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82

Adelaide Madera

Assisted Suicide: An Italian Perspective

Institut für Rechtspolitik
an der Universität Trier

IRP

Assisted Suicide:
An Italian Perspective

by

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The contribution is based on a colloquium that took place as an online event on June 28, 2021. The colloquium was part of a lecture series on “Law & Religion” by the author at the University of Trier.

Inhaltsverzeichnis

1. Introduction

The unrestrainable evolution of medical science and technology is drastically changing health-care, enabling new medical procedures and remedies, which are increasingly intertwined with moral principles. However, in our post-secular society a proliferation of disparate moral and ethical views has arisen, which imply different understandings of the idea of life and its end. Such views not only generate contrasting individual points of view but also urge public policies to provide responses, which satisfy social expectations. The multiplication of ethics, the emphasis on a subjective understanding of conscience and the weakening of a shared ethos are driving forces, which underline the claim for a broader recognition of individual self-determination in the fundamental choices of life.[1] Media often underline that health services are not equipped to provide satisfactory responses regarding end-of-life assistance, and several campaign organizations urge amendments of current legal frameworks in a view to a broader recognition of a right to self-determination.[2] Moreover, recent events, new statutes and controversial judicial rulings concerning such emerging and delicate bioethical issues have emphasized a sharp ideological and political polarization between two opposite ethical narratives: the secular and the religious/Christian one.[3]

It goes without saying that the right to life is a universal right. However, according to secular ethics, life as a "good" is strictly

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1 See *Fortunato Freni*, La laicità nel biodiritto. Le questioni bioetiche nel nuovo incedere interculturale della giuridicità, Giuffrè, Milano, 2012, p. 33 ff.

2 See *John Wyatt*, Right to Die? Euthanasia, Assisted Suicide and End-Of-Life Care, Inter-Varsity Press, Nottingham, 2015.

3 *Freni*, op. cit., p. 33 ff.

connected with its quality, which mirrors the "well-being" of its owner.[4]

According to this approach, since life is a personal "good", the view of human intangibility of life is undergoing a process of gradual dismantlement. There is an increasing weakening of the traditional idea of the sanctity of human life, joined with a refusal of pain, as the progress of technology and medicine allows to reduce it. Thus, when an individual subjectively believes that his life is not worth living anymore, and therefore is no longer a "good" that requires preservation, he should have a right to decide the timing and the ways of its termination. Following this perspective, in extreme cases, the possibility of putting an end to human life, through the so-called "assisted suicide", that is suicide with the support of third parties, should be allowed. Such a possibility complies with the need to protect the freedom of self-determination of each individual, where the deterioration of physical conditions due to an irreversible disease, accompanied by unbearable pain, no longer allows a sick person to live a life coherent with his view of human dignity.[5] This approach is part of a new concept of health, which is considered such as a claim, which an individual can raise against society as a whole. Such a perspective pushes each individual to self-perceive as an arbiter of the beginning and the end of life, sometimes even claiming a "right to die".[6] Furthermore, the idea of a "medicine of desires" is taking root,

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4 See *G. Zizola*, Testamento in vita. I termini del discorso, in Il Tetto, 2008, no. 263, pp. 61-62.

5 *Freni*, op. cit., p. 33 ff.

6 See *Chiara Tripodina*, Quale morte per gli "immersi in una notte senza fine"? Sulla legitimità costituzionale dell'aiuto al suicidio e sul "diritto a morire per mano d'altri", in BioLaw Journal, 3-2018, pp. 1-15.

which induces a sort of mental removal process of the limits inherent in the human condition.[7]

There is a palpable clash with certain religious convictions: according to mainstream religious perspectives, pain is a path toward soul salvation, life is a divine gift and there is no individual right to decide on its termination. According to the morality of the Catholic Church, "when the tendency to appreciate life prevails only to the extent that it brings pleasure and well-being, suffering appears as an unbearable setback, from which it is necessary to get rid of at any cost. Death, considered absurd if it suddenly interrupts a life still open to a future full of possible interesting experiences, becomes instead a claimed liberation when existence is now considered lacking in meaning because it is immersed in pain and inexorably devoted to a further more acute suffering; therefore large sections of public opinion justify some crimes against life in the name of the rights of individual freedom and, on this premise, demand not only impunity, but even the authorization of the state, in order to practice them in absolute freedom and indeed with the free intervention of health facilities", with the result that "choices once unanimously considered criminal and rejected by common moral sense, gradually become socially respectable."[8] According to this perspective, terminating one's life is not allowed, in no way, neither with the consent of the authorities, nor with the consent of the sick person: the natural flow of time has to run its course, and man has no authority to alter it.[9] The fundamental right to health means a right to live, not to die (neither with commissive or omissive euthanasia nor with

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7 See *Episcopal Committee for the Charity and Health-Care Services*, Proclaim the Gospel and Take Care of The Sick. The Christian Community and the Pastoral of Healthcare, §§ 9-10.

8 See *John Paul II*, Evangelium Vitae, § 64; Congregation for the Doctrine of Faith, Iura et bona, § 5.5.80.

9 *Freni*, op. cit., p. 33 ff.

suicide). A claim for a "right to die" would represent a "violation of divine law, an offense to the dignity of the human person, a crime against life, an attack against humanity".[10] It should be noted that according to the Church, not only is euthanasia not morally acceptable, but also a living will, since life constitutes an asset which is not at man's disposal.

According to religious authorities, the values and ethical principles underlying nature and human life are not negotiable, and cannot be the object of political debate. In any event, the view of the unavailability of human life is not an exclusive feature of religious perspectives, but is also embraced by certain "secular and liberal views of the world."[11]

However, in a democratic state based on the pluralism of values and freedom of opinion, those who refer to religious or philosophical convictions can no longer influence political processes so they cannot impose their views on others.

Provided that democratic processes are entrapped in the ideological contrast between the "right to death" and the "duty to life", the concrete risk is losing contact with effective data, which reveal impressive resorting to the euthanasia practice.

Actually, assisted-suicide is an option which an increasing number of people continue to resort to, where they suffer from irreversible diseases, which cause unbearable pain. However, in legal systems where assisted suicide is banned, this option can be exercised only by those who can afford the economic cost to move to a more permissive jurisdiction. In Italy, individ-

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10 See *Marco Canonico*, Eutanasia e testamento biologico nel magistero della Chiesa Cattolica, in Stato, Chiese e Pluralismo confessionale, Rivista Telematica, maggio 2009, available at www.statoechiese.it, p. 10; Iura et bona, cit., § 5.5.80.

11 See *Mario Romano*, Aiuto al suicidio, rifiuto o rinuncia a trattamenti sanitari, eutanasia (sulle recenti pronunce della Corte Costituzionale), in Sistema Penale, 8 January 2021, p. 4.

uals suffering from irreversible illnesses turn to legalized foreign clinics, especially in Switzerland, in the absence of adequate regulatory solutions in our system.[12] Otherwise, it can happen that a patient who is suffering from an irreversible disease chooses to terminate his life in advance, before his medical condition declines to the point that suffering is intolerable and he cannot commit suicide without third-party assistance.[13] Furthermore, a certain number of deaths that occur in healthcare facilities can be traced back to practices that can be classified as "active" euthanasia.[14] In both cases, the current situation shows a gap between what the legislative framework rules and the effective solutions patients resort to.[15]

12 *Freni*, op. cit., p. 33 ff.

13 See Carter v. Canada, [2015] SCC 5.

14 See *Marilisa D'Amico*, I diritti contesi fra laicità e fondamentalismi, in Stato, Chiese e pluralismo confessionale, Rivista Telematica, gennaio 2010, available at www.statoechiese.it, p. 10.

15 See *Stevie Martin*, Assisted Suicide and the European Convention of Human Rights, Abington – N.Y., Routledge, 2021.

2. The debate over legalization of a right to die

The debate over bioethical issues has, indeed, raised new legal challenges as the transplant of ethical issues risks being unavoidably affected by philosophical, ideological and religious arguments.[16] Modern legal systems have to face the challenge of defining the scope of the protection of the beginning and of the end of human existence. As the divisive issue of the recognition of a right to die is at the centre of a harsh political and academic debate, some academics invoke a process of re-visitation of the principle of secularism, due to the need to safeguard the religious neutrality of law as a "prerequirement of freedom and democracy", which would otherwise risk being undermined.[17] However, a process of desecularization is taking place in contemporary societies, and religious communities are instead regaining a public role. In democratic systems, prevalence is given to the values of the majority, which appear to be more reasonable and reassuring.[18]

The difficult balancing of the competing values requires an effort by the legislator aimed at protecting, on the one hand, respect for the dignity and self-determination of the individual in the choice or refusal of certain therapeutic treatments, also in anticipation of a future inability; on the other hand, the promotion of the use of treatments and drugs against pain, for

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16 See *Stephen Hoffman*, Euthanasia and Physician-Assisted Suicide: A Comparison of E.U. and U.S. Law, in Syracuse Law Review, vol. 63, 2013, p. 383.

17 See *L. Risicato*, Indisponibilità o sacralità della vita umana? Dubbi sulla ricerca (o sulla scomparsa) di una disciplina laica in materia di testamento biologico, in Stato, Chiese e pluralismo confessionale, Rivista Telematica, marzo 2009, pp. 1-29, available at www.statoechiese.it.

18 See *Risicato*, op. cit., p. 2.

those individuals who support the intangibility of life and believe that any life is worth living.[19]

However, where a legal system has to regulate important ethical issues, it often shows its inability to provide adequate responses, as there is little doubt that a reconciliation of the two competing interests in the protection of life and the right to self-determination seems an unmanageable matter.

Several international and supra-national provisions, and their interpretation before the courts, draw a complex architecture relating to the protection of human dignity, self-determination and the right to life.[20] However, the boundary between euthanasia, assisted suicide and end-of-life care and the frontiers of legitimate medicine are becoming increasingly blurred. Both the opposites are dangerous: preservation of life at any cost minimizes the will of the person concerned and risks resulting in therapeutic obstinacy; an unconditional recognition of a right to die can be affected by an economic cost/benefit analysis in modern health-care systems, increasingly dependent on spending review, resulting in a "duty to die", to the detriment of the most vulnerable people, whose decisions could be strongly influenced by psychological and financial reasons.[21] The identification of strict limits to assisted suicide is also due to the concern to prevent forms of abuse, which could lead to forced euthanasia, as occurred in the past.[22]

Within competing values, the role of health-care practitioners should not be underestimated. They are deeply involved in

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19 *Freni*, op. cit., p. 33 ff.

20 See *Diego Zannoni*, Right or Duty to Live? Euthanasia and assisted Suicide from the Perspective of the European Convention on Human Rights, in European Journal of Legal Studies Online First, 24 June 2020, pp. 1-32.

21 *Zannoni*, op. cit., pp. 1-32.

22 See *Zannoni*, op. cit., pp. 1-32.

"tragic choices",[23] and their freedom of conscience must be protected, albeit calibrating it with that of the patient's self-determination. Self-determination has increasingly acquired weight following the emphasis given to the so-called "informed consent": the conflict of values at stake is likely to undermine the so-called "therapeutic alliance" that should be established in the practitioner/patient relationship.[24]

[23] See *Guido Calabresi*, *Philip Bobbit*, Tragic Choices, W.W. Norton & Co., New York, 1978.

[24] See *Lorenzo D'Avack*, Sul consenso informato all'atto medico, in Dir. Fam., 2008, p. 759 ff.

3. Assisted suicide in the ECHR framework and a recent Italian judicial trend

In the European legal framework, a legal analysis cannot disregard the ECHR, which guarantees protection to the right to life (article 2) and to the respect for private life (article 8).[25] A blanket right to die cannot find coverage under article 2 ECHR. However, the right to life cannot be immunized from any balance with other competing interests, such as the protection of personal autonomy and private life. Article 8 protects the right to make autonomous individual choices concerning one's body, although they can result in a risk for health or be health-threatening.[26] Provided that a "blanket ban" is increasingly deemed as disproportionate in the ECHR framework, a uniform European approach is lacking.[27] Some states adopt a more conservative approach toward the preservation of life, while others recognize broader room for self-determination.

Only a few states grant active euthanasia (Belgium, Netherlands, Luxembourg), while others allow some forms of assisted suicide (Switzerland). Given such a variable European geometry relating to the issue, the European Court of Human Rights recognizes a wide margin of appreciation to States to find a balance between the individual right to self-determination and a state duty to protect the life of more vulnerable individuals.[28]

In Italy, a ruling of the Constitutional Court, no. 242/2019, declared the partial unconstitutionality of article 580 of the Italian

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25 See *Zannoni*, op. cit., pp. 1-32.
26 See ECtHR, 29.04.2002, App. No 2346/02, Pretty v. United Kingdom.
27 See *Martin*, op. cit., pp. 8-9.
28 See *Martin*, op. cit., p. 8 ff.

Criminal Code, which prohibited assistance in suicide.[29] Specifically, article 580 excluded the criminal liability for the person who, in the manner provided for in Articles 1 and 2 of the law 22 December 2017, no. 219, "facilitates the execution of intention of suicide, autonomously and freely formed, of one person kept alive by life-sustaining treatments and suffering from an irreversible pathology, source of physical or psychological suffering that he/she deems intolerable, but fully capable of making free aware decisions, provided that such conditions and methods of execution have been verified by a public structure of the national health service, following the opinion of the territorially competent ethics committee."

Thus, the ruling strictly defines a narrow area where assistance in suicide is decriminalized, depending not only on the will, capacity and "personal conditions" of a person who asks for assistance in committing suicide but also on specific "procedural requirements".[30]

This ruling gave rise to a harsh debate, even concerning the unusual decisional technique the Court took advantage of: commentators discussed whether it has an "innovative nature" or it finds confirmation in previous case law.[31] Furthermore, the ruling leaves open several questions, regarding the role of the rule of law and of constitutional principles in such a delicate matter, the boundary between the powers of the branches of government, and the effective rise of new controversial

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29 See Constitutional Court, 22 November 2019, No. 242, in Quad. Dir. Pol. Eccl., 2019/3, pp. 650-661. For a list of references on the case see Settimio Carmignani Caridi, Nota di Rinvio, in Quad. Dir. Pol. Eccl., 2019/3, pp. 667-672.

30 See *Angelo Licastro*, L'epilogo giudiziario della vicenda Cappato e il ruolo "sussidiario" del legislatore nella disciplina delle questioni "eticamente sensibili", in Quad. Dir. Pol. Eccl., 2019/3, p. 611.

31 See *Nicola Colaianni*, La causa di giustificazione dell'aiuto al suicidio (rectius: dell'assistenza nel morire), in Quad. Dir. Pol. Eccl., 2019/3, p. 592.

rights. The main question concerns who should be charged with the task of providing solutions which guarantee a balance among competing interests, that is, whether reconciliation of competing interests should occur ex ante, to prevent the rise of conflicts, or ex post, on a case-by case basis.[32]

It cannot be underestimated that the above-mentioned ruling has been anticipated by the decree no. 207 of 2018, where the Constitutional Court strongly solicited a legislative intervention on the delicate issue of assisted suicide.[33] The decree did not declare the unconstitutionality of article 580: its purpose was to leave room for the margin of appreciation of democratic procedures, which should be better equipped to find a balance between the urge to repeal a provision whose effects are no longer coherent with an updated reading of the constitutional framework, and avoidance of the risk of a dangerous legal vacuum. However, the persistent lack of legislative intervention justified the interventionist approach of the Constitutional Court in ruling no. 242, which defined limited circumstances where assistance to suicide cannot be considered a crime.[34]

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32 See *Antonio Ruggeri*, La disciplina del suicidio assistito è "legge" (o meglio, "sentenza-legge"), frutto di libera invenzione della Consulta. A margine di Corte cost. n. 242 del 2019, in Quad. Dir. Pol. Eccl., 2019/3, pp. 632-649.

33 See *Angelo Licastro*, Trattamenti sanitari, diritto all'autodeterminazione ed etiche di fine vita dopo l'ordinanza n. 207 del 2018 della Corte costituzionale, in Stato, Chiese e Pluralismo Confessionale, available at www.statoechiese.it, 14/2019, pp. 1-34; *Antonio Ruggeri*, Fraintendimenti concettuali e utilizzo improprio delle tecniche decisorie nel corso di una spinosa, inquietante e ad oggi non conclusa vicenda (a margine di Corte cost. n. 207 del 2018), in Consulta Online, 1/2019, pp. 92-112; *Chiara Tripodina*, Non possedere più le chiavi della propria prigione. Aiuto al suicidio e Costituzione tra libertà, diritti e doveri, in BioLaw Journal, 2019, pp. 1-8.

34 See *Chiara Tripodina*, La "circoscritta area" di non punibilità dell'aiuto al suicidio. Cronaca e commento di una sentenza annunciata, in Corti Supreme e Salute, 2/2019, p. 3.

4. The inadequacy of the current legal framework to rule the Cappato case

This ruling is extremely challenging as it concerns the right to self-determination, which in Italy finds coverage under articles 2, 13 and 32 of the Constitution, and its delicate balance with the right to health.

Currently, the delicate matter of end-of life choices is governed by law no. 219/2017, which regulates informed consent and living will. This law is the outcome of fierce judicial litigation on the issue.[35] Informed consent is given a peculiar role in this statute, as it is entrusted with the task of calibrating the right to health and the right to self-determination. Our legal system gives considerable importance to the principle of informed consent, which provides that each health treatment cannot be carried out without a competent patient's previously informed consent. Free and informed consent has a key role in the protection of human dignity and is strictly linked to the traditional relationship that is established between a physician and a patient, which must be deemed on an equal footing. Following this approach, an interference in the sphere of the patient's personal rights and freedoms by a practitioner can never be justified, as the protection of self-determination of the patient is

[35] In this regard, the Welby case (Trib. Roma, 23 July 2007, no. 2049) highlighted the case in which an individual is fully capable of understanding and willing, but is unable to perform the action necessary to interrupt the treatment, and there is a need for the support of a third party, who is qualified by medical skills. The need for assistance for the disabled patient underlined the lack at that time of a general provision that allowed interruption of life-sustaining treatment recognizing a sort of exemption from the general rule for the physician, avoiding burdening him with the responsibility for the omission or interruption of a specific medical treatment. See *Risicato*, op. cit., pp. 10-13.

increasingly becoming “an integral part of medical services.”[36] Informed consent has a “para-Constitutional” value, and finds protection not only under the provisions of the Criminal Code (article 50), but also under Article 2 of the Constitution which protects the inviolable rights of the individual and Articles 13 and 32 which establish the “personal inviolability and the right of each individual not to be subjected to medical treatment against his will except by law.”[37] Today art. 32 of the Constitution is also seen as the foundation not only of a “right to health as a fundamental social right” from which comes “the legally guaranteed claim for public services (health and social welfare) for every individual” but also of a “negative freedom” for the individual to exercise the option not to avail himself of a specific health treatment.[38] Art. 32 therefore establishes the full right to refuse treatments, including those of life sustainment, except for those therapies that are required for the pursuit of collective purposes (e.g. compulsory vaccinations).[39] Therefore, the right of refusal and the will to interrupt hypothet-

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36 Cfr. *G. Montanari Vergallo*, Il rapporto medico-paziente. Consenso e informazione tra libertà e responsabilità, Giuffrè, Milano, 2008, p. 15.

37 See *Freni*, op. cit., p. 33 ff.

38 See *Silvio Gambino*, Diritto alla vita, libertà di morire con dignità, tutela della salute. Le garanzie dell’art. 32 della Costituzione, paper presented at the International Conference “Diritto alla vita” organized by the Università di Messina in partnership with the Universidad de Las Palmas de Gran Canaria, Messina, 24-25 March 2011.

39 In particular, Article 32 of the Constitution, in its second paragraph, provides that: “No one can be obliged to accept a specific health treatment except by law. The law cannot in any case violate the limits imposed by respect for the human person.” In this regard, ruling no. 282 of 2002 of the Constitutional Court states that “the therapeutic practice arises ... at the intersection of two fundamental rights of the sick person: that of being treated effectively, according to the canons of science and medical art, and that of being respected as a person, and in particular in their physical and mental integrity, this right that art. 32, paragraph 2, second sentence, the Constitution also sets as an insurmountable limit the health treatments that can be imposed by law as mandatory for the protection of public health.”

ically salvific therapies fall within the sphere of primary rights. Also living wills are important instruments that allow individuals to take important decisions in advance, which will be binding in the event they are no longer competent. The current legal framework also emphasizes the need of a patient to be informed about the option of resorting to palliative care to alleviate his pain (art. 2 law no. 219). It therefore appears that the principle of self-determination is fully guaranteed based on the constitutional framework, also in the light of the European Charter of Human Rights and the Oviedo Convention on Human Rights and Biomedicine.[40]

However, the only option offered by the present legal framework is the interruption of life-sustaining treatment and deep sedation. This solution seems to be not acceptable and has been refused in the present case, as it would have resulted in a slower and more painful procedure, which would cause further distress for the family. Following this perspective, assistance of third-parties is the only way to escape from artificially keeping alive, which an individual may refuse on the basis of article 32 of the Italian Constitution. On the contrary, deep sedation implies total annulment of an individual's conscience and will, so it could be deemed not acceptable. According to the Constitutional Court, individual choices of the patient have to be given prevalence, even though such choices are not mirrored in current legal provisions: a prohibition of assistance in suicide would be an unreasonable and unjustifiable restriction on the right to self-determination of an individual to choose medical treatment, which should include those treatments which can free an individual from pain. Otherwise an

[40] See *Federica Botti*, La fine di un lungo viaggio al termine della notte: la legge 219/2017 sul consenso informato e sulle disposizioni anticipate di trattamento, in Quad. Dir. Pol. Eccl., 2018/2, pp. 619-640.

individual would only be able to resort to one way to take leave of his life.

5. The reasoning of the Constitutional Court in the Cappato case

According to the Court, a disparate treatment between the duty to respect the will of a patient to interrupt life-sustaining treatment, even though it implies the active intervention of third parties, and the request for assistance of a patient to avoid the longer and painful course coming from the interruption of life-sustaining treatments would be discriminatory, as it would infringe the fundamental right to equality, which is constitutionally granted and underlies the Court's reasoning as a whole. According to the Court, such a disparate treatment would be unreasonable.[41] However, neither did the Court expressly evoke article 3 of the Constitution nor did it recognize a right to die according to one's view of human dignity (as the same Court previously emphasized in decree no. 207).[42]

Basically, the Court did not reach the point of granting a right to die. According to the Court, the right to life is granted by article 2 of the Constitution (and by article 2 ECHR) and it does not expressly include a right to obtain state or third-party assistance in committing suicide.[43] Article 580 is aimed at protecting a compelling public interest (protection of life of vulnerable classes of individuals) whose "social cost" is a denial of a full right of self-determination in terminating one's life.[44] However, the Court took into serious account the evolu-

41 See *Tripodina*, La "circoscritta area", cit. p. 9.
42 See *Tripodina*, La "circoscritta area", cit., p. 8.
43 See *Tripodina*, La "circoscritta area", cit., p. 4.
44 See *Yale Kamisar*, Some non-religious views against proposed "mercy killing" legislation, in Minn. L. Rev., 42, 1958, p. 969 ff.; *A. Madera*, "Uccisione legale" e "suicidio assistito": il paradosso statunitense delle labili frontiere della "legitimate medicine", in Quad. Dir. Pol. Eccl., 2008/3, p. 913 ff.

tion of medicine and technology, which was unimaginable when article 580 had been enforced.[45]

Thus, the Court adopted a self-restraint approach, confining itself to assess assistance to suicide as a lawful action and excluding liability, given the specific circumstances of the case. In the specific case in question, the state compelling interest to protect vulnerable individuals is weakened, as the person involved, suffering from an irreversible disease and intolerable pain, is fully capable of making a free and informed decision to terminate his life with the support of a third party.[46]

A crucial question concerns the controversial link between ruling no. 242/2019 and the prior Court decree no. 207/2018. Such a decree did not raise the question of a right to die, but focused on the legitimacy of the action of who facilitates assisted suicide of another person. However, the first commentators raised the argument that the Court was prone to the recognition of a right to the assisted suicide to a patient who is suffering from an irreversible disease, is enduring unbearable sufferings, is not physically autonomous but is able to take free and aware decisions: the inclusion of such a right under the coverage offered by article 32 of the Constitution seems to imply the underlying suggestion that it has to be deemed as a fundamental right.[47]

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45 See *Tripodina*, La "circoscritta area", cit., p. 4.

46 According to *Colaianni*, op. cit., p. 595, this case is analogous to that of a doctor who causes the abortion of a woman whose continuation of pregnancy would result in serious injury or danger. See Corte Cost. no. 253/2009.

47 See *Pier Francesco Bresciani*, Termini di giustificabilità del reato di aiuto al suicidio e diritti dei malati irreversibili, sofferenti, non autonomi, ma capaci di prendere decisioni libere e consapevoli (Nota a Corte cost., ord. n. 207/2018), in Forum di Quaderni Costituzionali, 14 December 2018, pp. 1 ff.

In such a decree, the Court also urged an intervention on the lawmaker on this issue. Finally, the Court suggested the regulation of the possibility of a conscientious objection for the medical staff. So the crucial question is whether the Court was suggesting the imposition of a duty upon the medical staff. According to some commentators, the decree emphasized a subjective perception of human dignity, who cannot depend on legislative interference mirroring a common ethos.[48] Every individual cannot be considered as a passive recipient of medical treatments, following an obsolete paternalistic view of the physician-patient relationship. He remains an accountable main character, even where the most delicate choices of life are at stake.

As is known, the informed consent provisions achieve the valuable outcome to actively involve the patient in choices concerning health treatments. However, they highlight a legal gap. Where the patient claims the option not to make use of life-sustaining treatment aimed at artificially prolonging life, his choice may give rise to a clash between the freedom of individual self-determination and the duty of care burdening the physician, whose conscience should be protected, in relation to new technologies and interventional typologies. Current provisions govern the conduct of the healthcare practitioner only from the point of view of criminal and ethical responsibility. With regard to the protection of the doctor's freedom of conscience, in fact, within public health structures, Italian law provides the conscientious objection of health professionals in the matter of abortion (Article 9 of Law 194 of 1978), without even providing the counterpart of the obligation to provide a substitute service. The current protection offered to conscientious objection does not take into account the new social demands deriving from an expansion of the frontiers of bioethics,

48 See *Colaianni*, op. cit., p. 598.

which require an urgent updating of the current provisions due to the rise of new rights.[49] On this point, law no. 219 does not provide any form of conscientious objection for the medical staff, even though some commentators argue that a right to objection comes from article 1 § 5 of the above-mentioned law read in conjunction with article 22 of the code of ethical medical conduct.[50]

However, in ruling no. 242 the Constitutional Court clarified that there is no obligation upon the medical staff to facilitate assisted suicide. Thus complying with a patient's request depends on the individual conscientious choice of a physician.

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49 See *Licastro*, L'epilogo giudiziario, cit., p. 614.

50 In this regard, it should be remembered that, according to the medical code of ethics, articles 3 and 14, the obligation to treat does not imply an artificial prolongation of human life: "the doctor's duty is the protection of life, physical and mental health of man and the relief of suffering with respect for the freedom and dignity of the human person"; moreover "the doctor, even taking into account the patient's wishes where expressed, must refrain from obstinacy in diagnostic and therapeutic treatments from which a benefit for the patient's health and/or an improvement in the quality of life cannot be expected". The Englaro case (Cass. Civ., Sez. I, 16 October 2007, no. 21748; Cass. Pen. Sez. IV, 12 April 2005, no. 13241) emphasized the situation in which the interruption of life-sustaining treatments may or may not be allowed if the patient is unable to express a precise and current will. This is the case of patients in a permanent vegetative state who are not, however, in conditions of brain death, like Eluana Englaro, to whom the feeding provided by a nasogastric tube was finally interrupted, after a long legal battle carried on by her parents. This case raised also concerns about the risk of therapeutic obstinacy, given the assimilation of the substances that had maintained alive a patient, but in a permanent vegetative state for 17 years. The Civil Court held that a person in a vegetative state can refuse life-sustaining treatments and can claim their rights through their legal representatives. Pursuant to art. 32 of the Constitution, the Criminal Court held that that the medical staff had to act in the pursuit of the exclusive interest of the patient, although in this case it was extremely controversial to decide which was the most genuine interest of the patient involved. See *Risicato*, op. cit., p. 15 ff.

Focusing on a mere criminal perspective, the Court held that a physician cannot be deemed criminally liable if he facilitates the termination of life of a patient complying with his will, even though he cannot be forced to act against his conscience.[51] This reasoning raised the question of whether the practitioner's conscience is given stronger protection than a patient's self-determination.[52]

[51] See, *Licastro*, L'epilogo giudiziario, cit., p. 615.

[52] See *Marilisa D'Amico*, Il "fine vita" davanti alla Corte costituzionale fra profili processuali, principi penali e dilemmi etici (Considerazioni a margine della sent. n. 242 del 2019), in Osservatorio Costituzionale, 1/2020, p. 300.

6. A cautious approach

Thus, the Court adopts a more cautious approach than the one embraced in its prior decree, which is mirrored by a different interpretation of the normative text: this reasoning results in a transition from a "duty to comply with a patient's choice" burdening the medical staff, to the mere recognition of an "individual right to refuse any medical treatment" even necessary for survival.

On the one hand, the concern of people arguing that full autonomy in this field is purely illusory should not be underestimated, as "a right to be assisted in suicide will depend on whether you are ill enough or suffering enough … in the view of somebody else."[53]

On the other hand, the recognition of the subjective perception of human dignity cannot be "absolute" in this delicate field, as well as the fact that the primacy of autonomy cannot be "absolutized"[54]; it deserves consideration within the prism of all the options provided by the current legal framework, which does not permit an individual perspective to prevail over all the others.[55] However, such a reading has been criticized by some commentators, who underlined that the establishment of a right of a patient without the imposition of a duty upon the medical staff risks undermining the effective exercise of such a right.[56]

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53 *Robert J. George, Ilona G. Finlay* and *David Jeffrey*, Legalised Euthanasia will Violate the Rights of Vulnerable Patients, in BMJ, vol. 331, 2005, p. 684; Rex. T. Ahdar, The Case against Euthanasia and Assisted Suicide, NZ Law Review, 2016, p. 475.

54 See *Richard A. McCormick*, Vive la Difference! Killing and Allowing to Die, in Quad. Dir Pol. Eccl., 1998/3, p. 648.

55 *Colaianni*, op. cit., p. 599.

56 *Tripodina*, La "circoscritta area", cit., p. 13.

The reasoning of the Court is simple: when the individual's conditions are the above-mentioned ones, there is no need to punish the facilitation of suicide, as the reasons justifying the criminal liability of providing assistance to suicide are weaker. Following this perspective, as it is possible to receive medical assistance to terminate life-sustaining treatment, there should not be any reason to deny the legitimacy of an action aimed at avoiding a patient being subjected to pain due to such termination. However, this reasoning implies a reflection about the correct relationship between article 32 of the Italian Constitution and the right to self-determination.

The crucial question concerns whether there is a difference between an individual asking for the interruption of life-sustaining treatment and an individual claiming help to take a lethal drug. The issue has been highly contested for many years.[57] According to influential commentators, there is a great difference between the two situations, as "removing a positive benefit and introducing a negative benefit are quite different, morally speaking, even if the result is the same."[58] Another influential scholar underlined that "one way to soften resistance to the unacceptable is to confuse it with the acceptable."[59] In the milestone case Vacco v. Quill, the US Supreme Court held that "the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational."[60] With regard to the Italian constitutional framework, when life-sustaining treatment is interrupted, a physician just

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57 See *M. Cathleen Kaveny*, Two Questions on Assisted Suicide, in Quad. Dir Pol. Eccl., 1998/3, pp. 631-637; McCormick, op. cit., pp. 639-649.

58 See *Hoffman*, op. cit., p. 387.

59 See *McCormick*, op. cit., p. 649.

60 See *Vacco*, at 800-801.

complies with a constitutional obligation, which implies that no one can be subjected to a medical treatment against his will: the natural conditions of a patient are restored, which were previously altered by artificial means. On the contrary, assisted suicide finds no constitutional protection as it triggers a causal process resulting in a patient's death.[61] So these two situations cannot be put on an equal footing even resorting to the right to self-determination. This point of view is mirrored by the National Committee for Bioethics.[62]

However, "the tenuousness of the distinction between acts and omissions in the medical treatment context" has to be seriously taken into account.[63] There are many nuanced situations, which result in different jurisdictions ranging between restrictive and permissive responses on the issue.[64]

In the European context, an analysis of proportionality should be required, which implies assessing whether and to what degree state measures interfere with that sphere of self-determination granted by article 8 ECHR, whether such measures, even in accordance with domestic law, are "necessary in a democratic society", whether a complete ban is the least restrictive alternative to pursue valuable state interests (i.e. the protection of vulnerable classes).[65] Indeed, a State has a fundamental interest in the preservation of human life, and it has to "decline to make any sort of judgment about the quality of life" of an individual.[66] Such basic interest "reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the

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61 See *Licastro*, L'epilogo giudiziario, cit., p. 619.
62 See *Resolution* 18 July 2019.
63 See *Martin*, op. cit., p. 178.
64 See Carter v. Canada, [2015] SCC 5; Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).
65 See *Martin*, op. cit., p. 116.
66 See *Hoffman*, op. cit., p. 142.

young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated in the same way as anyone else's."[67] Another risk is that of undue influence of physicians over patients, which could alter the highly confidential relationship between a patient and a physician.[68]

The crucial question is whether such state interests are so compelling as to prevail over personal liberty in any case, without an in-depth investigation of the most genuine good for a person (on which public and private choices could find a common ground).[69]

The achievement of a fair balance is extremely complex and it requires a contextualized approach, in order to prevent a disparate treatment of persons who are in substantially analogous positions, where an objective and reasonable justification is lacking.[70] However, in the European scenario, the circumstance that every state enjoys a wide margin of appreciation in reaching such a fair balance cannot be underestimated, requiring serious consideration for its specific constitutional, legal, political and historical context, and such a factor can lead to different legal outcomes in different legal contexts.

Furthermore, another question concerns the duties upon the public health-care system. Although a physician can refuse to provide assistance to suicide, what about the public health care system? Should it provide that the individual right to assisted suicide can be effectively exercised? As a clear right to assisted suicide has not been regulated, there remains a sort of grey area and there is a high risk that a genuine right to

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67 See *Glucksberg*, at 732.

68 *Kaveny*, op. cit., p. 636.

69 See *David Busscher*, Linking Assisted Suicide and Abortion: Life, Death and Choice, in J. Elder., vol. 23, 2015, p. 146; *Kaveny*, op. cit., p. 647.

70 See *Martin*, op. cit., p. 159.

self-determination is emptied of its substance.[71] Italian legal system had experienced this sort of legal conundrum with the right to abortion. Abortion procedure is legally allowed. However, given the high number of conscience objectors among physicians and medical staff, in some geographical contexts it is not effectively available. For these reasons, some regions held competitions excluding objecting medical staff and this sort of public choice gave rise to further concerns about discrimination for religious reasons.

[71] See *Licastro*, L'epilogo giudiziario, cit., p. 617.

7. The influence of religion on public policies

In the last ten years, Italian legislation has followed, in compliance with the directives of the European Union, a more progressive direction. Also, the fruitful exchange of experiences between legal systems in a globalized world has contributed to the widespread circulation of legal approaches, favouring the use of shared procedures for solving ethical problems raised by religious and cultural pluralism. The Italian legal system has started to face the most controversial issues of bio-law, such as those of the beginning and end of life, recognizing the right to self-determination with a view to reconciling it with the need to guarantee the coexistence of multiple ethical views. The lawmaker has often tried to balance the interests involved, imposing severe limitations in various sectors relating to bioethics.[72] This approach has often resulted in aligning with the mainstream opinions in Italian society, which are consistent with the guidelines of the Catholic Church. In Italy, the Catholic Church, which considers life as a sacred and intangible good, has often had an open and incisive influence on legislative policy choices.

However, in a pluralist system, religious ethics cannot be imposed on non-believers. For this reason, the legislator should provide interventions, which meet the different claims for legal protection. A secular state is required to respect ethical pluralism, indeed to guarantee the coexistence of a multiplicity of moral positions, even opposing ones, and, therefore, a plurality of models and lifestyles. It is only in this way that law can carry out its promotional function, which allows social growth

[72] See *Freni*, op. cit., p. 33 ff.

to be guided toward the increasingly conscious and responsible exercise of freedom.[73]

[73] See *Pasquale Stanzione, Giovanni Sciancalepore* (eds.), Procreazione assistita. Commento alla legge 19 febbraio 2004 n. 40, Giuffrè, Milano, 2004, p. 205.

8. Concluding remarks

Recent case law leads us to believe that the public discourse on the issue is taking on a new dimension, in view of the adoption of more liberal and permissive guidelines, which favour the self-determination of individuals. Regarding this, the controversial distinction between the right to refuse medical treatment and the crime of assisting in the suicide of a consenting party has given rise to concerns about, on one hand, an infringement of the principle of equality; on the other hand, the risk of abuse. According to some judges, such a distinction seems "a meaningless exercise in semantic gymnastics."[74] According to others, "the difference is not of degree but of kind. You no longer seek the ending of unwanted medical attention. You seek the right to have a second person collaborate in your death."[75]

In different jurisdictions, the legalization of assisted suicide took advantage of different legal techniques.[76] In any event, where there was a legal vacuum, the judiciary has played a supplementary role in the effort to provide justice by responding to emerging social demands. The Cappato case testifies that where a legislative gap threatens rights perceived as fundamental, the judiciary takes the place of Parliament. Judicial boards identify solutions, which follow a transnational "lenient" judicial trend toward those people who help patients in irreversible conditions to commit suicide, where the circumstances of the case demonstrate a weakening of the "moral wrong."[77] Thus, the intervention of the judge is not limited to

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74 See People v Kevorkian, 527 N W 2d 714 (Mich 1994) at 728.
75 See Compassion in Dying v State of Washington 49 F 3d 586 (1996 US App) at 594.
76 See *Ahdar*, op. cit., p. 478.
77 See *Hoffman*, op. cit., p. 395.

urging the legislator to resolve the deficiencies and the regulatory uncertainties that it highlights, but takes on the role of identifying new standards, on the basis of the constitutional framework as a whole. The Cappato case shows the supplementary role of the judiciary: every time a situation of legislative vacuum arises on issues of vital importance, there is a sort of counterbalance between the different branches of the government, the judiciary extends the area of his intervention, with a view to responding to a claim for justice and equity which would otherwise remain frustrated due to the inaction of the lawmaker.[78]

In any event, the choice to grant equal treatment to the two situations (interruption of life-sustaining treatment and assisted suicide) should be left to democratic processes, which should result in the adoption of provisions aimed at achieving a balance, even imperfect, between conflicting interests. Public choices remain neutral as long as no obligation is imposed on anyone to act against his conscience. Instead, the lack of a legislative intervention leaves the matter in the hands of courts, who become "interpreters of social expectations"[79]. In this way, there is a high risk of courts blindly adhering to a conservative view of preservation of life at any cost or taking excessively progressive approaches, which do not perfectly align with constitutional and European standards.[80] Thus, judicial interventionism renders more pressing the need for the lawmaker to adopt legislation regulating the matter and defining eligibility standards to have access to assisted suicide, in order to prevent its abuse.[81]

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78 See *Freni*, op. cit., p. 33 ff.

79 See *Zannoni*, op. cit., pp. 1-32.

80 See *Zannoni*, op. cit., pp. 1-32.

81 At the moment in Italy a campaign association ("Luca Coscioni") is collecting signatures to ask for a referendum aiming at partially re-

In a comparative perspective, the Italian judicial approach, which defines a restricted area of de-criminalization of assisted suicide, is more cautious than the German approach, which recently gave broad recognition to self-determination, as it made access to assisted suicide dependent on strict conditions.[82] The Italian approach is far from emphasizing just the individual ability to take completely autonomous decisions, and from leaving too much space to a subjective perception of the quality of life and the intolerability of suffering: it maintains a sufficient level of state control over individual choices concerning end-of-life, requiring a strict scrutiny of the viability of procedural requirements.[83] Thus, according to the Court, the National Health System is charged with the difficult task of assessing the conditions, which render assisted suicide legitimate and the ways of execution, in order to prevent abuses to the detriment of vulnerable people and to safeguard the dignity of a patient.[84]

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pealing article 579 of the Criminal Code in order to legalize third-party assistance in suicide. More than 500.000 signatures have already been gathered. The Italian Conference of Catholic Bishops has expressed concern for the issue. It declared, "choosing death is the defeat of the human, the victory of an individualistic and nihilistic anthropological conception in which neither hope nor interpersonal relationships find anymore space". The Italian Conference maintained its position that "anyone who is in conditions of extreme suffering must be helped to manage pain, to overcome anguish and despair, not to eliminate their life." See https://www.ansa.it/sito/notizie/politica/ 2021/08/18/eutanasia- cei -e-vittoria-dellindividualismo- enichilismo-_ 637b77e2-f877-47d8-9466-b482695f1d80.html (Retrieved 19 August 2021).

82 See *Nicola Colaianni*, L'aiuto al suicidio tra Corte Costituzionale 242/2019 e BundesVerfassungsGericht 26 febbraio 2020, in Stato Chiese e Pluralismo Confessionale, Rivista Telematica, 6/2020, pp. 1-5.

83 See *Colaianni*, op. ult. cit., pp. 1-5.

84 See *Tripodina*, La "circoscritta area", cit., p. 13.

However, the crucial question arising from the Cappato case concerns how much room has been left to legislative discretion. Did the Constitutional Court exceed its jurisdiction? Provided that the lawmaker did not intervene to reconcile conflicting interests, the Court played a pivotal role in filling the gap within the framework of the constitutional principles and the current legal provisions to prevent fundamental rights being undermined.[85] According to some commentators, it seems that the Court defined the boundaries of legislative choices, selecting a specific "ethical option" to regulate a specific case.[86]

In any event, the lawmaker did not subsequently provide new regulation, so many questions remain open. Thus, this ruling emphasizes the risk of a transition toward a "juristocracy"[87], namely a dangerous change of the balance of powers among the three powers of government, where the role of the lawmaker is "marginalized" as it is reduced merely to provide detailed legislation following the Court's addresses.[88] In this way, the lawmaker is disempowered, as the judiciary is charged with "tragical choices" between conflicting values.[89]

It goes without saying that the ruling opened a new approach to self-determination, according to which different ways of committing suicide (suicide through interruption of life-sustaining treatment or through medical assistance) cannot be subject to disparate treatment.

Can the rationale of the judgement be extended to further cases, for the sake of the principle of equality?[90] What about

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85 See *Tripodina*, La "circoscritta area", cit., pp. 11-12.
86 See *Licastro*, L'epilogo giudiziario, cit., p. 621.
87 See *Ran Hirschl*, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, Harvard University Press, Cambridge, 2004.
88 See *Licastro*, L'epilogo giudiziario, cit., p. 629.
89 See *Guido Calabresi*, Philip Bobbit, op. cit.
90 See *Tripodina*, La "circoscritta area", cit., p. 9.

patients that are not kept alive through life-sustaining treatments, even though they suffer from irreversible diseases?[91] The current case is founded on the idea that a patient is able to take free and conscious decisions. Can the request for assisted suicide be claimed through advance treatment directives? Namely, should the possibility to make a free and aware decision be limited to cases where the existence of a present will can be assessed or should an individual be recognized as having the possibility to plan his assisted suicide (as he has the legal right to plan interruption of life-sustaining treatment, under certain conditions under the law no. 219)? [92]

This scenario rises another ethical question: what about medical liability in cases of patients in an unconscious state or of patients who are physically unable to take a lethal drug autonomously? [93]

These controversial issues raised the reflections of academics who suggest resorting to reasonableness, and to the language of public reason, which should lead public discourse, in order to negotiate conflicts in the political and legislative sphere, where opposite views require reconciliation.[94]

The principles of equality and reasonableness should lead future choices, with a view to balancing individual expectations with their impact on society as a whole.[95] The patient's wishes should be taken into account seriously, but in a dynamic dialectic with other important interests.[96] In this way the risk of a slippery slope, which could lead to an extension of situations

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91 See *Paolo Veronesi*, "ogni promessa è debito"; la sentenza costituzionale sul "caso Cappato", in Studium Iuris, 2/2020, pp. 131-140.
92 See *Licastro*, L'epilogo giudiziario, cit., pp. 624-627.
93 See *Licastro*, L'epilogo giudiziario, cit., pp. 624-627.
94 Cfr. *John Rawl*, Liberalismo politico, Comunità, Milano, 1994, pp. 5-9.
95 See *Zannoni*, op. cit., pp. 1-32.
96 See *Zannoni*, op. cit., pp. 1-32.

of "social acceptability" or "pragmatic tolerance"[97] of life termination, could be prevented. Italy, as a member state, should provide clear guidelines to comply with the European framework, which implies establishing narrow circumstances and clear limits to an individual's possibility to resort to assisted suicide.[98] Therefore, a State has the fundamental duty to legislate in ethically sensitive matters that concern the essence of the human being and of society itself, carefully exercising its power "to regulate (to the point of prohibiting) technical applications that harm the values linked to the human person", even "resorting to a clear precautionary principle."[99]

The balance, even imperfect, between the different values involved in the bioethical field, and in particular the complex problems relating to the power to affect the beginning and the end of human existence must always take place in compliance with constitutional principles and the bioethical discussion must always be realized in an open dialogue among several social, political, religious scientific legal and cultural components of society, in the pursuit of a balanced osmotic relationship between the different cultural and ideological options.[100]

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97 See *Ahdar*, op. cit., p. 482 and p. 487.

98 See *Zannoni*, op. cit., pp. 1-32.

99 See *Lorenzo Chieffi*, I paradossi della medicina contemporanea, Lecture held at the Second Level Master on "Diritto, Politiche e Management Sanitario e Socio-sanitario", SSSAP, Unical, 23 settembre 2011.

100 See *Carlo Casonato*, Bioetica e pluralismo nello Stato costituzionale, in Carlo Casonato – Cinzia Piciocchi (eds.), Biodiritto in Dialogo, CEDAM, Padova, 2006, p. 9.

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Assisted Suicide: An Italian Perspective

The unrestrainable evolution of medical science and technology is drastically changing health-care, enabling new medical procedures and remedies, which are increasingly intertwined with moral principles. Although a uniform European approach on assisted suicide is lacking, a common trend is developing: the boundary between euthanasia, assisted suicide and end-of-life care and the frontiers of legitimate medicine are becoming increasingly blurred. In Italy, a ruling of the Constitutional Court, no. 242/2019, declared the partial unconstitutionality of article 580 of the Italian Criminal Code, which prohibited assistance in suicide. Specifically, article 580 excluded the criminal liability for the person who, in the manner provided for in Articles 1 and 2 of the law 22 December 2017, no. 219, "facilitates the execution of intention of suicide, autonomously and freely formed, of one person kept alive by life-sustaining treatments and suffering from an irreversible pathology, source of physical or psychological suffering that he/she deems intolerable, but fully capable of making free aware decisions, provided that such conditions and methods of execution have been verified by a public structure of the national health service, following the opinion of the territorially competent ethics committee." The present paper analyzes the legal regime of assisted suicide in Italy, the role of the rule of law, and the crucial boundary between the branches of government with regard to this delicate issue, and investigates current legal challenges and potential future legal tracks.

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