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Reasonableness and Law

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corresponding punishment are suited to achieving an aim assumed to be legitimate" (Palazzo 1998, 381–82). The suitability of means with respect to the aims of protection is judged on the basis of well-established criteria worked out by the constitutional courts of Europe in cases of involving criminal law. Thus, for example, the Federal Constitutional Court of Germany (or *Bundesverfassungsgericht*) has settled on the view of means-to-ends adequacy as a three-pronged requisite that breaks down into the constituent criteria of suitability (*Geeignetheit*), necessity (*Erforderlichkeit*), and appropriate or reasonable fairness (*Angemessenheit*) (Luther 1997, 345; Manes 2005, 283). It can be observed in these cases that the reasonableness test takes the form of a judgment whose object has to do with rationality with respect to the aims (or *Zweckrationalität*) involved in working toward such an end—and yet such means-to-ends rationality still remains inherently political.

5 Reasonableness and Alternative Models by Which to Regulate Euthanasia: The Procedural Justification, or *Prozedurale Rechtfertigungen*

The procedural-justification model has been used in different areas of the criminal law applicable to bioethics: examples are its use in connection with induced abortion and euthanasia, and physician-assisted suicide in particular. A well-known procedural-regulation model for physician assisted suicide is that offered by the Dutch law (2002), which provides that a physician will not be held criminally liable for a euthanasia or assisted suicide carried out in compliance with the procedure set forth in the law. On the procedural approach, the legislators abstain from any direct evaluation of the interests at play—and so do not set forth beforehand, and once and for all, which of these interests should prevail—but rather confine themselves to stating the conditions, methods, and procedures defining the boundaries within which a person may freely choose and self-determine a course of action. We thus have a combination of substantive and procedural rules: compliance with the procedure legitimates the act by providing a basis on which to rule out the act's illegality or its punishability; conversely, a failure to comply with the procedure will entail criminal liability (Donini 2004, 27ff.; Eser 2000, 43ff.; Magro 2001, 253ff.).

Procedural justification offers an alternative to the regulative model based on balancing and ranking by law the conflicting interests at play: on the procedural model, responsibility for deciding on a prevailing interest rests with the concerned persons themselves, and no liability arises so long as the established procedure is followed. This procedural approach is conceived as a way to deal with the issues of sociocultural pluralism forming the background to legal systems in the West, where legislatures, especially as concerns bioethical issues, have little chance of invoking a standard of reasonableness based on a wide consensus on the part of the citizenry.

The role of reasonableness on the procedural model is that of a guideline useful in working out the legal procedure following which an otherwise prohibited behaviour will not be subject to punishment. Certain necessary guarantees need to

be provided in end-of-life cases, requiring that the option for euthanasia be framed as an exceptional one of last resort (*extrema ratio*): "Self-determination through others must in any event be reasonable," and there are two necessary conditions subject to which such arrangements (euthanasia) can be deemed reasonable; that is, the terminal process must be irreversible ("point of no return") and the person in question must be bound to a near death (Cornacchia 2003, 405). It is these criteria that the Dutch law seems to look to in providing that a physician will not be liable to punishment so long as, among other conditions, both the physician and the patient reach "the conviction that there is no other reasonable solution for the situation." This requisite—that there be no other reasonable alternative available—connects with the conditions of necessity, suitability, and proportion that, as we saw, figure in German constitutional case law as sub-criteria for a judgment of reasonableness. The requirement to exhaust all reasonable alternatives goes along in this sense with the need for protection that must accompany any act of self-determination resolving itself into death.

The peculiarity of the Dutch model lies in the emphasis it lays on the doctor-patient relationship as the place within which to work out a reasonable assessment of the interests involved: it is within the context of this relationship that a request for assistance in suicide must be pondered and carried through, all the while satisfying the conditions and guarantees established by law. In the Dutch framework, then, the balancing between the right to life and the freedom of self-determination in health matters is entrusted to the pondered assessment of the patient in consultation with his or her doctor. There is a point that needs to be stressed here, which is that the reasonableness at issue on the procedural approach to medically assisted suicide is that of the law (or the legislator) and not that of the patient's decision. In fact, this decision is not even amenable to a judgment of reasonableness: "Once these largely procedural tests have been satisfied, the content of the patient's decision is not open to any scrutiny at all." (Jackson 2004, 439). So there is no room, on this approach, for any argument claiming that a request to die in inherently unreasonable.

6 Act *Versus* Omission in the Reconstruction of Euthanasia: A Reasonable Distinction?

Whether the distinction between active and omissive conduct makes good sense as a heuristic or classificatory device is something that can be assessed in light of reasonableness. The distinction between active and passive euthanasia (between mercy killing and letting die) becomes crucial in determining criminal liability if it is on this distinction that we base the distinction between legitimate and criminally illegitimate conduct (Ashworth 2006, 283ff.; Tassinari 2001, 147ff.). The oversimplification involved in this reconstruction comes through clearly in those cases where a refusal of lifesaving treatment requires withdrawing life support, and the patient requests the physician to do so. These cases show that while the physician's behaviour is substantially omissive in meaning—in the sense that it consists in

no longer providing life-sustaining care: omitting to provide care—it is by contrast active from the practical standpoint of what it materially involves doing. Hence, a strict dichotomy between active (illicit) and passive (licit) euthanasia can entail for the physician liability for murder of the consent-giver (Article 579 of the Italian Criminal Code).

What makes this reconstruction look not too persuasive—not too reasonable—is its making the ascription of criminal liability dependent on a criterion (act *v.* omission) almost entirely reduced to a merely causal, naturalistic understanding of what the conduct in question consists in. As is known, certain corrective doctrines have been worked out to deal with the problems deriving from this strict dichotomy between act and omission, examples being the German doctrine of *Unterlassung durch Tun* (theorizing the idea of an "omission by positive act")[7] and the doctrine that suicide and euthanasia are functionally identical on the normative plane (Cornacchia 2002, 405ff.). But these doctrines seem unable to adequately cover all cases where the withdrawing of lifesaving treatment requires a certain *facere* (or positive act) on the physician's part.

There is for these cases an alternative scheme that seems more appropriate on a theoretical plane and more consistent with the principle of reasonableness: it involves looking at the normative elements that frame the category of offences committed by way of an omission in which the omission consists in a failure to perform a duty to act imposed by the criminal law on specified classes of persons. When all the conditions are satisfied, an informed and competent patient's rejection of life support will release the medical personnel from a legal obligation to provide care. The physician's conduct can be deemed noncriminal owing to its being consistent with his or her professional duties, in accordance with an interpretive model that, with all due adjustments, can also be used to legitimize so-called indirect euthanasia.

This interpretation has recently been used in one of the most debated rulings on bioethics issued in Italy: the holding was that no criminal liability attaches to a physician for withdrawing life-sustaining treatment upon request by a competent patient.[8] Set forth in the Italian Constitution (under Article 32, second paragraph) is a constitutional right to an informed refusal of treatment, including lifesaving treatment, and it was ruled on this ground that the act of withholding treatment may not be deemed illegal so long as this is done in fulfillment of a duty.

In conclusion, where the case at hand is one in which a physician withholds lifesaving treatment upon request by a competent patient, the distinction between act and omission may be deemed reasonable if understood in a strictly naturalistic way. But not so if the distinction so understood is used as a criterion by which to distinguish criminal (legitimate) from noncriminal (illegitimate) behaviour, under the equation whereby omission is legitimate whereas positive act is not.

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[7] There is a strand of German legal literature that uses this doctrine to rule out that someone can be punished for withholding life support if this is done acting on a valid request of the patient: Roxin (1987, 348ff.); Schneider (1997, 31ff., 174ff.)

[8] *Tribunale di Roma*, ruling issued 17 October 2007.

6.1 Reasonableness as a Criterion on Which Basis to Judge the Constitutionality of Criminalizing Physician-Assisted Suicide: The Experience of the U.S. Supreme Court

There is a further way in which reasonableness comes into play in working out the relation between euthanasia and the right to withhold life-sustaining treatment. The U.S. Supreme Court has used reasonableness as a criterion by which to assess the soundness of the distinction between killing and letting die.

In *Vacco v. Quill*,[9] the issue before the court was whether a New York statue criminalizing physician-assisted suicide violated the Equal Protection Clause of the Fourteenth Amendment: while medically assisted suicide is a crime under New York state law, the patient, on the other hand, is recognized as having the right to refuse treatment, including lifesaving treatment. The respondents argued that the statute was unconstitutional on grounds of its violating the principle of reasonableness: "it is hardly unreasonable or irrational for the State to recognize a difference between allowing nature to take its course, even in the most severe situations, and intentionally using an artificial death-producing device." The New York penal statute would thus institute a differential treatment "not rationally related to any legitimate state interest." Indeed, under the ban on assisted suicide, "mentally competent, terminally ill patients" who are kept alive by life-support systems can use "consent to treatment provisions" to request withdrawal of lifesaving treatment, but terminal patients who do *not* depend on a life-support system cannot turn to a physician for help in hastening their death. And since, on the respondents' argument, a refusal of lifesaving care is "essentially the same thing" as physician-assisted suicide, the differential treatment between terminal patients according as they depend or not depend on a life-support system is unreasonable.

The Supreme Court, however, rejected the view that a refusal of lifesaving medical treatment can be equated with suicide and therefore held that the New York statute does not violate the Equal Protection Clause. The reasonableness of this statute is based on a number of criteria converging on the criterion of its being adequate to the purposes of protection. For one thing, the court held that the distinction between *letting* a patient die and *making* that patient die is an "important, logical, rational" distinction, as well as a "widely recognized and endorsed" one in the medical profession and in the legal tradition; for another thing, this distinction is in agreement with the "fundamental legal principles of causation and intent"; and finally, there exist "valid and important public interests that easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end."[10] In analogy to *Pretty v. The United Kingdom*, reasonableness is essentially being conceived here according to the traditional doctrine prohibiting arbitrary decisions (*Willkürverbot*): the principle of equality established

[9] U.S. Supreme Court, *Vacco, Attorney general of New York*, et al., *v. Quill* et al., 521 U.S. 793 (1997).

[10] U.S. Supreme Court, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

under the Equal Protection Clause can be deemed to have been violated only if no reasonable (*vernüftig*) ground for differential or nondifferential treatment is found (Luther 1997, 344).

7 Ways in Which the Provisions in Law No. 40/2004 Regulating Medically Assisted Procreation Might Be Judged Unconstitutional in Light of the Standard of Reasonableness

With Law No. 40/2004 the legislature introduced for the first time in Italy a comprehensive scheme under which to regulate medically assisted procreation. Under a motion filed by the *Tribunale Amministrativo Regionale* of Lazio, paragraphs 2 and 3 of Article 14 of Law No. 40/2004 are currently being reviewed to determine their compatibility with two articles of the Italian Constitution: Article 3—where the issue is the reasonableness of the challenged provisions in relation to the constitutional prohibition against discrimination—and Article 32, where the issue is whether the provisions effect an adequate balance between a woman's health and the need to protect the embryo.

This pending judgment of constitutionality provides an opportunity to make a few considerations bearing on the questions here discussed, since the Constitutional Court is being asked to assess the reasonableness of a criminal provision having strong bioethical implications. The prohibitions set forth in Article 14(2)(3) make violators criminally liable to imprisonment as well as to pecuniary penalties and to up to one year's suspension from the health-care profession. Article 14(2) provides that—"in view of the advance of science and technology" and the periodic updating of guidelines—embryos may not be created in any number greater than that strictly necessary to a single and simultaneous implantation, and in any event may not be created in any number greater than three. And Article 14(3) provides that embryos may be cryopreserved only in those cases in which—owing to unforeseen, documented, and serious causes beyond human control which affect the woman's health—intrauterine transfer proves impossible; and such a transfer will in any event have to be effected "as soon as possible."

Regardless of what the referring court may observe in regard to the issues brought before it, the provisions under review conflict in more than one respect with the principle of reasonableness. In fact, there are at least four ways in which the provisions in question may prove inadequate when considered in light of this principle.

7.1 A First Sense in Which the Provisions Under Review May Be Deemed Unreasonable: The Drafting Method Used by Lawmaker

One feature of Article 14(2) which raises doubts as to its reasonableness is the drafting method used by the lawmaker in setting it down. In this case, testing the reasonableness of the rule entails making a series of considerations beyond that

which consists in comparing the rule with another one providing a *tertium comparationis*: such further considerations will therefore have to be concerned with the inherent reasonableness of the rule itself.

Having said this, let us return to Article 14(2). By rigidly fixing in advance a maximum number of producible embryos, the provision at issue defeats the purpose of its own appeal to "the advance of science and technology." Here the rationale is supposed to be that of making the provision itself open-ended or responsive to the constant evolution under way in medicine and science. Statutorily establishing a set limit of three embryos winds up instead ossifying the provision, thereby making it unreceptive to the rapid changes that are taking place in this field of research. As much as one might argue here that this is not such a crippling feature of the provision, since the entire law is subject periodic updating under certain guidelines devised specifically for it, this cannot be held up as a solution, because the guidelines in question can only *supplement* or *specify* the law but not modify the substance of it. Article 14(2) thus seems to fail of reasonableness by virtue of its not being suited to receiving the feedback from science which the provision itself claims to take into account, and which appears indispensable in light of the fast-changing nature of assisted reproductive technology and, of course, its close dependence on scientific innovation. One can appreciate, in short, a certain contradiction between the provision's declared legislative purpose and the encapsulatory form chosen for the provision itself.

7.2 A Second Sense in Which the Provisions at Issue May Be Deemed Unreasonable: Their Cap on the Number of Embryos That May Be Created and Their Prohibition Against Cryopreservation—an Unreasonable Balancing of Conflicting Interests?

The interests falling within the scope of a criminal statute must be balanced in such a way that the limitation imposed on the disfavoured interest respects the standard of proportionality and preserves the core of that interest or right. Reasonableness in the balancing of rights or interests by law thus lies in the "prohibition against imposing unilateral or otherwise excessive demands" (Luther 1997, 358; also see Palazzo 1998, 381; Manes 2007, 768ff.).

So, where the challenged provisions are concerned, we must ask whether the sacrifice imposed on the health of the mother-to-be might be justified—or adequately made up for—in view of the need to protect a contrary interest regarded as more urgent or significant. The interest that prevails on the mother-to-be's right to health is, in the provisions under consideration, the embryo's life. The primacy accorded to the embryo's interest upturns the precedent set by the Italian Constitutional Court with decision No. 27/1975 on abortion. The balancing test is worked out in this ruling by favouring "not only the mother's right to life but also her right to health" with respect to the need to "protect the embryo." This view defended by the court

is grounded in the "nonequivalence" between the two spheres of interest at issue, in that "the right not only to life but also to health of someone who already is a person cannot be equated with the right of someone who is not yet a person, namely, the embryo." (Dolcini 2004, 459). So, while on the one hand, the extension to the unborn child of the inalienable human rights set forth under Article 2 of the Italian Constitution justifies providing the embryo with criminal protection, the same extension cannot, on the other hand, be taken to mean that the law may accord to the embryo a "total and absolute primacy."

In the Constitutional Court's 1975 ruling, reasonableness in balancing is gauged by the relation of direct proportionality between someone's ascribed status as a person and the degree of protection afforded by criminal remedies. But the assumptions on which Italian lawmaker framed the 2004 law effect a complete about-face with respect to that gauge. Viewed in this light, then, the 2004 law on medically assisted procreation fails to comply with the model of reasonableness forming the basis of a well-established precedent set by the Constitutional Court, and forming as well as the basis of the legislative scheme by which abortion is currently regulated.

7.3 The Legal Limitations on Reproductive Technology and the Unreasonable Requirement to Sacrifice the Woman's Health

It has been discussed so far how the prohibitions introduced with Article 14(2)(3) of Law No. 40/2004 are in important ways ineffectual, even self-defeating. In addition to that, there is also their being *criminal* prohibitions, and it is striking to think that the procedures so criminalized had hitherto been legal and admissible—in fact they were fully recognized as good medical practices which even helped to form the best-science standard developed at assisted-reproductive-technology centres internationally. In contrast to what had been the case before the law went into effect, the prohibition against producing embryos in any number greater than that necessary to a single and simultaneous implantation, coupled with the prohibition against cryopreservation, makes it so that if an embryo fails to adhere to the uterus, the woman has to undergo a new ovarian-stimulation procedure, thereby exposing herself to the risk of conditions associated with fertility hormone injections (conditions such as ovarian hyperstimulation syndrome and neoplasm). This risk, therefore, cannot be characterized as inherent in the use of reproductive technology but is rather a direct consequence of the legislatively established rules at issue.

In short, the 2004 law sets up a demanding procedure—and one that is not risk-free, either—even as alternative solutions are available which carry a lesser risk and employ, to use the language of the law, under Article 4, paragraph 2, a "physically and psychologically less invasive technique." The policy decided by the legislature in framing this law thus seems difficult to bring in line with the "lesser invasiveness" principle which the law itself invokes, and in a broader sense the policy seems to be at odds with the principle requiring precaution and adequacy of means. It seems evident, in light of these considerations, that a judgment assessing the constitutionality of the provision in question as to the alleged infringement of the right to health

(set forth under Article 32 of the Italian Constitution) proves to be deeply tied to a reasonableness test. Indeed, under the previously discussed constitutional precedent,[11] no legislation regulating therapy can be based on legislative discretion alone but must instead take into account the soundest medical and scientific knowledge available. And it was argued that this is not what the challenged 2004 law does, since its sacrificing of the mother's right to health is not based on constraints inherent in medical protocol but derives directly from legislative choice, thereby indicating that the law does not hold up under a strict test of reasonableness.

7.4 The Law on Medically Assisted Procreation and the Parameter of Systemic Reasonablenes

If we shift focus now from an analysis of the single provisions contained in Law No. 40/2004 to an overall assessment of this law, we will see that reasonableness is still useful as a tool by which to judge its external coherence, meaning its coherence with the rest of the legal system, to see whether it supports the system's intrasystemic coherence. One cause for concern in this connection is that this law (No. 40/2004) unreasonably affords for the embryo greater protection than that which the Italian law on abortion (No. 194/1978) affords for the foetus (Canestrari 2004, 417; Risicato 2005, 679ff.; Romano 2007, 512–13). In other words, the entry into force of the 2004 law made it so that the Italian legal system now affords—under its criminal law—greater protection for the very first stages of embryo development than it does for the (more advanced) fetal stage: an embryo is much more closely protected when still *outside* a mother's womb than it will be once it has been implanted.

This uneasy relation between the two laws in question (the one on medically assisted procreation and the other on abortion) thus introduces an element of intrasystemic unreasonableness as concerns the criminal protection of prenatal life: it would be reasonable to expect such protection to intensify in proportion as prenatal life develops, yet the legal system does exactly the opposite, by making the relation *inversely* proportional instead. The resulting criminal regulation thus sets up between the embryo and the foetus a differential treatment that does not seem fully in keeping with the principle of reasonableness understood as intrasystemic coherence of the legal system. There are further examples that can be adduced in this regard. Among the most significant of them is the criminal prohibition against preimplantation genetic diagnosis (embryo screening) involving a procedure that is more than merely observational, a prohibition set forth under the original framework of Law No. 40/2004 with its accompanying guidelines (Ministerial Decree of 21 July 2004): it seems that this prohibition is rendered all but meaningless by the possibility for the mother to undergo prenatal diagnosis (by amniocentesis or by chorionic villus sampling) and to decide, on the basis of the test results, whether to proceed to an abortion.

[11] Constitutional Court, decision 282/2002.

8 Conclusions

The considerations thus far made evince, even in their succinct form, not just the multiform nature of principle of reasonableness but also its growing use in working through bioethical issues falling within the scope of criminal law. This can be appreciated with respect to the activity of both the courts and the lawmaker. Where the courts are concerned, we can see the standard being used in deciding hard cases relating to bioethics, as in a recent controversial ruling rendered by the Italian Court of Cassation on the issue of whether lifesaving treatment may be withheld from a patient in a permanent vegetative state: here the court explicitly invoked the "conciliatory logic of reasonableness, which makes it necessary to take into account the concrete circumstances of the case at hand."[12]

Where legislative decision-making is concerned, on the other hand, reasonableness can serve as a criterion by which to assess whether it is advisable to make use of criminal punishments. From this standpoint, reasonableness can play an important role that comes into focus once we consider the delicate nature of bioethical issues, which bear a strong connection to the whole question of the basic rights and of human dignity. From the specific perspective of the criminal law regulating bioethical subject matter, the most relevant role we see for reasonableness—among its multiple roles—consists in making sure that the constitutional principles of criminal law are respected. The ethically sensitive and contentious nature of bioethical issues is such as to call for a mild rather than a severe regulatory scheme, all the more so if a choice is made to bring such issues under the scope of criminal law, and in these cases reasonableness must accordingly act as a bulwark against criminal laws which fail to satisfy the requisites of adequacy, proportion, and necessity or which otherwise entail an unjustified—unreasonable—limitation on some of the interests at stake.

As we have seen, the fact that criminal punishments affect the fundamental rights requires the reasonableness test in the criminal area to be especially rigorous, based on a model of strict scrutiny in assessing the reasonableness of a criminal law and not on the looser assessment of whether the law in question embodies a minimum of rationality (Manes 2007, 742). For these reasons, and keeping to the specificity of criminal law, we should note that reasonableness makes more sense as a device by which to limit the overprotection (*Übermaβverbot*) of interests than as a device by which to ground a prohibition against an under-protection (*Untermaβverbot*) of interests, as can instead be seen in the way the German Constitutional Court has framed (in its own case law) the issue of abortion (Luther 1997, 345; Manes 2007, 762).

In conclusion, there emerges with respect to bioethical issues a need to embrace a notion of reasonableness in criminal law anchored to the basic guarantees that such law is supposed to ensure. In other words, because the constitutional principles governing criminal law are the very benchmark by which to determine the

[12] *Corte di Cassazione, sez. I civ.*, decision 21748/2007.

legitimacy of legislative enactments, the operation of these principles cannot be undercut by reference to reasonableness. In fact, as we discussed, the dependency works in the opposite direction, for it is the standard of reasonableness that must be modelled on the constitutional principles of criminal law, and not vice versa. This holds all the more for ethically pregnant areas of legislation such as bioethics, where the basic guarantees underpinning criminal law must stand firm and cannot be renounced—beyond all reasonable doubt.

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