain point, choices considered self-damaging, even at the "end of life", of an adult and capable individual, when, for example, these choices may be the result of cognitive limitations or errors. The same perspective, then, can also be useful in assessing the legitimacy of rules that impose certain conduct on third parties who come into contact with individuals who have the will to take their own life, because, for example, they are seriously ill.

3. Are we really free to make rational choices? Possible options of the legislator to avoid the self-damaging"mistakes" of the individual

The philosophical ideal of autonomy underpinning anti-paternalism may come into friction with the actual workings of the human mind, according to the current knowledge of psychology and neuroscience in general. Without being able to go into the details of these theories, it is possible, however, to recall that, according to some studies in cognitive psychology, there are two systems of thought in every person: one, automatic and intuitive, which governs rapid or

unconscious reactions; the other, rational and reflexive, which superintends conscious, controlled, deductive behaviour (Kahneman, Tversky, 1979: 47). The competition between these two systems, in combination with heuristics ("mental shortcuts", i.e. simplified psychic elaborations aimed at achieving the goal in a short time and with minimal cognitive effort), lead to characteristic errors (*biases*), which prevent the best choices from being made in the individual's best interest. This tends to show that a model based on the notion of a rational agent is inadequate to describe real decision-making behaviour (Kahneman, Tversky, 1982: 3; Bonini, 2001: 391; Rossano, 2012: 85). If there are innate cognitive limits to the rationality of decisions, it can be assumed that those norms that tend to "influence" the choices of individuals towards conducts deemed not self-defeating are not paternalistic, or are only moderately so; always, however, preserving the ultimate freedom to choose, i.e. without coercion, but ensuring that, eventually, the individual himself is convinced, based on an *a posteriori* judgement, that this is indeed his good (Thaler, Sunstein, 2008: 5; Glaeser, 2006: 133). The moderation of this anti-paternalism lies in recognising the state, only, the possibility of influencing the individual. An attempt is made to steer his choice towards what is considered ideal, without, however, compromising his autonomy at the moment of the final decision, which will always be up to the individual, albeit after certain procedures have been carried out to warn him of the possible consequences of his conduct.

Cognitive psychology and neuroscience, therefore, have demonstrated the abstractness, if not the fictitiousness, of the perfect rationality of individuals and the tendency to maximise utility as the objective of every human choice. The recognition of factors, intrinsic or extrinsic to man, as sources of conditioning the "process" of free self-determination, therefore seems to constitutionally legitimise, in a solidaristic perspective, those norms aimed at removing the obstacles represented, for example, by those morbid or social factors, by those educational deficiencies, by those cognitive limits of rationality, which sometimes prevent the individual - although capable of understanding and willing - from making choices in his own interest; choices that can give rise to decisions that, without these "obstacles", would perhaps not be made. With reference to "end-of-life" choices made by individuals suffering from serious pathologies, it is evident, on the one hand, that only those who possess the appropriate mental faculties can

aspire to ask to be helped to die; on the other hand, it emerges that these cognitive faculties may in some cases be conditioned, weakened, if not actually compromised, by the disease itself or by the conditions of psychological prostration due to suffering, including moral suffering, borne perhaps for long years. Morbid factors, therefore, that could be detrimental to the presumed rationality of the decision and also to the "authenticity" of the freedom of the will, even though they affect a subject considered capable of understanding and wanting.

The discourse opens, therefore, towards the possible regulation options that the legislator can adopt in the presence of possible cognitive errors or choices that could be irrational (Rangone, 2012: 151; Rubaltelli, 2006: 57). A first option is that of "command-control", which prohibits certain activities, often through the use of criminal sanctions, also to avoid the possible errors of the individual, who makes a self-defeating choice. As a form of indirect paternalism (see § 1), think of Article 580 of the Italian criminal code which, as we shall see more fully below, punishes with imprisonment from five to twelve years anyone who facilitates the suicide of others in any way, even when the decision appears to be fully free and unconditional.

Leaving other regulatory options that are ill-suited to "end-of-life" choices aside - such as *empowerment* tools[1] - the other option is that of *nudge strategies*, aimed at avoiding mistakes by *softly* directing choices in the direction the legislator believes desirable, without prejudice to the final freedom of choice. These may be predefined choices, made by *fedault* by the public authorities, but admitting an express choice to the contrary by the individual (Thaler, Sunstein, 2008; Eidenmüller, 2011: 814). The problems associated with a regulation inspired by this moderate anti-paternalism or libertarian paternalism, such as the "gentle push", may be related, for instance, to the possibility that the legislator's choices, aimed at avoiding cognitive errors of individuals, are, in turn, the result of opposing cognitive errors, or are, in fact, the result of ideological, moral or

[1] These are instruments designed to educate recipients to cope with errors, along the lines of the warnings on cigarette packets or the calories in food products, or the prospectuses for financial products. To date, the results of these instruments are uncertain, both because this type of information often fails to overcome the character attitudes of individuals, and because one would have to get to the bottom of the accuracy of the information.

religious choices, camouflaged by the supposed "good" or interest of the individual. In the latter case - as could also occur with regard to end-of-life choices - the alleged "good" of the individual is instrumentalised, when the real reasons for the legislative choice are other, incompatible with a secular and pluralist state such as the one designed by the Italian Constitution (see § 2).

Moreover, the risk of excessive and unjustified regulations, which could constitute an exaggerated hindrance, e.g. procedural, to individuals making certain choices, should not be underestimated. If the legislator sets up a cumbersome bureaucratic apparatus to be overcome in order to arrive at the choice advised against by the State, this constitutes a less serious, but nevertheless perceptible, form of restriction of freedom. The proceduralisation of the choice, moreover, should be all the more serious, laborious and thorough, the more serious the potential damage and the more concrete the possibility of its realisation. It is obvious, therefore, that in the case of "end-of-life" choices, given what is at stake, complex and articulated procedures aimed at ascertaining the genuineness of the suicidal will are legitimate.

In recent decades - especially in civil law, consumer protection law, and economic and financial law - libertarian paternalism has received a number of endorsements and has repeatedly been suggested *de lege ferenda*. This seems, therefore, to be a line of evolution in law, which could also concern criminal law, while taking the greater moral implications and symbolism that criminal prohibition traditionally entails into account (Mill, 1993: 1227). An example, in some respects, might be the laws that in some countries, foremost among them Holland and Belgium, allow active euthanasia under certain procedural conditions aimed at guaranteeing the full autonomy, weighting and information of the individual, seeking to avert forms of "fallacious will" (Magro, 2001: 229; Canestrari, Ciambalo, Pappalardo, 2003: 133).

4. Procedural exculpatory measures as regulation of "end-of-life" choices

The example now given, from a penal point of view, leads the discourse towards the so-called procedural exculpatory measures, which generally consist of administrative *procedures* aimed at ascertaining in advance the certainty of certain assumptions of the lawfulness of the act (Donini, 2004: 28; Di Giovine, 2009: 178: Sessa, 2018: *passim*; Sessa, 2024: 168). These could also include the freedom of the self-inflicted choice, informed, conscious, considered in the light of a series of explanations. The procedural scapegoat, in itself, tends towards a neutrality of the state with respect to the ethical value of the choice, limiting itself to controlling the actual freedom of the choice itself (Donini, 2004: 29-30). It cannot be ruled out, moreover, that the administrative procedures underlying these exculpatory measures may also be used to guide the individual, with a "gentle push", towards a certain (non-self-damaging) choice deemed preferable by the legislator. On the other hand, if the objective is to overcome possible cognitive errors, the intentions of the State and the individual may in some ways eventually coincide, since the legislator will indeed have the task of directing the choice, but towards that (non-self-damaging) option which, downstream of the information procedure, may turn out to be the preferable one according to the individual's own *a posteriori* judgement. It is not, therefore, a matter of a purely "precautionary" paternalism (aimed, by means of absolute obligations or prohibitions, at preventing an event that, according to the state, the individual clearly has an interest in avoiding), but rather of a "tutelary" character, i.e. aimed at guaranteeing the effectiveness of the self-damaging will, where the "precautionary" matrix cannot go beyond the "gentle push" (Husak, 2008: 69). The model proposed here, therefore, may fall within the so-called libertarian paternalism in the "tutelary" sense, aimed at suggesting the adoption of conducts capable of reducing the self-exposure to certain risks or damages, such as death to the individual. Conducts that, if affected by cognitive errors, somehow fall outside the realm of authentic will, to fall rather into a kind of self-damaging culpable attitude (Capoppi, 2008: 107).

In a liberal-solidaristic system such as the one designed by the Italian Constitution, therefore, state intervention should be limited, even through proceduralisation, to *soft* influence practices that do not compromise the right to self-

determination, aimed, in particular, at overcoming possible cognitive determinant typical *biases* (Trout, 2005: 393). State interference by means of criminal sanction, on the other hand, should not be aimed at modifying individual preferences in conflict with supposedly higher values (moral, ideological, religious, etc.) or with a concept of "proper good" defined by others. Such strategies, of proceduralised "soft push", are not only legitimate, but, if aimed at overcoming cognitive limitations deriving from morbid factors or psychological prostration in subjects in any case considered capable of understanding and willing, they are dutiful in a solidaristic system, insofar as they are aimed at removing obstacles that effectively limit the freedom and equality of citizens. Effective freedom to make decisions, in fact, cannot disregard the possibility of access to the best range of relevant information (Risicato, 2024: 139). With reference to end-of-life choices, therefore, it seems obvious that a prerequisite for an informed choice is a will fully informed by precise communication of the diagnosis and prognosis of the illness, as well as by the presentation of possible alternatives, such as palliative care and pain therapy.

5. The codictic discipline and Italian constitutional jurisprudence on "end of life" choices

So far we have reconstructed the theoretical framework within which a legitimate regulation of end-of-life choices should be inscribed in a liberal-solidarity system such as the one designed by the Italian Constitution of 1948. The Italian penal code, on the other hand, dates back to 1930, to the fascist era, with an ideological approach profoundly different from the one later adopted by the Constitution. This discrepancy is also clearly perceived with regard to "end of life" choices. Articles 579 (murder of the consenting person) and 580 (aiding suicide) of the Italian penal code, in fact, seem to show the unavailability of the good "life" on the part of its holder, even when the choice is the result of a fully free, unconditional and informed will.

We believe it is appropriate at this point to describe the two offences more fully. Consent killing, provided for in Article 579 of the Criminal Code, is nothing more than a "special" offence with respect to the general offence provided for in Article 575 of the Criminal Code on homicide, inserted into the legal

system to punish euthanasia as well. The provision states that "anyone who causes the death of a man, with his consent, shall be punished by imprisonment of from six to fifteen years. The aggravating circumstances indicated in Article 61 do not apply. The provisions relating to murder shall apply if the act is committed: 1. against a person under eighteen years of age; 2. against a person who is insane, or who is in a state of mental deficiency, due to another infirmity or due to the abuse of alcoholic or narcotic substances; 3. against a person whose consent has been extorted by the offender by violence, threat or suggestion, or who has been obtained by deception". The law considers murder of the consenting person as a separate offence, even though it is essentially a common murder, mitigated by the consent given by the victim. The specialising element with respect to common homicide, in fact, is precisely the victim's consent, which, on the one hand, diminishes the criminal disvalue of the conduct; on the other hand, it does not fall within the cause of justification of the consent of the person entitled under Article 50 of the Criminal Code, since its object is a right, life, considered absolutely inalienable by the 1930 legislature. It was precisely Article 579 of the criminal code that in 2021 was the subject of a referendum proposal, for its partial repeal, on the following question: "Do you want Article 579 of the criminal code (homicide of the consenting person) approved by Royal Decree No. 1398 of 19 October 1930, paragraph 1, limited to the following words 'imprisonment from six to fifteen years'"; paragraph 2 in its entirety; paragraph 3 limited to the following words "shall apply"?"[2]. The text of Article 579 of the Criminal Code, which, in the event of the question being admitted and the referendum being accepted, would have been as follows: "whoever causes the death of a man, with his consent, shall be punished in accordance with the provisions relating to murder if the act is committed: 1. against a person under eighteen years of age; 2. against a person who is insane, or who is in a state of mental deficiency, due to another

[2] The abrogative referendum is provided for in Article 75 of the Italian Constitution and states that 500,000 citizens or 5 regional councils can propose to the entire electoral body *"the total or partial abrogation of a law or an act having the force of law",* meaning a law in the formal sense, i.e. approved by parliament according to the ordinary procedure. After the referendum is proposed, the Constitutional Court decides on admissibility. All citizens voting for the election of parliament are entitled to participate in the referendum, and for the referendum to be valid, a *quorum* must be reached, i.e. the majority of those entitled to vote must take part in the vote; for the rule subject to the referendum to be repealed, a majority of the votes validly cast must be reached.

infirmity or due to the abuse of alcoholic or narcotic substances; 3. against a person whose consent has been extorted by the perpetrator by violence, threat or suggestion, or who has been obtained by deception". In the perspective of the promoters of the referendum, consent was to take on a new value: from an element that, by qualifying the conduct, mitigates the punitive treatment of [however subsisting] homicide, to a presupposition that excludes the conduct from the area of the criminally relevant, subject to exceptions built on the condition of the - residual - offended persons (Padovani, 2021: 7). That given by the Italian Constitutional Court on the referendum proposal, however, was a judgement of (in) admissibility, which we will discuss shortly.

The offence envisaged, on the other hand, by Article 580 of the Criminal Code (instigation or aiding and abetting suicide) provides that "whoever determines others to commit suicide or encourages others to commit suicide, or in any way facilitates their suicide, shall be punished, if suicide occurs, with imprisonment from five to twelve years. If the suicide does not take place, he shall be punished by imprisonment of from one to five years, provided that serious or very serious bodily harm results from the suicide attempt. The penalties shall be increased if the person instigated or aroused or aided is in one of the conditions indicated in numbers 1 and 2 of the previous Article. However, if the aforementioned person is under fourteen years of age or in any case lacks the capacity of understanding or will, the provisions relating to murder shall apply". Putting the analysis of the conduct of instigation aside and focusing on that of aiding suicide, we can say that the conduct consists in voluntarily facilitating the execution of another person's suicide, committed or at least attempted with serious or very serious bodily harm, through acts of aid rendered to the suicide, for example by providing the means to carry out the suicide, creating favourable situations, giving suitable instructions for the execution, and so on. There must be no direct cooperation in the execution, otherwise the conduct falls within the scope of the crime of murder of a consenting person.

Both norms under consideration protect the good of life, in the view of the historical legislator even against the will of its holder. In fact, in the ideological vision espoused by the 1930 code - imbued with authoritarianism mixed with Catholicism - life was almost a "duty" rather than a "right". Although attempted suicide is not punished in Italy, the reasons for this, reading the preparatory works

of the code, are to be found not in the freedom to take one's own life without risking criminal consequences should one fail, but in the - albeit correct - reason that the threat of punishment would have no deterrent effect on a subject distressed to the point of committing suicide. On the contrary, it was pointed out in the preparatory work that the threat of punishment would have the opposite effect, i.e. it would induce one to prepare well and execute suicide effectively, precisely to avoid the penalty in the event of failure. The "duty" to live is a postulate proper to an ethical and totalitarian state, such as the fascist state, because the individual in that ideological context was a "cog" of the state, he was useful to it in order to work, to produce, to fight, to procreate, etc. If living was a kind of "duty", life then could not be freely disposed of by its owner, because it "belonged" [also] to the state.

The perspective, of course, has profoundly changed with the entry into force of the Italian Constitution, marked by the aforementioned liberal and solidaristic principles that have placed the person at the centre and no longer the State and that have recognised a series of rights and freedoms that certainly militate towards a perspective that has challenged the full legitimacy of the previously mentioned cases (Articles 579 and 580 of the Criminal Code), especially with reference to the much debated issue of euthanasia practices. It is sufficient to bear Article 32 of the Constitution in mind, which, if, on the one hand, protects health as a fundamental right of the individual (even before being an interest of the community), on the other prevents anyone from being obliged to undergo a specific medical treatment (except by provision of law). In short, therefore, it can be said that health and even life, for the Italian Constitution, are a fundamental right, but not a duty, with all that may follow from this in terms of criminal law.

The Italian Constitutional Court (sent. no. 242 /2019, Cappato case), in fact, has declared the constitutional illegitimacy of Article 580 of the Criminal Code (aid to suicide), in the part in which it does not exclude the punishability of a person who, in the manner provided for by Articles 1 and 2 of Law no. 219/2017 (rules on informed consent and advance treatment dispositions), facilitates the execution of the suicide intention - autonomously and freely formed - of a person kept alive by life-support treatments and suffering from an irreversible pathology, source of physical or psychological suffering that he considers intolerable, but

fully capable of making free and conscious decisions, provided that these conditions and the modalities of execution have been verified by a public structure of the national health service, after obtaining the opinion of the territorially competent ethics committee.

Today, therefore, Law No. 219/2017 gives relevance to the expressed will of the patient to refuse health treatment necessary for his or her survival (Canestrari, 2023: 35). The hypothesis in which a person fully capable of self-determination expresses the refusal of a medical treatment, despite being informed by the doctor of the consequences, thus of the danger or certainty of death or serious damage to health, has generated a lively debate in doctrine and jurisprudence, through which, even before Law No. 219/2017, the right was affirmed at least to "not to treat oneself" and "to let oneself die", a concept, moreover, different from a true "right to die".

Italian constitutional jurisprudence has had the opportunity to express itself again, very recently, on the same issues, reinforcing, in substance, what had previously been affirmed, but specifying that ruling No. 242/2019 did not recognise a general right to end one's life but, in light of Law No. 219/2017, affirmed the right to refuse life-sustaining treatment, making even less invasive procedures included among such treatments (Cort. cost., 18 July 2024, No. 135). In the latter ruling, the Court reiterated that the right to life is the subject of express protection by all international human rights charters, which mention this right first over any other (Art. 2 of the ECHR; Art. 6 of the International Covenant on Civil and Political Rights), or immediately after the proclamation of human dignity (Art. 2 of the Charter of Fundamental Rights of the European Union). From these provisions, according to the Italian Court, flow, therefore, obligations that are also binding on the national system, through Article 117, para. 1, of the Constitution (as well as, with regard to the CFREU, Article 11 of the Constitution). From the recognition of the right to life "derives, finally, the corresponding duty of the legal system to ensure its protection through the law (as well as, more generally, through the action of all public powers). This duty - laid down in explicit terms by Article 2(1) of the ECHR and Article 6(1) of the ICCPR - has recently been affirmed by this Court, with particular clarity, precisely with reference to the issue of the end of life: [d]art. 2 of the Constitution. - no differently than Article 2

ECHR - descends the State's duty to protect the life of every individual" (Order No. 207 of 24 October 2018).

It was precisely the affirmation of the State's duty to protect human life that was at the basis of the aforementioned decision of inadmissibility of the referendum on the partial repeal of Article 579 of the Criminal Code (murder of the consenting person), since, by making it lawful to murder by giving valid consent, it would have deprived life of the minimum protection required by the Constitution (Sentence 2 March 2022, no. 50; Adamo, 2024: 21).

The Constitutional Court, indeed, should have answered the question "is the referendum admissible?", but it answered a different question, namely "is the legislation resulting from the referendum admissible?"; a question that - it is evident - helped to declare the question inadmissible (Penasa, 2022: 1). The last lines of the judgment state that the referendum is inadmissible "due to the constitutionally necessary nature of the legislation that is the subject of the question", thus considering that the *ratio of* Article 579 of the criminal code is the protection of the supreme value of life, endangered by an even partial abrogation of the code provision. However, the provision in question does not appear to have constitutionally binding content and this can be deduced from the position taken by the Constitutional Court itself in resolving the "Cappato case" referred to above. In that pronouncement it limited itself to stating that "the legislator cannot be deemed to be prevented" from incriminating "conduct that paves the way for suicidal choices" (Ord., 24 October 2018, no. 207) and to exclude that the crime of facilitating suicide "can be deemed per se to be in conflict with the Constitution" (Sent., 24 September 2019, no. 242). It follows that, according to the Italian Court, if, on the one hand, our Constitution does not prohibit the incrimination of the homicide of the consenting person, as well as that of aiding and abetting suicide, on the other hand, it does not even impose it, lacking precisely - as we shall see better in the next paragraph - constitutional obligations of criminalisation (Bricola, 1973: 7; Paonessa, 2009: 65).

In Judgment No. 50/2022, on the other hand, the Constitutional Court saw in Article 579 of the Criminal Code a kind of constitutionally necessary provision. If, however, the ways and forms of the implementation of constitutional protection are left to the discretion of the legislature, the laws "although consti-

tutionally necessary, are not of binding content" (Constitutional Court, Judgement No. 49 of 13 January 2000). The Constitutional Court, however, has held - we read again in Judgment no. 50/2022, § 4 - that "disciplines such as the one under consideration may be amended or replaced by the legislature itself with other disciplines, but they cannot be purely and simply repealed, because the minimum level of protection required by the constitutional references to which they are attached would not thereby be preserved". Also from this standpoint, however, the inadmissibility of the referendum question pronounced by the Constitutional Court does not seem to be well understood, because if a minimum level of protection of life is invoked, the partial abrogation requested with the referendum would not have affected those hypotheses in which the invalidity of consent requires the application of the general case of wilful homicide *pursuant to* Article 575 of the criminal code. The admission of the question and the popular approval of the referendum, therefore, would have left unaltered the criminal protection of life in those cases in which the consent is vitiated by certain "fragilities" of the holder of the property: minors under eighteen years of age, the mentally ill or persons in a condition of mental deficiency due to another infirmity or due to the abuse of alcoholic or narcotic substances, persons whose consent has been extorted with violence, threats or suggestion, or stolen with deception. The Constitutional Court's pronouncement, however, did not allow the Italians to express their opinion on an issue that is as delicate as it is ethically complex, that of aiding suicide by means of euthanasia practices, indirectly affirming the mandatory nature of the (penal) protection of life even in those cases in which the holder's consent to death appears to be unimpaired by psychic deficiency or other infirmity or frailty.

The referendum question was also "rejected" by the Constitutional Court because it would have pushed towards a "generalised licence to kill" (Luccioli, 2022: 5). The scenario foreshadowed by the Court was that of a "race to mass suicide at the hands of others", but it was a vision distorted "by the perspective chosen by the constitutional judges to look at Article 579 of the criminal code as an abstract provision atomised from the legal context" (Pugiotto, 2022: 87). According to the Court, the murder of the consenting person would have become possible "without any limiting reference" and, therefore, the approval of the referendum proposal would have made "the murder of those who validly consented

to it indiscriminately lawful", with the legitimisation of "self-destructive choices made by the holder of the right, which may turn out, however, not to have been adequately thought out". If, however, we make a reconnaissance of the jurisprudence on Article 579 of the Criminal Code, it emerges that the positive ascertainment of a valid consent has never found any confirmation in practice, since the provision of Article 579, para. 3 of the Criminal Code has been understood in a rigorous manner, postulating proof of absolute certainty, due to the peculiar relevance of the right to life with respect to the aggression of third parties (Padovani, 20220: 27). Then, the sphere in which the consent given for one's own death could have exculpated the homicidal action would have been exclusively the one within what is prescribed by the aforementioned Law No. 219/2017 on the subject of free and informed consent, since the expression "with his consent" would have been saved by the partial repeal of Article 579 of the Criminal Code.

Another argument for which the Constitutional Court, in its ruling no. 50/2022, deemed it necessary to reject the referendum proposal is to be found in the qualification of life as a "value that stands at the apex". A value defined by the Court as "the first of man's inviolable rights, as a prerequisite for the exercise of all others'. Those on the value of life and, in particular, on the "end of life", however, are all questions on which generalised agreement is indeed difficult. Can there be unanimity in answering the question of whether and how the quality of life is measured or to what extent it is worth living? Or, whether death is the end or the end of life? (Pugiotto, 2022: 89). Therefore, in a liberal democracy there should not be what in some cases seems to be a sort of imposition to live, leaving more room for individual free choice, around which, however, there must be adequate safeguards and procedures to verify the genuineness of the will. The referendum went in this direction: decriminalising in the sense of allowing and not forcing (Pugiotto, 2022: 89).

6. The legal asset "life" as a limit to the punitive power of a secular and pluralist State

From what we have written, what seems to emerge is that the Italian Court wanted to affirm, albeit implicitly, a sort of constitutional obligation on the part of the legislature to protect (criminal) life, even against those more modest forms of aggression, characteristic of the free choices to end one's existence prematurely in the event of serious pathologies that make, in the view of the holder of the asset, life itself no longer worthy of being continued.

Such a conclusion, however, in our opinion seems to stand in friction with the theory that legitimises the punitive intervention of the state, at least when this supposed obligation to protect is necessarily understood through criminal sanction. As is well known and as we have already anticipated, in fact, in order to distinguish crime from sin and, therefore, criminal law from morality, material behaviour is required - mere thought not being sufficient - that offends a graspable and well-determined legal good. Although in Italy the principle of offensiveness is not expressly constitutionalised, it can nevertheless be inferred from our Fundamental Charter, in particular in Article 13 (inviolability of personal liberty), Article 25(2) (principle of legality), Article 27(1) (personality of criminal responsibility) and Article 27(3) (re-educative function of punishment); read systematically, in connection with the principles of freedom of expression (Article 21), ideological tolerance and respect for the human person. Punishment limits and compromises the fundamental freedoms of the individual and, therefore, can only be legitimised if it is the consequence of a fact that is indeed material, but also offensive (Moccia, 1992: 109). The cornerstones of the principle of offensiveness are to be found in these constitutional norms because the *extrema ratio* character of criminal law is based on them, which reduces punitive intervention only to facts that are offensive to graspable legal goods (Caterini, 2004: *passim*; Manes, 2005: *passim*). Reasoning differently, criminal liability could be based on the mere violation of an obligation, on simple disobedience or transgression of a legislative command, as is the case in ethical and totalitarian states. A secular and pluralist State, such as the one configured by the Italian Constitution, on the other hand, as the basis of a crime can only demand an offence against a legal good. The very concept of a legal good, moreover, is not so easy to define, but if we

want to attempt to do so, we can say that it should be an interest, a well-defined entity, really graspable and consolidated in the collective conscience, so that it can be easily recognised by the addressees of the criminal law, who will also be able to realise its offence (Jäger, 1957: 13).

Another question is the degree of importance that the good must possess in order to become a legitimate object of criminal protection. The question is this: can the legislator freely choose any good and protect it through the criminal law, or is he limited in this choice, having to restrict his options only to those goods that are most important? On the basis of the aforementioned principle of *extrema ratio*, the answer can only be in the sense of an only partial freedom of the legislator in the choice of legal goods to be protected, because he is not completely free of limits. He must restrict the choice only to the most important interests, excluding the more negligible and modest ones. This is the "critical" function of the juridical good, which allows censure to be levelled at the legislator when he prepares rules to protect modest interests that do not deserve to generate the most serious sanctioning reaction, i.e. the criminal one.

If this is the case, what is the criterion for determining which goods are most relevant? The answer is always linked to the Italian Constitution. First of all, one must take Article 13 of the Constitution, which defines personal freedom as inviolable, prohibiting any form of detention and any other restriction, except in the cases and ways provided for by law into consideration. It is clear, therefore, that personal freedom is a "good" protected in a direct and very pregnant manner by our fundamental Charter; a good that, moreover, is offended by the criminal sanction that, par excellence, consists precisely in the limitation of criminal freedom. Even on the basis of the principle of equality (Article 3 of the Constitution), which also expresses the need for proportion between the offence to the good and the sanction, it would be an exaggerated reaction to impose the criminal sanction for facts that offend secondary legal goods. The same requirement of proportionality, therefore, logically implies that, since the good compromised by the penalty is personal liberty, which has constitutional importance, the same importance must be attached to the good that the legislator wishes to protect with the criminal penalty. If this were not the case, it would legitimise the offence - through punishment - to a good at the top of the hierarchy of constitutional values (personal liberty), in order to protect another that does not have as much importance, at

least as constitutional importance. Ultimately, following this approach, the legal goods that the legislator can legitimately protect through the imposition of criminal sanctions are only those that have constitutional importance, excluding instead those that are more marginal, precisely because they do not have such importance (Bricola, 1973: 42; Angioni, 1983: *passim*; Fiandaca, 2014: 70-71).

Returning to the "end-of-life" choices and the criminal cases set out in the Italian criminal code, there is no doubt that life is a legal asset at the apex of the Italian Constitution and, as such, legitimately protectable by the legislature. Although not explicitly protected, there is no doubt that the Constitution clearly protects human life. This protection is grounded in Article 2 of the Constitution, although no explicit reference is made to the good "life" in this provision. The guarantee that the Italian Republic recognises to the inviolable rights of man necessarily implies the protection of his life. This protection is reinforced, then, by the prohibition of the death penalty enshrined in Article 27(4) of the Constitution.

The Italian Constitution, thus, acquires the role of a limit to the State's punitive power also with reference to its function as a "catalogue" of goods that the legislature can legitimately protect with criminal sanctions. It is important to clarify, however, that this character of "limit" towards the legislature, which possesses the legal good, precludes the good itself from having a function that we could define as "propulsive" of criminal law, if one were to think that once the constitutional relevance of the good had been ascertained, the legislature would somehow be obliged to provide for its criminal protection. This is not the case, because the constitutional value of the good constitutes a necessary but not sufficient condition for the legislator to threaten the criminal sanction, since the legislator himself will also have to assess whether the penalty is indispensable or whether, conversely, the protection of that good can be guaranteed with different measures, precisely on the basis of the well-known principles of *extrema ratio*, fragmentary nature, subsidiarity and deservingness of punishment that should characterise the criminal system. This was, moreover, the constant orientation of the same constitutional jurisprudence: "the possible charge to the legislature of having omitted to penalise certain conducts, in hypothesis socially reprehensible or harmful, or even unlawful from another point of view, or of having defined the incriminating cases too restrictive, leaving out such conducts, cannot, in principle, result in a censure of the constitutional legitimacy of the law, and even less

so in a request for an "addition" to the same by a ruling of this Court" (judgments n. 447/21998, no. 226/1983; no. 49/1985, no. 411/1995; orders no. 288/1996, no. 355/1997).

7. Brief concluding remarks

On the basis of these arguments, therefore, the cited jurisprudence of the Italian Constitutional Court, which declared the referendum question on Article 579 of the criminal code inadmissible, is not convincing, since it uses the good "life" not as a limit to the State's punitive power, but as a criterion in itself legitimising the criminal sanction. The choice, on the other hand, should be referred to the legislator, or to the will of the people, even through a referendum, as further criteria of criminal policy. In essence, the extreme and safe constitutional relevance of the good of life in itself is not sufficient to legitimise criminal sanction, *a fortiori* when the offence to the same good - if this is the case - has been the result of a fully free and informed choice by the holder of the good. In our opinion, in such cases there is no sort of constitutional obligation to protect the good of life by criminal law, all the more so when the punishment comes into conflict with the individual's freedom of self-determination which, as we have seen above, admits of criminal protection - through procedural exemptions - only against self-destructive intentions formed in a non-genuine manner, the result of cognitive errors or, in the words of the Constitutional Court, of "self-destructive choices made by the holder of the right [...] not adequately thought out".

The aforementioned liberal-solidaristic perspective of the Italian Constitution, in fact, is useful, as we have anticipated, to legitimise those norms aimed at regulating situations in which it appears consistent to "contain", up to a certain point, the self-damaging choices of an adult and capable individual, when, for example, these choices may be the result of cognitive limitations or errors, or of poor or inadequate pondering. In our view, the state is not legitimised to behave like a "father", but more like a kind of elder "brother" whose task is to advise, to guide, to protect, without, however, imposing absolute prohibitions guarded by criminal sanction. The State, through criminal law, is therefore only legitimised to ensure that the choice considered self-damaging is adequately meditated, rea-

soned, reflected upon, on the basis of all the best available information. The criminal sanction, therefore, should only be imposed for conduct that facilitates the suicide of others or causes the death of the consenting person, when the choice of the holder of the good "life" is not the result of this necessary pondering according to standardised procedures which, if adopted, should be exculpatory.

In conclusion, returning to the question from which we started, we agree on the subjective and relative nature of what constitutes "one's own good" and "one's own evil", which cannot be ascribed to supposedly objectively rational and absolute visions. The conviction remains that behaviour believed to be self-damaging, if not subject to coercion or undue pressure, if not vitiated by cognitive vulnerability, if the result of a well-informed and well-considered choice, must be left to the autonomy of the individual without forced interference by the State, because everyone must be allowed, consciously, to make mistakes to their own detriment, if mistakes can really be spoken of (Waldron, 1981: 21).

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