The Place of Religious Institutions in the Elaboration of the Juridical Norms in Europe: The Case of Euthanasia.
The legislation on euthanasia in Europe, or the limits of the autonomous individual?

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Session: The Place of Religious Institutions in the Elaboration of the Juridical Norms

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Abstract. This presentation highlights the main issues involved in the author’s current research project on legislation on euthanasia in Europe. It is a comparative study of three countries, classified as culturally Catholic, where the author has already conducted extensive field research: France, Belgium (with its two different modes of regulation), and Spain, where the norm is currently being developed. Two main elements are underscored: the role played by civil society groups, and in particular by religious groups, in the process of norm setting and the influence of religious norms on legal norms, on the one hand, and the binding quality of the norm and/or the practice, by way of legislation and/or of a practice heralding the principle of individual autonomy while upholding some fundamental principles, or rather the desire to legislate in a more precise manner, which triggers the establishment of a normative model. More generally, through the domain of the “politics of death,” the presentation questions the reality and the limits of the normative neutrality of the state, and the reality in modern societies of the founding principle of modernity: autonomy.

Introduction

Part and parcel of the processes of modernization of the state in Europe, as well as of the processes of political emancipation vis-à-vis established churches and religions, the autonomization of medicine as a field and as an institution has played a crucial role¹, first on a legislative level (with such instances as the creation of the notion of illegal practice of medicine), but

also on more concrete, and especially symbolic, levels, pertaining to the link between science and medicine, which constitutes a strong modern value. However, the “secularization” of medicine has been highly dependent, in its form and in the degree of autonomization granted to the medical field, upon three main types of sociopolitical contexts. The first encompasses different aspects, in the countries considered, of the relationship between religion and politics, and the way in which the process of dissociation was conceived of and established – how the religious was separated from its evolution, both at the level of practice and at the level of ideology and discourse. The second context has to do with the relation between the state and civil society, that is to say, the way in which the state, in the country considered, “institutionalizes” – or not – society by defining in it – or not – a sense of the common good, hence encouraging and putting into practice an “interventionist” conception of health. Again, this factor is closely dependent upon the dominant values asserted during the process of modernization, because these values underpin the dominant mode of regulation in this particular society (contemporary Spain thus grounds an important part of its social legislation in the claim for a better respect of the norm of equality). Finally, the third aspect has to do with the position and the status of the medical domain in each country, and whether or not the relationship of the general society and individuals with medicine is institutionalized. Beyond the mere question of the law, it is necessary here to take into account the cultural tradition governing the relation to the doctor and the medical institution. For example, in France, medical doctors display, and are still widely oriented by, a largely therapeutic attitude, founded upon the scientific means at their disposal, leaving a narrow autonomy of decision left to the patient, which might in part explain the fact that patients tend to demand that these scientific means be used, including when they make claims for euthanasia, whereas the way the claim is presented will be different in a context traditionally more grounded in the idea of individual attention and the possibility of assisted suicide.

In fact, in our view the question of euthanasia in the context of the relation of medicine to political society and religious norms constitutes one of the most important domains, if not the most important domain, in which the question of the autonomy of the Weberian Kulturmensch as one of the ideologically founding values of our societies is posed in the most acute manner. This is the reason why we shall dedicate the present study to this question.

This multidimensional question, highly contextualized, as we just saw, should also be approached in light of two contemporary trends: first, the

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3 We can also underscore another highly contextualized factor: the difference between the actual term used in different countries, euthanasia, assisted suicide, "Sterbehilfe" in Germany, given the heavy historical connotations of other terms.
evolution of regulation in contemporary societies, linked to what we can call, without getting into theoretical debates, postmodernity, late modernity, or ultramodernity, which leads, regardless of the national political tradition, be it rather “republican” or rather “liberal”, to insist first and foremost upon the role of individuals and their choices, as opposed to some form of “general will”. Then, another question arises to complexify the debates: the evolution of medical techniques, which make it possible to keep some people alive where this would not have been possible in the past. This then begs the question of the possibility to assert a “right to die”, and elicits the arguments over what a society can allow and condone. This last claim opens the debate about whether it is society or the individual who should be allowed to make the decision.

From this spring the following questions, which constitute in our eyes the three terms of the debate we would like to lay out here: the position of the law and the relation between law and morality in the societies considered; the role or influence of religious norms in the framing of the legal norm, and the attitudes and strategies of different religious groups. In conclusion, following these two parts, we shall return to the question of individual autonomy, both in discourse and ideology and in practice – the two sometimes pulling in opposite directions.

**Part 1: The position of the law and the relation between law and morality in modern societies**

Two closely intertwined aspects must be evoked here: on the one hand, the way in which the law regulates, in a more or less binding manner, individual behavior, and thereby constrains individual choices, and the way in which various contemporary forms of regulation have evolved; on the other hand, the distinction between law and morality, which is constitutive of modernity, and its influence on the relation between law and ethics. This general approach will also be applied more precisely to the issue of bioethics, which directly interests us here. It will in part govern the influence granted to religious norms and groups in the making of the law, to which we devote our second part, even if, a priori, democracy means that regulating standards must come from representatives of the people as a whole, that is, first and foremost from the secular state, and not from the conformity to a particular faith, albeit one adhered to by the majority.

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4 Ruth Horn, « La prise en charge des malades en fin de vie en Allemagne et en France », in La vie des idées.fr, 7 Avril 2009, p.1. For instance, it is possible to have similar legislations, as in France and Germany, where euthanasia is considered a homicide, on the basis of different moral foundations, which leads to differing practical rulings. Hence, the very definition of euthanasia is not the same, the term consequently covering different actions.
As the key regulating instrument of modern societies, the law reveals in each of these societies, in its form and the degree to which it institutionalizes social attitudes, a particular way of living together, and it underscores the interaction between the state, the legislation it articulates and which traces the contours of social life and representations, and the community that receives it. The form of the state and the way in which it was developed and conceived is thus crucial. This is true both for constitutional and administrative law, and for the law produced by the state for society, which interests us here. Hence, just as it is common to analytically differentiate between two types of ideologies and forms of state, we can contrast two different traditions of regulation by means of the law, which we can call, in an analytical and heuristic endeavor, a “republican” and a “liberal” mode. The tendencies followed by legislation on ethical or bioethical issues, or on end of life care, illustrate this dichotomy; either a minimal level of legislation in order to allow a large autonomy of choice while ensuring that certain fundamental principles constitutive of the society and chosen by it are upheld, or a more precise set of legislation in order to ensure certain protections, for instance the well-being of children, and hence the definition of a “normal” model of organization, of “family” in the present example, by the choice and the designation, among other possibilities, of the possible receivers of medically assisted conception. By way of consequence, this mode reduces the possibility given to each individual to individually determine his or her choices, even within the respect of the fundamental principles, and in particular the equality of access and the possibility to follow his or her own conception of the “good life”.

It is true that this position must be nuanced and situated within the evolution and the role of the law in contemporary societies as analyzed by Jacques Chevallier under the vocabulary of “transformations of legal regulation”. Chevallier insists in particular on the ever increasing role played by a conception and a practice of law designated as soft law, which refers to a state less directly involved in regulation, where new processes of norm elaboration come into play. The law is more pragmatic, more flexible in its content, and the arenas of legislation are multiplied. The law then does not necessarily appear as the “mode of regulating and framing social relations”. It no longer enunciates a constraint but some objectives that would be worth

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5 In several of her works, Danièle Lochak has demonstrated the existence of an adjacent process, by which the legal category induces within society a vision of what constitutes normality. See for instance Danièle Lochak, « la doctrine sous Vichy ou les mésaventures du positivisme », in les usages sociaux du droit, CURAPP, 1989, p. 252-285, where she proposes the hypothesis that the racial laws of the Vichy regime in France contributed to imposing a conception according to which Jews were not individuals like everyone else.
achieving, and their rather imprecise meaning hence depends upon their interpretation. It is a law-tool that can be modified according to the circumstances.

Does this challenge the crucial role played by the law in the abstract choices open to society? Does it induce a certain flexibility in the way the law is upheld?

Indeed, it seems that, in our period of postmodernity, a challenge is mounted against the very meaning of the law, regardless of the conception, be it chosen or practiced, of its role in social organization. That being said, this evolution does not in our view directly challenge the necessary role of the law in our societies. We refer here to John Rawls, and to his affirmation of the importance and centrality of “justice” as a core principle of democratic systems, given the necessity – and on this point we agree with him – of this procedural justice so that different worldviews and comprehensive doctrines, defined in particular around different notions of the good, may coexist. The primacy of the just over the good that Rawls defends is a reflection of this phenomenon, which, without necessarily leading to the demise of cultural preferences or of philosophical or religious convictions, implies that whatever is not regulated by law may be decided by individuals and communities. There would thus be a possibility, according to Rawls, for certain positions – not all, we shall return to this point\(^8\) – to reach a minimal agreement, by way of a process of deliberation among free and equal citizens, which neither affects nor challenges the different conceptions of the good shared by individuals, relegating these conceptions to the private realm. This general approach deserved to be underscored because, while it seems to be a key to understanding the whole debate, possessing a strong heuristic power, it nevertheless seems only partially relevant to grasp the domain associated with euthanasia, where, in certain countries, there is still in place a real regulation through law, central and binding, which goes against the phenomena of disappearance of such centrality described for instance by Niklas Luhmann. There also exists, it is true, in other cases and legislations, a strengthening of the principle of autonomy, linked for instance to the respect of such values as the equal respect owed to the beliefs\(^9\) of every individual.

\(^8\) These include, for Rawls, the religious positions which include toleration in the very understanding of faith; philosophical positions pertaining to political liberalism, Kant or Mill; political positions pertaining to a democratic political conception. See, among others: John Rawls, « Réponse à Habermas », in John Rawls, Jürgen Habermas, débat sur la justice politique, Paris, Le Cerf, 1997; John Rawls, Paix et démocratie, le droit des peuples et la raison publique, Paris, La Découverte, 2006.

\(^9\) This, in Spain, goes hand in hand in the current projects to put in place a legislation on assisted suicide, with a will to enforce territorial equality, a problem often raised because of the large competences wielded by the autonomous communities in legal matters and in the upholding of the law, which appears as part of the argument in the current project to modify the law on the termination of pregnancy, which should offer women an equal access to medical facilities on the entire Spanish territory.
From this first perspective, the politics of death would thus appear as one of the last strongholds of the resistance, in some legal-political traditions, against the acceptance of the founding principle of autonomy – which means, however, by placing the individual at the center of the process of decision-making, granting the individual the freedom to make choices in matters of life, and hence also of death.

This seems partly linked to the evolution of the relation between law-morality-ethics. The distinction between law and morality is a product of the enlightenment. We thus defend the idea, suggested by Dominque Terré\(^\text{10}\), that the fact that there are today pluralistic ethical convictions makes it so that some of them sometimes try to find legitimation by the law, or to bolster their legitimacy through the law, because they no longer possess any binding value other than morality, in a society where this is necessarily relative. The relation between law and ethics thus seems to evolve in two opposite directions:

- in certain domains, an evolution towards liberalization, decriminalization (in cases of abortion, the use of drugs, euthanasia in Belgium): it is hence a liberal form of law, which does not carry a particular moral conception, and leaves moral responsibility entirely in the hands of the sane individual. Here, we find ourselves in the very core of the meaning of autonomy and political modernity, a conception which, for instance, does not correspond to the conception developed in France, by Rousseau, of the role of the law as configurator of society, while it does not move as far away as one could expect form the idea that founded the Civil Code, which is defended by Jean-Etienne-Marie de Portalis\(^\text{11}\) as a characteristic of modern law: laws that must follow and confirm the current state of morals, and not the opposite.

- in a different direction, and in a new way, the law seems to respond to a claim that ethical demands be fixed, thus determined by the collectivity rather than by the individual, leading to harsh sanctions against drug trafficking, discrimination, or racial abuse. In these cases, we can say that there is a form of substantialization of the law, or perhaps re-substantialization, and we can consider that the law no longer only confirms the evolution of morals.

More generally, we can claim, following Raymond Boudon, that it is not possible that the law merely follow morals\(^\text{12}\). We can consider that at no point in history, including modernity and late modernity, have morals entirely been built on morality, and that the law has more or less always

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\(^{11}\) Jean-Etienne-Marie de Portalis, « Discours préliminaire au premier projet de Code civil », 1801. Portalis was one of the main authors of the Napoleonic Civil Code, and in this text written in the early 19th century, he develops a very rich analysis of the role of the law in a modern society.

served as an auxiliary, allowing a regulation of domains or questions unsettled by morality. This is for example the case of the Civil Code evoked above, whose authors operated a transaction that made it possible to link morals to the law, and hence to link “the authority of the law to the force of the nation.”

However, it must be emphasized that this would not only be the role of codification, but also of jurisprudence, that is to say the interpretation of codification, of the regularities that it establishes, and from here it is already possible, on the one hand, to express the idea that jurisprudence and its meaning cannot be independent from the state of society, and hence from a certain social pressure, and, on the other hand, a question that we shall return to in our third, concluding section, to establish a parallel with the comparison between the law and practice in matters linked to euthanasia, bringing together the values carried by the law, the will of the law to occupy this role, or to allow each individual to express his or her values, medical deontology and its taking a stance, implicit or explicit, on the therapeutic act and its limits, which brings us back to the position of medicine in society and to the values that regulate it, and to the individual, thereby relative, moral conceptions and practices of medical practitioners that flow from these.

These evolutions of the law, of legal regulation, and of the relation between law and morality and ethics are superimposed on a key question in legal texts which have to express themselves precisely on the domains directly pertaining to morality and to ethics: the question of the influence, if not of the intervention, of religious groups and norms in the elaboration of this legal norm, a question which sends us back to the legitimacy of the religious domain in the public sphere, and, of course, to the compatibility of religious norms and democratic norms.

Second part: the role of religious groups and norms in the establishment of the legislative norm

The political realm is, indeed, linked to the present religious realm. Among the actors recognized as legitimate interlocutors by the decision-making

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13 According to Dominique Terré, it is actually – this is a strong hypothesis that we shall not discuss here – one of the reasons why the law was invented.


15 On can draw a link to the above-mentioned evolution of the progression of legal regulation towards a logic of soft law, soft regulation, which, according to Dominique Terré, could be considered as « an unprecedented encounter between law and morality » (p. 498), a form of expectation the law had towards ethics, which provides less binding rules, but rules that are also less « democratically grounded » (p. 498), and which therefore are bound to encounter opposition when they attempt to impose themselves.
authority – in general within the consultation structures, in a phase preceding the elaboration of the law – one can generally find representatives of the majority of religious faiths present in the national sphere. Surely, this attitude is not systematic, and one can mention the case of Spain, which is currently in this phase of consultation that precedes the actual moment of elaboration. As the Spanish Health Ministry announced in 2008, a working committee comprising experts and representatives of the Justice and Health Ministries was to be created in order to conduct a preliminary study aiming to facilitate the government’s decision-making. Thus, at least in this first phase, the creation of a reflection structure was based on the reference to medical knowledge, on the requirements of the law, and the decision to establish a regulation by law for assisted suicide, i.e. the possibility for a terminally-ill patient to receive the necessary help to put an end to his or her life, which requires a modification of the penal code, will be enacted by the government and thus by a structure endowed with electoral legitimacy. The Spanish case is particularly interesting because it is a process in the making and will thus allow to appreciate whether, in the next stages, a systematic voice is given to the representatives of the different faiths, and in particular to the Catholic Church, which at the moment is not the case, since the normative modification under consideration is not matched, in the decision-making process, by a desire for consultation in moral terms through interlocutors considered legitimate in this regard. Furthermore, the interest of the Spanish case is enhanced by the attitude adopted by the Spanish Catholic Church since the transition to democracy in 1978. Indeed, aware of the situation of cultural pluralism induced by modernization, the bishops try to refer to a power or hegemony with its roots in other social eras and configurations, wanting to reinstate those standard-setting and ethical principles which, in their view, express the collective conscience of the Spanish people. This position has not varied since 1978, in the face of a society in which the creation of legislation in a large number of social domains was rendered necessary by the democratization and the separation between religion and politics, but also by the appearance of new questions, common to all democracies. The Spanish political system as it resulted from the period of transition to democracy has indeed, over the past 30 years, been confronted with new contexts and stakes that have made and will continue to make it evolve. This evolution, as a trajectory particular to Spain, does not, however, represent a forced State or party secularism, imposed upon the society, but is created in the logic of a larger neutrality and in particular faith-neutrality, and is grounded, as mentioned earlier, in the desire to better guarantee the fundamental principles and liberties, and in particular the principle of equality.

Whatever the socio-religious state of the country, however, this argument is never well-received. This assertion is the result (fait?) of the Catholic Church and of its hierarchy, through numerous declarations and statements concerning the evolution of social legislation, in particular regarding topics such as abortion or homosexual marriage.
However, the Spanish law-making process regarding euthanasia appears as an exception, and the French “model”, where an ethics committee including representatives of different faiths was created before the parliamentary mission resulting in the adoption, in 2005, of the law concerning the rights of terminally-ill persons, in its different periods of elaboration represents a more widespread “model”.

Several questions should be asked here: which faiths are present, to what extent do they possess the legitimacy to express their opinions in a structure requested by the political sphere, what is the actual influence of the norms they carry on the law eventually elaborated? The measurement is indeed quite delicate, including through the study of the interveners. More generally, one must here ask the question of the place of religion in the public space, as a source of interlocutors whose expertise is sought because a question touches upon major existential choices, and whose expertise is uncontested, whichever may be the distribution of the convictions of the individuals composing the national community. Put differently, in a field pertaining to the respect of individual convictions, does not the secular state, i.e. the neutral state without any Truth, overstep its role by imposing limits upon everyone and thus upon all not only regarding the respects of the fundamental principles of the society, i.e. the principles common to all, but grounded in the reference to one or several particular morals imposed upon all through the influence they exerted during the elaboration of the legislative norm?

Moreover, it corresponds to a very specific contextualisation, due to the relations of the Catholic Church with the Franco regime, often called “national-catholicism”, but also due to the church’s support of the democratization process, a support resulting from the expectation of a particular legitimacy to express its views of social regulation, which underlines the ambiguity of the institution and its rejection of the implications of democracy. Once again, the Church seems to consider the regulation of some standards of Spanish daily life to be its domain and no one else’s.

Law no. 2005-370 of 22 April 2005, regarding the rights of ill persons at the end of their life, known as Léonetti law.

This is indeed a fundamental methodological question we are confronted with: how can we seize speeches and statements made in political assemblies? It is useful to detect the pre-constructs, the transversal discourses and the topics expressed, in these discourses, in order to distinguish the elements contributing to the construction of the vision of the political, the moral, the links between duty and ethics rendered more complicated, including in modern and differentiated states, by the question of the practical space granted by the political to the religious in the definition of a public ethic.

It would be necessary at this point – another aspect that it was chosen not to dwell upon in this contribution – to mention the debate initiated by Jürgen Habermas in his most recent writings on the resources available to the religions at the moral level in order to found the rules of living together, in
Moreover, this question is reinforced by that of the compatibility of the religious norms with the democratic ethos, more precisely by the idea of deliberation and debate of ideas without the desire to impose, through the law, one Truth.

Let us return, one again, to John Rawls. We also subscribe, in a general manner, to his idea according to which religions, and thus identity referents, undergo an evolution in their contact with liberal democratic societies. This does not imply that it is their doctrines that must change, but rather “the type of arguments they accept to use to defend their points of view.” For Rawls, religions must not employ religious arguments in the public debate, but instead show what he calls the duty of civility, which is an a minimal conception of reason as the capacity to find arguments in dialogue with others, enabling them to participate in large public debates. This implies that religions must use arguments grounded in reasonings intelligible for all, that all can recognize as valid, even if they do not agree with the conclusions. Such behavior would also convey the fact that these religions are “conscious of belonging to a larger community.” This is thus also an initiation to citizenship.

The citizen aspect implies that the members of religious groups, in their sense of citizen belonging, do not seek to impose the consequences of their convictions, in particular in the realm of law, but instead become aware of the consequences for others should this be the case.

However, as mentioned above, Rawls recognizes that this reasoning can be valid only for certain religious doctrines which, in particular, include the principle of tolerance.

The question of the legitimacy of these groups to participate in the consultation, without there being any discussion on this legitimacy, and that of their influence on the elaboration of the civil norm, is thus added to the problem of their doctrinal incompatibility with democracy.

In order to illustrate the debate, we would like to return here to the case of the Catholic Church by choosing, first, the Spanish example. We will begin by quoting the statement made by then Prime Minister Felipe Gonzalez at the beginning of the 1980s concerning the reaction and the demands expressed regard of the limits indicated by the secular reason in this sense. For instance, Jürgen Habermas, L’avenir de la nature humaine, NRF, 2002.

A useful analysis was conducted by Philippe Portier in « Liberté et religion dans la pensée de Jürgen Habermas », Politeia, avril 2007, p. 35-52.


23 Catherine Audard, « John Rawls et les alternatives libérales à la laïcité », in Raisons Politiques 2009/2, n° 34, p. 101-125, p. 115


John Rawls, Paix et démocratie, le droit des peuples et la raison publique, Paris, La découverte, 2006
by the Vatican about the establishment of a law on abortion: “The Church’s
hierarchy often seems concerned by what it calls a ‘dechristianisation’ of the
country, and by the part it believes we have played in this. I see (…) the
Christian faith as part of the historical personality of the Spanish people. I
feel it would be stupid to try and change this by decree; [ But ] we must not
(…) confuse the modernization of Spain with what the Church sometimes
calls ‘dechristianisation’. Once, the Pope explained his stance on the abortion
law to me in a very interesting way. The problem, he told me, is that many
citizens believe that what is not banned by law is not a crime. Perhaps, I
answered, but by applying the opposite formula, we’d return the Inquisition:
that which is a crime is punished by the law. As leader, I cannot take into
account the moral conscience of every individual. It would be unthinkable to
write into the Criminal code that which is punishable by Catholic morality.
The same goes for Muslim morality!”

This statement concerning the civil law in Spain reflects, more generally, the
ambiguity of the Catholic doctrine regarding the foundations and
requirements of the rule of law, as expressed particularly during the second
Vatican Concile (Concile Vatican II) through the encyclicals Gaudium et
Spes and Dignitatis Humanae.
In Gaudium et Spes, the Vatican agrees with the idea of the sovereignty of
political organization, but at a moral level, this organization and its
independency is limited by the moral, natural law established by the Creation;
and the Catholic Church remains the only authentic interpret of this natural
law. This is the case even if the political forms, the political leaders, all of
this remains within the province of the citizens, and even if the Church is not
linked to a political system and must not obtain privileges. So, we can say
that Catholicism, through Vatican II, does not recognize the modern idea of
political autonomy. The individual does not constitute the center, the
principle of the political link.
Dignitatis Humanae, on the other hand, expresses the idea that every human
being must have religious freedom as a civil right (because of the dignity of
everyone recognized by the Creation), but and so DH can dialogue with
modernity, but that civil right allows everyone to look freely for the Truth,
that means the Catholic one.
To look from a more general perspective at the way in which the Catholic
Church as a whole has accepted democracy in all its aspects, one can refer to
a text particularly important in this respect, namely Jean-Paul II’s encyclical,
Centessimus Annus of 1st May 199125, which can be interpreted as a criticism
of those who “on the behalf of a scientific or a religious ideology, try to
impose their view as to what is good and fair upon everyone.” “The Christian
truth is not like this”, a reflection of the idea in Spanish statements. The
Church fully respects freedom. But “freedom can only be fully valued by
embracing truth”. And the text clearly states : “democracy without values
easily becomes upfront or underhand totalitarianism, as we’ve seen with
history (versus the historical truth, furthermore).” The Church therefore

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25 One may here refer to the work of Philippe Portier, *La pensée de Jean-
defends the universal right to enlighten people and prevent democracy from representing a totalitarian risk; democracy without God and without Catholic truth is lacking in something. Behind all this do we not find that persistent idea of the primacy of the spiritual sword, and especially of the priority, in terms of values, which can be expressed particularly easily in those countries where the Catholic Church has, for longer than in many others, benefited from the support of a temporal sword?

As a counterexample, one can mention a different way of reaching out to religious groups or norms in the democratic context, the sense and space of which do not beg the same questions, in order to summarize in conclusion of this part the questions posed by the consultative method in the legislative field. We have here a purely informative recourse, the aim of which is not the reflection on a general norm applicable to all, but a better respect for the convictions of each individual. We are alluding here to the frequent practice, at least in France, of resorting to hospital chaplains during training sessions organized for the medical personnel (or sometimes in response to and dedicated to questions such as the different faiths’ views on death, on bioethics, transplants26, or on “the necessary gestures at the moment of death”, “on what one may do when one enters into a room and sees someone praying”, for instance. The chaplains, just as the medical personnel, generally recognize the utility of such trainings, since it is important that the personnel, in a society often indifferent or without knowledge about the practices, know what may or may not be done, according to the circumstances. This facilitates both their own legitimacy and their relations with the personnel and thus becomes a necessity, for all those faced with the evolution of a society which is not necessarily hostile, but rather areligious. To be sure, these trainings are sometimes considered an enumeration of technical considerations; yet, they contribute to the regulation of the general relations through a better knowledge of the possible demands of the patients with regard to the respect of his or her religious freedom. The training may thus be conceived as a factor of appreciation of the other.

We are thus faced with the situation of the recognition of the place of religions in the public space, legitimized by the obligation of States and public services to respect and to guarantee the exercise of the freedom of religion. The information and the consultation of the faiths are based on the

26 These formations, under different names, such as « death at the hospital, what to say, what to do? Practical approaches for health professionals” in France comprise a group of interveners, medical personnel, psychologists, representatives of different confessions, accompanying personnel, and have a pluridisciplinary approach (biology of death, legislation, support to terminally-ill patients, social aspects, spiritual or religious aspects…). One can here refer to a study of the author on the right and the practice of hospital chaplaincy in France: « La gestion du pluralisme religieux dans les hôpitaux français : droit et pratique des aumônieres », in Anne Fornerod, Francis Messner, Claude Proeschel (dir), L’assistance spirituelle dans les services publics, Presses Universitaires de Strasbourg, 2010, to be published.
desire to ensure to everyone the possibility of conforming with one’s convictions, subject to the usual restrictions in terms of public order, and not to take general measures.

The influence of religious norms on the elaboration of legislative norms, the place of these regarding ethics and the administration of modern societies leads us, in an open conclusion, to the question of the autonomy of the individual, in our case of the terminally-ill patient, which implies that this person be able to determine him- or herself the rules of good life and to comply with them.

Conclusion: death, the last space of autonomy?

We will start out from the French case, briefly sketch out the legal framework and the way of its elaboration, and ask the question of conjunction of the law and its practices. Our aim is not to detail the mechanisms but to base ourselves on concrete elements concerning the two series of questions touched upon here in order to established the most general terms of the debate, i.e. the auto-institution of societies and the autonomy of the individuals.

The debates in France about euthanasia began at the end of the 1970s. The media, from then onwards, qualified the different acts concerned as euthanasia, i.e. as homicide. This led their authors 27 to have doubts on the legitimate character of their acts, in particular regarding the way in which they had interpreted article 37 of the code on medical deontology that states that one must “avoid any unreasonable obstinacy in the investigations and the therapy”. The entire debate thus supported a general attitude in favor of the conservation of life under all circumstances.

Confronted with this reality, two movements appeared in French society which favored more autonomy and less relentless pursuits

- one movement for the “right to determine one’s death” which became, following its organization from 1980 onwards, the Association for the right to die in dignity (Association pour le droit de Mourir en Dignité, ADMD).
- one movement made up of pioneers in the field of palliative care, opposed to euthanasia, but also opposed to therapeutic fury and emphasizing their attachment to the principle of respect for the autonomy of the ill person.

Regarding the political domain, not a single proposition in favor of euthanasia has been accepted. While numerous criticisms and public debates did appear, the answer eventually given exclusively approved of palliative

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27 We concur here with Ruth Horn, « La prise en charge des malades en fin de vie en Allemagne et en France », in La vie des idées.fr, 7 avril 2009
care through public policy measures set up from the 1990s in order to facilitate the establishment of the relevant services. The legislative elaboration reflects the hesitations and ambiguities of this “state of society” and the medical institutions. The 2003 Humbert affair in particular lead to the instauration of a parliamentary committee that resulted in the adoption of the Leonetti Law on 12 April 2005. This law takes up the definition given by the report of the CCNE (Comité consultatif national d’éthique) (including members of the principal religious faiths and other reflection movements) in 2001: euthanasia “constitutes the act of a third person who deliberately puts an end to the life of a person with the intention of ending a situation judged unbearable”. It is thus a deliberative act that is prohibited regardless of the motivation with which it is carried out. Two important elements should be emphasized: one does not know who judges on the unbearable character of a situation and, furthermore, no mention is made of the patient’s will. This law refuses the action of “making somebody die”, but establishes a right to “let die”. Hence, it defines precisely what is allowed and what is prohibited and insists, moreover, on the necessary collegiality of the decision, thus disregarding, for the doctor as for the patient, the idea of an autonomous decision.

This is the philosophy of the legal framework put in place. One should add here an outline of the current situation of the relation between law and practice. Even if it is the law that commands the distribution of things, the actual practice, in a continuous action, contributes to questioning and transforming it. These two dimensions are in constant evolution, not always concomitantly, due to different social, medical, legal or paralegal factors such as reflections on the rights of patients or religious freedom, notions that evolve with the circumstances. In France, it appears that doctors receiving requests for euthanasia respond more favorably than in other countries, although, as we saw, the idea of the respect of the patient’s will is not the dominant principle. One can thus consider that each attempt at qualification must go beyond the traditional frameworks of classification of political systems, be they liberal or “republican”, just as the Spanish case has proven that the presence of a historically, culturally or sociologically very dominant religion does not systematically imply a stronger interference of this religion in the elaboration of the norm.

This shows how difficult it is to know if this topic constitutes one of the domains where autonomy has not been able to be accepted as the guiding principle of the conduct of society, including in societies a priori not of non-liberal tradition. The question of the place of religion in the public space traverses this debates, and one can thus ask whether certain spheres of social activity are placed under a “holy canopy”.

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28 The développement of these services has in fact been very slow, and came against the reluctance of many doctors, because it seemed to oppose their therapeutic conception of their mission.
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