Corte costituzionale

ORDER NO. 334 OF 2008

Franco BILE, President

Ugo DE SIERVO, Author of the Judgment

ORDER No. 334 YEAR 2008

In this case the Court considered a jurisdictional dispute between the Milan Court of Appeal and the Court of Cassation on the one hand and the two houses of Parliament on the other concerning a case in which the courts had ordered the termination of the feeding of a person in a persistent vegetative state. The Chamber of Deputies and the Senate claimed that the courts had adopted "a substantially legislative decision". The Court dismissed the dispute, finding that the houses of Parliament had sought to challenge the substantive merits of the court rulings, rather than establish that the courts "used the contested measures – which had all the characteristics of court rulings typical of them, and which thus had effects only in the case before them – as mere formal pretexts for exercising legislative functions or for infringing Parliament's lawmaking powers".

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

ORDER

in proceedings concerning a jurisdictional dispute between branches of state arising following judgment No. 21748 of the Court of Cassation of 16 October 2007 and the order of the order of the Milan Court of Appeal of 25 June 2008, commenced pursuant to appeals by the Chamber of Deputies and the Senate of the Republic filed in the Court Registry on

17 September 2008 and registered as Nos. 16 and 17 in the Register of Jurisdictional Disputes between Branches of State 2008, admissibility stage.

Having heard the Judge Rapporteur Ugo De Siervo in chambers on 8 October 2008 .

Having found:

that in the appeal filed on 17 September 2008 (Register of Jurisdictional Disputes between Branches of State, admissibility stage, No. 16 of 2008), the Chamber of Deputies raised a jurisdictional dispute against the Court of Cassation and the Milan Court of Appeal, claiming that these courts had "exercised powers intrinsic to the legislature, in any case infringing the prerogatives of the said branch";

that, in particular, judgment No. 21748 of 2007 of the Court of Cassation (1st Civil Law Section) and order No. 88 of 25 June of the Milan Court of Appeal (1st Civil Law Section) had "created innovative arrangements applying to the facts before them, based on presuppositions which could not be inferred from the law in force by any of the interpretative criteria that may be used by the courts", and should accordingly be annulled by this Court;

that both measures mentioned were adopted pursuant to an application by the guardian of a young woman to interrupt treatment (feeding by stomach tube) which maintains the persistent vegetative state in which she has been for a number of years following a road accident;

that this application, which had already been rejected by the *Tribunale di Lecco* and by another section of the Milan Court of Appeal, was finally accepted by the contested order, following the judgment by the Court of Cassation in which it annulled the negative ruling of the Court of Appeal;

that la Court of Cassation has found that a legal representative who requests the termination of treatment essential to life "must, first of all, act in the exclusive interest of the incapacitated individual; and, in the search for the best interest, must decide not "instead" of the incapacitated individual nor "for" her, but "with" her: it is therefore necessary to reconstruct the presumed wishes of the unconscious patient, who was already an adult before falling into that state, taking into account the desires expressed by her

before losing consciousness, or inferring these desires from her character, lifestyle, inclinations, reference values and ethical, religious, cultural and philosophical beliefs";

that the interruption of the treatment may therefore be ordered only: "a) when, in accordance with a rigorous clinical assessment, the condition of a vegetative state is irreversible and there are no medical grounds, according to scientific standards recognised on an international level, for the supposition that the person has even the slightest possibility of any, even tenuous, recovery of consciousness and of a return to a perception of the outside world; and b) provided that this application is really representative, on the basis of clear, consistent and convincing evidence, of the voice of the represented individual, drawn from her character, lifestyle and beliefs, and corresponding to the way in which she understood the very idea of human dignity before falling unconscious";

that the applicant Chamber of Deputies considers that the dispute is clearly admissible insofar as it does not aver a mere *error in iudicando* by the courts: the two court are *vice versa* claimed to have filled the legislative gap taken as a prerequisite for their own judgments "through activity which essentially displayed the characteristics of full blown legislative activity";

that therefore the Chamber of Deputies has an interest in "restoring the constitutional order governing competences", since these judgments resulted in "the radical subversion of the principle of the division of powers" in violation of Articles 70, 101(2) and 102(1) of the Constitution;

that the presumption underlying the applicant's arguments lies in the absence of express legislative arrangements suitable for regulating the case before the Court, as asserted by the Court of Cassation itself;

that whilst the Court in any case considered that it was in a position to accept the application, the Chamber of Deputies argues that the court was precluded from doing so, given the "location of the matter within the sphere typical of legislative discretion": by contrast, the courts "set about unilaterally producing legislation";

that this fact is confirmed by numerous indications pointed out by the applicant;

that, in the first place, the Court of Cassation drew inspiration from “a cluster of references to solutions to this issue which had been adopted in foreign legal systems and foreign judgments” and, going so far even as to reach beyond the limits set out in these judgments, itself confirmed that it was “impossible to identify specific legislative arrangements within Italian law as in force”; moreover, “the numerous draft bills proposed in this area, which were moreover pending at the time when the contested court rulings were adopted” were “evidence” of the legislative gap which had hitherto accompanied the so-called 'living will': “on the other hand, it can be well understood”, the Chamber of Deputies adds, “that within the context of the fields of human experience in which, as is the case in the matters before the Court, medical and scientific development raises controversial and fundamental ethical/legal questions, Parliament's response – irrespective of whatever stance it might adopt – cannot be virtually immediate, but requires adequate time for reflection, without prejudice to the application of existing legislation during the intervening period”;

that in the presence of these conditions, in order to justify the intervention by the courts, it is not “appropriate to rely on the impossibility of applying the maxim '*non liquet*', since its rationale is certainly not that of permitting the transformation of the courts into lawmakers, but as is known is rather aimed at rendering the requirement to comply with the system of legislation in force yet more inescapable”;

that in fact, in the light of Articles 70, 101 and 102 of the Constitution, “nobody can deny that, in accordance with our legal tradition, the Constitution lays down a requirement to divide tasks between the legislature and the judiciary, the core nucleus of which cannot be subject to amendments or moderations of any kind. This requirement is precisely set out in the constitutional provisions mentioned above, which firmly reject the idea – which is however an objective fact underpinning the judgments contested here – that there is nothing more than a porous frontier between the legislature and the judiciary which each branch may freely cross as necessary”;

that this conclusion should all the more so be restated with reference to the legislation governing the constitutional rights which may only be amended through primary

legislation, because in this case “the law is the 'privileged' means provided for the configuration” of these rights;

that, the applicant continues, the courts did not have jurisdiction to rule pursuant to Article 12 of the provisions applying to the law in general because, on the contrary, Articles 357 and 414 of the Civil Code, which govern the powers of guardians, should as things stand already have precluded acceptance of the application, since in the opinion of the Chamber of Deputies a guardian cannot be granted the right to “dispose of the life of the protected individual”;

that, similarly, Article 5 of the Civil Code, which regulates decisions to dispose of one's own body, and Articles 575, 576, 577, 579 and 580 of the Criminal Code, concerning murder, should have required the court to find that Italian law is “inspired by the basic principle that no person has the right to dispose of the human life”, protected under Article 2 of the Constitution, as has already been found, in a case which the Chamber of Deputies considers to be similar, in a judgment of 15 December 2006 of the *Tribunale di Roma*, 1st Civil Law Section;

that, by contrast, the legislation referred to by the courts in support of their judgments appear to the applicant to be “clearly inappropriate”: in fact, legislative decree No. 211 of 24 June 2003 (Implementation of directive 2001/20/EC relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use), Article 13 of law No. 194 of 22 May 1978 (Provisions offering social protection for maternity and the voluntary termination of pregnancies), as well as the code of ethics for physicians, Article 2 of the ECHR along finally with the Oviedo Convention enshrine the opposing principle of the protection of the right to life and health of the patient;

that, finally, not even Articles 13 and 32 of the Constitution are capable, according to the Chamber of Deputies, of supporting the conclusions reached by the courts, given that “even accepting the argument that constitutional principles may be applied directly by the courts, this eventuality must be restricted to cases in which their normative content is unequivocal and self-sufficient, and is as such capable of performing *ex se* the function of a comprehensive criterion for the resolution of the case”;

that, on the other hand, the aforementioned constitutional provisions are not in themselves capable of providing the court with a rule by which to decide the case, also in view of the "different readings to which Article 32 of the Constitution may be subject";

that in order to arrive at the conclusion which it reached, according to the Chamber of Deputies the courts should by contrast have raised a question concerning the constitutionality of Article 357 of the Civil Code: by failing to do so, they on the other hand ended up "setting aside the legal provisions which would have precluded the solution adopted", replacing them with "legislation devised *ex novo*";

that for these reasons, the Chamber of Deputies requests the Court, by declaration that the dispute is admissible, to declare that the court was not entitled to adopt the contested decisions, and hence annul the same;

that by appeal filed on 17 September 2008 (Register of Jurisdictional Disputes between Branches of State, admissibility stage, No. 17 of 2008), the Senate of the Republic raised a jurisdictional dispute against the Court of Cassation and the Milan Court of Appeal, concerning the same decisions contested by the Chamber of Deputies, requesting this Court to rule that "the judiciary, and in particular the Supreme Court of Cassation, was not entitled: a) to establish the right of a person in a persistent vegetative state to obtain the termination of invasive medical treatment amounting to a useless prolongation of life by medical means and which will with certainty result in her death; b) to order the enforceability of this highly personal right by the guardian in view of and given the assumption of presumed opinions previously expressed by the invalid", and hence annul judgment No. 21748 of 2007 of the Court of Cassation and the order of 25 June 2008 of the Milan Court of Appeal;

that the facts of the case are the same as those already stated by the Chamber of Deputies: the measures taken by the courts amounted to an "interference in the sphere of competence of the legislature", based on a "conscious supplementary intention aimed at remedying a supposed situation involving a legislative gap"; indeed, the existence of draft bills pending on this issue gives this interference the character of an undue intervention "in specific legislative procedures in progress before Parliament";

that, as regards the question of admissibility, the Senate notes that “the purpose of the appeal is exclusively to demonstrate that the judgment established a principle of law which reached over into the competences of the legislature, and hence overstepped the limits which the legal order places on the judiciary, rather than to invite the Court to review the logic of the arguments followed by the Court of Cassation when reaching its judgment”: the aim is not therefore to point out an *error in iudicando*, but the fact that the court ventured beyond the “very confines of the judiciary”; against this background, the challenge directed against the “interpretative errors by the court” is “an essential step in highlighting the time and manner in which the court” overstepped its functions;

that, on the merits, the Senate considers that the Court of Cassation has adopted “a substantially legislative decision”, by which “it introduces into Italian law the authorisation to terminate the life of a patient in a persistent vegetative state”, but neglecting to attain this result by the only path open to the court in such cases, namely by raising the question of the constitutionality of Articles 357 and 424 of the Civil Code, insofar as they preclude full protection of the right to health; in other words, the Court of Cassation “aimed to find, in some cranny of the legal system, a legislative pretext which allowed it to formulate a principle of law which permitted it to order the termination of the life of the patient”; in order to do this, the Senate continues, “it was forced to refer to isolated judgments of courts from legal systems other than Italy, as well as to the Oviedo Convention, (…) disregarding the fact that under Italian law there are already norms applicable to the case before the Court, including in particular those contained in the Criminal Code (Articles 579 and 580 of the Criminal Code)”;

that, in this way, the Court of Cassation is claimed to have overstepped its own role as guarantor of the uniform interpretation of the law, infringing the competences conferred on Parliament pursuant to Article 70 of the Constitution: the case before the Court should have been decided not according to the maxim *non liquet*, but with the recognition that the claim was groundless under current law; it is in fact a matter for Parliament “to adopt satisfactory legislation aimed at regulating end-of-life choices”: the applicant claims that “by returning the issue in question to the setting of parliamentary political representation, it will be

possible to ensure the participation of the most varied elements of civil society, including those which give voice to the scientific, cultural and religious world. According to a formulation of the issue which appears to be difficult to dispute, the recourse to legislation guarantees respect for the principle laid down in Article 67 of the Constitution through the adoption of choices that are certainly in the interest of the entire national community", particularly when confronted with legislation concerning fundamental rights subject to a "primary law reservation";

that the Senate goes on to emphasise that the court should have developed its arguments on two points, both questionable, namely "the right of the person afflicted by illness to obtain the termination of medical treatment" and "the guardian's ability to exercise this right";

that, with regard to the first point, the applicant notes that the provision of food and water are only by considered by some to be therapeutic treatment, whilst others regard them as "essential healthcare duly provided by the physician" who, also on the basis of the document drawn up by the National Bioethics Committee of 18 December 2003, is under a "duty to proceed"; in any case, in the absence of "legislation aimed at permitting the termination of treatment of terminally ill persons", in a previous judgment the very same Court of Cassation (order No. 8291 of 2005) and the *Tribunale di Roma* (judgment of 15 December 2006) held that the courts did not have any right to carry out "essentially broad-sweeping activity" in this area;

that by contrast, both Article 2 of the ECHR (as interpreted by the European Court of Human Rights in its judgment of 29 April 2002 in *Pretty v. United Kingdom*) as well as Article 3 of the Universal Declaration of Human Rights underscore, according to the applicant, the "essential nature of the principle of the protection of life", which is hence firmly anchored to Article 27 of the Constitution and Articles 579 and 580 of the Criminal Code, governing the questions of consensual murder and assisted suicide: "there are therefore two contrasting ways of considering the person and her inviolable rights which may lead one to read the decision on the termination of feeding either as a cause of death or

as a manifestation of the freedom to decide the termination of a therapeutic treatment that is unacceptable insofar as disproportionate and useless";

that in order to resolve this tension, the Senate considers that it is necessary for Parliament, which alone is entitled to tackle the issue, to intervene specifying, amongst other things, the conditions and nature of the persistent vegetative state, which is "still subject to uncertainty and differences of opinion insofar as it does not coincide with brain death": similarly, law No. 578 of 29 December 1993 (Provisions governing the verification and certification of death) expressly provided that death shall be regarded as the irreversible cessation of all brain activity;

that the need to legislate is confirmed by "international law instruments" such as Article 5(3) of the Oviedo Convention (the implementation of which would have required the legislative decree provided for under Article 3 of law No. 145 of 28 March 2001 (Ratification and implementation of the Council of Europe Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine: Convention on human rights and biomedicine, done in Oviedo on 4 April 1997, as well as the Additional Protocol No. 168 of 12 January 1998 on the prohibition of cloning of human beings)) and Article 3(2) of the Charter of Fundamental Rights of the European Union;

that, as regards the powers of the guardian, the Senate asserts "that under Italian law there is no specific power of the guardian to intervene with regard to the right, which in any case is not available, to terminate life and the constitutional regime for rights defined as highly personal" in the absence of legislation concerning the so-called living will;

that, in particular, the conviction expressed by the courts regarding the extension of the powers of guardians beyond the realm of pecuniary interests is mistaken in the absence of a specific provision conferring such powers: in another judgment, the very same Court of Cassation (order No. 8291 of 2005) precluded a "general power of representation with reference so co-called highly personal decisions";

that, in view of this principle, the contrary examples pointed to by the contested decisions (Article 4 of legislative decree No. 211 of 2003 concerning clinical trials; Article

13 of law No. 194 of 1978 concerning the voluntary termination of pregnancies; Article 6 of Oviedo Convention) appear to be exceptional and not open to application by analogy: the exercise of the right to “dispose of one's own body” and to “decide on ones own healthcare” cannot therefore be entrusted to the guardian.

Whereas:

in two separate appeals, the Chamber of Deputies and the Senate of the Republic commenced the jurisdictional dispute against the respondent courts, arguing that judgment No. 21748 of 2007 of the Court of Cassation and the order of 25 June 2008 of the Milan Court of Appeal arrogated, and in any case infringed, the legislative competences of Parliament;

in particular, these measures, which put in place time limits and conditions for the termination of the treatment consisting in artificial feeding and provision of water to which a patient in a persistent vegetative state is subject, are claimed to have used the court system in order in reality to modify the the law in force, thereby encroaching on an area reserved to Parliament;

the appeals should be joined since they concern the same matters;

during this stage of proceedings, pursuant to Article 37(3) and (4) of law No. 87 of 11 March 1953, this Court is called upon to rule, without any oral argument between the parties, exclusively whether the appeal is admissible, considering whether the subjective and objective prerequisites for a jurisdictional dispute between branches of state are satisfied;

there is no doubt that each House of Parliament has standing to defend the constitutional competences endowed upon it, even where exercised jointly;

similarly, the Court of Cassation and the Milan Court of Appeal have standing to act as respondents in the dispute, insofar as they are organs competent to make a definitive ruling, in relation to the proceedings of which they are seized, stating the position of the branch to which they belong (*inter alia,* order No. 44 of 2005);

in the judgment at issue in the appeals, the Court of Cassation enunciated, during the course of non contentious legal proceedings, the legal principle to which the lower court

was required to adhere in the case placed before it, and the Milan Court of Appeal applied this principle to the specific case, having already found the hypothetical doubts regarding its constitutionality to be manifestly groundless;

according to the settled case law of this Court, disputes concerning court rulings are admissible "only when the status of the decision or findings contained in it as a judicial decision or finding is challenged, or when it is claimed that these limits have been overstepped – limits different from subjection of the courts to the law, including constitutional law, which it encounters within the legal system as guarantees for other constitutional competences" (order No. 359 of 1999; see also, more recently, judgments No. 290, No. 222, No. 150, No. 2 of 2007);

the same case law asserts that a jurisdictional dispute concerning a court ruling cannot be reduced to the presentation of a legal and logical solution alternative to that contested, since jurisdictional disputes "cannot be transformed into an atypical form of appeal against court rulings" (order No. 359 of 1999; see also judgment No. 290 of 2007);

however, this court finds that in the case before it there are no indications capable of demonstrating that the courts used the contested measures – which had all the characteristics of court rulings typical of them, and which thus had effects only in the case before them – as mere formal pretexts for exercising legislative functions or for infringing Parliament's lawmaking powers, with which the latter is always and in any case endowed;

despite both parties' assertions that they do not wish to criticise *errores in iudicando*, they in effect submit various criticisms regarding the way in which the Court of Cassation selected and used the legislative material relevant for the decision or how it interpreted it;

the procedural matters which gave rise to the present proceedings have not yet been concluded whilst, at the same time, Parliament may at any time adopt specific legislation in this area, based on an adequate balancing between the fundamental constitutional rights in play;

accordingly the objective requirement for the instigation of the jurisdictional disputes raised does not subsist.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

rules the appeals concerning the jurisdictional dispute raised by the Chamber of Deputies and the Senate of the Republic against the Court of Cassation and the Milan Court of Appeal, as mentioned in the headnote, inadmissible pursuant to Article 37(3) and (4) of law No. 87 of 11 March 1953.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 8 October 2008.

Signed:

Franco BILE, President

Ugo DE SIERVO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 8 October 2008.

The Director of the Registry

Signed: DI PAOLA