Commentary

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Medically assisted suicide in Italy: the recent judgment of the Constitutional Court

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Abstract

Medically assisted suicide is considered among the most controversial of the current bioethical debate in our Country. In the Italian legal system, we are lacking specific discipline of this practice, as it is covered by the general legal forms applicable to crimes against life. The Constitutional Court, with Decision No. 242/2019, declared the illegitimacy of Art. 580 of the Criminal Code (instigation to suicide), in the part not excluding the punishment of those who facilitates the execution of the intention to commit suicide, independently and freely formed, by a person kept alive by life support and suffering an irreversible disease, source of physical or psychological suffering that the person deems intolerable, but who is fully capable of making free and conscious decisions.

The Constitutional Court found that the current regulatory framework concerning the end of life leaves certain situations constitutionally worthy of protection and to be balanced with other constitutionally relevant assets without adequate protection. The Court has identified the conditions that can justify third-party assistance in ending the life of a sick person.

The judges envisaged the possibility of including this discipline under Law No. 219/2017, but this hypothesis is not shared by the Italian National Bioethics Committee. ***Clin Ter 2021; 172 (3):193-196. doi: 10.7417/CT.2021.2312***

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Medically assisted suicide "is considered among the most controversial of the current bioethical debate in our Country". In its reflection on medically assisted suicide, the Italian National Bioethics Committee emphasises that "we should also consider the fact that personal elements and specific situations play an important role when questioning the issue of the right to life, the existence of the right to death and the ethical values from which to draw inspiration, as well as the dimension in which to place the intervention of a third-party, in particular the physician, called upon to respond to the patient's request" (1).

Such considerations are placed in a context of international laws, such as the Article 3 of the Charter of Fundamental Rights of the European Union (2) and the Convention of the Protection of Human Rights and Dignity of the Human Being Regard the Application of Biology and Medicine (Oviedo Convention) of April 4, 1997 (3), that have inspired the national pieces of legislation and ethics commissions and institutions. With reference of the Oviedo Convention, the Article 9 states that "the previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account".

In the Italian legal system, we are lacking specific discipline of this practice, as it is covered by the general legal forms applicable to crimes against life. Assisted suicide is considered a criminal offence, regulated jointly with instigation to suicide ex art. 580 of the Criminal Code regarding instigation or assisted suicide.

The Constitutional Court, with Decision No. 242/2019 (4), declared the illegitimacy of art. 580 of the Criminal Code, in the part not excluding the punishment of those who, in the manner foreseen by articles 1 and 2 of Italian Law No. 219 of 22 December 2017 about "Rules on informed consent and advance directives" (5), facilitates the execution of the intention to commit suicide, independently and freely formed, by a person kept alive by life support and suffering an irreversible disease, source of physical or psychological suffering that the person deems intolerable, but who is fully capable of making free and conscious decisions.

Health conditions and methods of execution must be verified by a public facility of the national health service, after consulting the territorially competent ethics committee.

This sentence defines the question of constitutional legitimacy raised by the Milan Court of Assizes (6). On the one hand, the Milan Court of Assizes had questioned the scope of application of the rule, in the part that incriminates the act of assisting suicide as an alternative to the act of encouraging suicide, regardless of the extent to which this act determines or reinforces the intention to commit suicide.

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On the other hand, it had contested the sanctions applied for such conduct, punished with the same penalty as for encouraging suicide.

Article 580 of the Italian Criminal Code (encouraging or assisting suicide) foresees three different acts, which differ in terms of impact on the formation of the intention to commit suicide: the "determination" and "reinforcement" of another's intention to commit suicide, or any act likely to lead an individual to form a previously non-existent intention or intended to reinforce an already existing intention and the act of assisting suicide, with reference to anyone who facilitates its execution in any way.

The Constitutional Court found that the current regulatory framework concerning the end of life leaves certain situations constitutionally worthy of protection and to be balanced with other constitutionally relevant assets without adequate protection. In September 2018 (7), the Constitutional Court affirmed that nowadays it is not at all difficult to grasp the rationale of protection of a rule such as Art. 580 of the Italian Criminal Code, by which the legislator of 1930 intended to protect human life understood as an inalienable asset, also on the basis of the importance that the community placed on the conservation of the lives of its citizens. Currently, the constitutional framework views the human person as a value, especially regarding the weakest and most vulnerable people.

The criminal legislator can prohibit those behaviours that favour suicidal choices, in the name of an abstract notion of individual autonomy that ignores the concrete conditions of malaise and abandonment in which such decisions are often conceived. Although the indictment of assisting suicide cannot be considered incompatible with the Constitution, the Court underlined the fact that we must consider situations that were unimaginable at the time when the rule was introduced, now made possible by the progress of medical science and technology, often capable of saving patients in extremely serious conditions, despite not restoring sufficient vital functions.

In such situations, the assistance of third parties in ending a person's life can be the only way for patients to escape from being kept alive artificially, which persons do not want and have the right to refuse. This in accordance with their own concept of human dignity.

Therefore, the Court has identified the conditions that can justify third-party assistance in ending the life of a sick person. For example, the cases in which the person assisted is a person suffering from an irreversible disease and source of physical or psychological suffering, which he finds absolutely intolerable, who is kept alive by means of life support, but remains capable of making free and conscious decisions.

Current legislation allows the patient to request the interruption of life support treatments in progress with simultaneous continuous deep sedation but does not allow to the physician to make available to the patient, who is in the described conditions, treatments intended to cause his death. This situation forces the patient to undergo a slower process, in hypotheses less corresponding to his own vision of dignity in dying and more fraught with suffering for his loved ones.

The Court identified a limited area of constitutional non-compliance of the criminal case and, in order to allow Parliament to intervene with appropriate provisions, decided to postpone dealing with the question of constitutionality to a subsequent hearing, to assess the eventuality of a law regulating the matter.

During the XVIII Legislature, some draft legislation was presented on the subject: draft law No. 1559 (presented to the Chamber on 31 January 2019 and assigned on 5 March 2019, the examination of which has not yet started) containing "Amendments to articles 579 and 580 of the Criminal Code on consensual homicide and encouraging or assisting suicide"; draft law No. 1875 (presented to the Chamber on 30 May 2019 and under committee examination as at 31 July 2019) containing "Provisions on medically assisted suicide and euthanasia"; draft law No. 1888 (presented to the Chamber on 5 June 2019 and under committee examination as at 31 July 2019) containing "Amendments to article 580 of the Criminal Code on assisting suicide, and to Law No. 219 of 22 December 2017 on advance directives and the provision of palliative care"; Bill No. 1464 (presented to the Senate on 7 August 2019 and assigned on 17 September 2019, the examination of which has not yet started) containing "Amendments to article 580 of the Criminal Code and amendments to Law No. 219 of 22 December 2017 on advance directives and the provision of palliative care"; Bill No. 1494 (presented to the Senate on 17 September 2019 and assigned on 16 October 2019, the examination of which has not yet started) containing "Amendments to article 580 of the Criminal Code and amendments to Law No. 219 of 22 December 2017 on medically assisted suicide and protection of dignity in death".

This last legislative proposal, presented pending the publication of the text of the ruling by the Constitutional Court on 25 September 2019, would allow the administration, at the patient's request, of a drug capable of causing death quickly and painlessly in the cases identified by the Constitutional Court, with the exclusion, among the conditions that justify the request for medical assistance to die, of the patient being kept alive by means of life support. The intention is to include in the regulations on medically assisted suicide those patients who, although not kept alive by means of life-support, are still affected by serious and irreversible diseases, source of intolerable physical or mental suffering. Such treatment could also be administered in the patient's home, only under the National Health Service, by medical and health personnel who have not expressed conscientious objection in this regard.

The provision by the Legislator of the condition of being kept alive by life-support treatments as a premise of lawfulness of the request for assisted suicide would exclude from the legal scope of application situations with patients suffering from irreversible diseases but not in this condition.

Given that no legislation has arisen on the matter, nor is intervention by the legislator imminent, the Court (8) ruled on the matter in order to guarantee constitutional legality.

In order to avoid the risk of abuse for the life of people in situations of vulnerability, it is essential to ensure the prior check of the actual existence of the conditions legitimising assisted suicide. Since the declaration of unconstitutionality relates specifically and exclusively to the assisted suicide of persons who could already refuse the treatment necessary to

keep them alive (Article 1 comma 5 of the aforementioned Law 219) one important point of reference is thus the provisions of the same Articles 1 and 2 of the Law 219.

Briefly, Article 1 comma 5 of Italian Law No. 219/2017 establishes that "Anyone capable of acting has the right to refuse, in whole or in part, according to the methods referred to in comma 4, any diagnostic assessment or health treatment indicated by the physician for their disease or individual acts of the treatment itself. They also have the right to revoke at any time, according to the methods referred to in comma 4, the consent given, even when the revocation implies the interruption of the treatment. For the purposes of this law, artificial nutrition and hydration are considered health treatments, insofar as they consist of the administration, on medical prescription, of nutrients by means of medical devices (9). If the patient expressed the wish to withdraw or refuse health treatments necessary for his survival, the physician shall explain to the patient and, if he agrees, to his family, the consequences of this decision, present the possible alternatives and offer every form of support for the patient, including services of psychological support. Without prejudice to the opportunity for the patient to change his will, acceptance, revocation and refusal shall be noted in the medical record and in the electronic health record".

Law No. 219/2017 recognizes, in fact, the right to withdraw life support for persons "capable of acting" and establishes that the manifestation of will must be acquired in the ways and with the tools most appropriate to the patient's condition and documented in writing or through video recordings or, for persons with disabilities, through devices that allow them to communicate, and then included in the medical record. This is without prejudice to the opportunity for the patient to change his will: an aspect that, moreover, in the case of assisted suicide, is inherent to the very fact that the person concerned, by definition, retains dominion over the final act that triggers the lethal process. The law establishes that the physician must explain the consequences of this decision and present possible alternatives to the patient, promoting any support action for the patient himself, also by making use of the psychological assistance services. In this context, the irreversible nature of the disease and physical or psychological suffering must obviously be considered. The procedure in question ascertains the patient's capacity for self-determination and the free and informed nature of the choice made (10-11).

It is also fundamental to guarantee the patient appropriate pain therapy and the provision of palliative care, in accordance with Law No. 38/2010 (12). Involvement in a pathway of palliative care must be a pre-requisite for the subsequent choice by the patient of any alternative course of therapy, so those who request medically assisted suicide must be presented with a concrete offer of palliative care and adequate support.

According to the Court, the verification of these conditions must be entrusted to public facilities of the national health service and must envisage the intervention of a third collegiate body, capable of guaranteeing protection in situations of particular vulnerability, such as the territorially competent ethics committee.

The judges also specify that, as far as conscientious objection is concerned, this declaration of unconstitutionality is limited to excluding punishment for assisted suicide in the cases considered, without creating any obligation for physicians to provide such assistance.

As regards the facts prior to the publication of the ruling, the non-punishment of assisted suicide aid is subject to the fact that the assistance was provided in ways even other than those indicated, but which qualify in any case as offering substantially equivalent guarantees. What will be required is to verify that the conditions of the requesting person that legitimise the assisted suicide have been subject to medical control, that the will of the person concerned has been clearly and unambiguously expressed, that the patient has been adequately informed about his condition and possible alternative solutions, specifically with regard to access to palliative care and the possible use of continuous deep sedation. The existence of these requirements must be verified by the judge in the specific case. However, the Court concludes with the hope that the matter will be the subject of prompt and complete discipline by the legislator.

In this context, coordination with the ethical dimension is undoubtedly of great importance.

The National Council of the National Federation of Orders of Surgeons and Dentists unanimously approved the application guidelines of Art. 17 of the Code of Medical Ethics ("The physician, even upon request by the patient, must not undertake or encourage acts intended to cause death") (13): "The free choice of the physician to facilitate, on the basis of the principle of self-determination of the individual, the intention of suicide autonomously and freely formed by a person kept alive by life-support treatments, suffering from an irreversible disease, source of intolerable physical or psychological suffering, who is fully capable of making free and conscious decisions (...), must always be assessed case by case and implies, if all the above conditions are met, the non-punishment of the physician from a disciplinary point of view".

Finally, in the ordinance of 2018, the judges envisaged the possibility of introducing this discipline by including it under Law No. 219/2017, within the context of the relationship of care and trust.

This hypothesis is not shared by the Italian National Bioethics Committee, "given that there remains a clear *de facto* difference, with effects on an ethical and juridical level, between the patient who is free to refuse or accept a therapeutic treatment and the patient who asks to be helped to die (assisting suicide)" (14).

Thus, in the summary document prepared by a working group made up of academics and professionals who are experts in the issues in question (15), it was not deemed appropriate to integrate Law No. 219/ 2017: "This legislation is characterized by a certain internal consistency and a general value, which would be altered by the addition of rules relating to a procedure, such as medically assisted suicide, which is wholly peculiar due to its intrinsic characteristics and problems. (...) The group hopes, ultimately, for an autonomous law, specifically dedicated to medically assisted suicide, connected to the Criminal Code and to Law No. 219 of 2017 by careful coordination clauses. The group envisages a law in principle that does not need to be integrated by subordinate sources, except with regards to profiles of a purely technical, organizational and administra-

tive nature (e.g. accreditation system for facilities used for assisted suicide). It could be useful to provide references to guidelines that better detail moments of the procedure or of adapt them to the evolution of good clinical practices and scientific acquisitions".

Recently the Court of Assizes of Massa (16), having to apply art. 580 of the Italian penal code in the light of sentence no. 242/2019 of the Constitutional Court which recalls the provisions of Law no. 219/2017, states that this dependence does not necessarily and exclusively mean "dependence on a machine", in relation to the requirement of dependence on life-sustaining treatments. According to the Judges "what matters are all those health treatments (pharmaceutical, medical or paramedical assistance, and, finally, with the use of machinery, including artificial nutrition and artificial hydration) without which triggers "a process of weakening of the organic functions whose outcome, not necessarily rapid, is death".

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References

1. National Bioethics Committee. Bioethical reflections on medically assisted suicide. 2019. Available at: http://bioetica.governo.it/media/3797/medically-assisted-suicide.pdf
2. European Parliament, Council and Commission. Charter of Fundamental Rights of the European Union. Article 3 - Right to the integrity of the person. Official Journal of the European Communities. December 18, 2000; C364/9. Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf
3. Convention on Human Rights and Biomedicine. Oviedo. April 4, 1997. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164
4. Constitutional Court. Decision No. 242 of Sep. 25, 2019. Official Journal - 1st Special Series - Constitutional Court No. 48
5. Italian Minstry of Justice. Law No. 219 of Dec. 22, 2017. Rules on informed consent and advance treatment provisions. Official Journal No. 12
6. Milan Court of Assizes order. 2018. Available at: https://www.biodiritto.org/ocmultibinary/download/3291/32222/9/fa9413a1154ae72194f5cbd8ddbaa81b.pdf/file/ordinanza_cappato_corte_assise_milano.pdf
7. Constitutional Court. Order No. 207 of Oct. 24, 2018. Official Journal - 1st Special Series - Constitutional Court No. 46
8. Constitutional Court. Decision No. 242 of Sep. 25, 2019. Official Journal - 1st Special Series - Constitutional Court No. 48
9. Montanari Vergallo G, Busardò FP, Berretta P, et al. Advance healthcare directives: moving towards a universally recognized right. Eur Rev Med Pharmacol Sci. 2018;22(10):2915-2916
10. Busardò FP, Bello S, Gulino M, et al. Advance health care directives and "public guardian": the Italian supreme court requests the status of current and not future inability. Biomed Res Int. 2014;2014:576391
11. Di Luca A, Del Rio A, Bosco M, et al. Law on advance health care directives: a medical perspective. Clin Ter. 2018; 169(2):e77-81
12. Italian Ministry of Justice. Law No. 30 of 15 March 2010. Provisions to guarantee access to palliative care and pain therapy. Official Journal No. 65
13. The Italian Code of Medical Ethics. 2014. Available at: https://portale.fnomceo.it/wp-.ontent/uploads/2018/03/CODICE-DEONTOLOGIA-MEDICA-2014.pdf. Section 17
14. National Bioethics Committee. Bioethical reflections on medically assisted suicide. 2019. Available at: http://bioetica.governo.it/media/3797/medically-assisted-suicide.pdf
15. Gruppo di lavoro in materia di aiuto medico al morire. Aiuto medico a morire e diritto: per la costruzione di un dibattito pubblico plurale e consapevole - Documento di sintesi del gruppo di lavoro in materia di aiuto medico al morire. Recenti Prog Med. 2019; 110:462-472.
16. Court of Assizes of Massa, judgment of 27 July 2020. Available at: https://www.giurisprudenzapenale.com/wp-content/uploads/2020/09/Sentenza-Massa.pdf.