

Editorial – From ruling No. 242/2019 of the Constitutional Court to the Italian law on medically assisted death: a complex transition

G. RICCI, F. GIBELLI, A. SIRIGNANO

Section of Legal Medicine, School of Law, University of Camerino, Camerino, Italy

On 10 March 2022, the Chamber of Deputies of the Italian Parliament approved with a large majority the draft law No. 3101 on medically assisted death (also called “assisted suicide”).

There were 253 votes in favour, 117 against and one abstention.

The approval of the law is, in fact, a response to the lively social pressure that has long been calling for assisted suicide to be made lawful in Italy, as it is in other European countries¹.

The existing law on the end of life, No. 219/2017, does not provide for the possibility of assisted suicide^{2,3}.

The text of the law, entitled “Provisions on medically assisted voluntary death”, will now have to be discussed in the Senate for the final vote.

If definitively approved, the law would therefore exclude the punishability of medically assisted death, i.e., the self-suppressive act practiced and realized by the patient through technical support made available by a physician or a healthcare facility.

The draft law represents the outcome of a legal and regulatory path that had begun with the issuance in 2019 of the historic ruling No. 242 by the Italian Constitutional Court^{4,5}.

With that landmark decision, the Court partially decriminalized medically assisted death, defining precise conditions that made it legitimately feasible.

Specifically, the Constitutional Court had been asked to rule on the case of Marco Cappato, an Italian politician investigated for the offence provided for in Article 580 of the Italian Criminal Code (“incitement or aid to suicide”)⁶.

In 2017, Marco Cappato helped Fabiano Antoniani, a person suffering from tetraplegia and blindness, to commit assisted suicide by taking him to a euthanasia clinic in Switzerland.

According to the Public Prosecutor, Marco Cappato was responsible for “having strengthened Fabiano Antoniani’s suicidal intention [...] offering him the opportunity to access assisted suicide [...] in Switzerland and having made every effort to put Antoniani’s family in contact with Dignitas by providing them with informational material” and “for having facilitated Antoniani’s suicide by transporting him by car to Dignitas on 25 February 2017, where the suicide occurred on 27 February 2017”.

However, on 14 February 2018 the Court of Assizes of Milan raised the question of the constitutionality of Article 580 of the Criminal Code⁷, considering it contrary to the principles enshrined in the Italian Constitution in two respects. Basically, as it is formulated, Article 580 of the Criminal Code equates incitement to suicide and the mere material facilitation conduct, both in terms of criminal purpose and in terms of sanctions.

According to the Court, such equalization represents a distortion referable to the socio-cultural context in which the Italian Penal Code was written in 1930. During the Fascist regime, suicide was indeed considered unacceptable since it was contrary to the principles of sacredness and non-availability of human life⁸.

With the ordinance no. 207 of 2018⁹, the Italian Constitutional Court upheld the objection of unconstitutionality raised by the Court of Assizes of Milan, recognizing that the Article 580 of the Criminal Code conflicted with the provisions of Articles 2, 13 and 32 of the Italian Constitution, which protect the freedom of self-determination of the patient in the choice of treatment.

The Court, however, considered giving the legislator time to intervene to fill the legal vacuum appropriate, opting to postpone the decision to a subsequent hearing almost a year after the pronouncement of the ordinance.

A year later, due to the total inertia of politics, the Court issued its historic judgment no. 242/2019, in which it affirmed the partial legitimacy of medically assisted death, which can be practiced under certain conditions. These conditions are as follows:

1. Suicide assistance must be purely material.
2. Suicidal intent must be freely and independently formed in the mind of the person who intends to end his or her life.
3. The person must be on life-support and suffering from an irreversible disease causing intolerable physical or psychological suffering.
4. Despite severe physical or psychological illnesses, the subject must be fully capable of making free and informed decisions.
5. The conditions underpinning the feasibility of the suicidal act and the manner in which it is carried out must be verified by a public structure of the National Health Service and must be approved by the competent local ethics committee.

Based on the principles set out in the judgment, on 23 December 2019 the Milan Court of Assizes definitively acquitted Marco Cappato from the charge of incitement to suicide on the grounds that the fact did not exist.

The ruling No. 242/2019 set out an important legal guideline that effectively made it non-punishable to assist another person to commit suicide if the conditions outlined by the Constitutional Court were met. The significance of the judgement was such that it prompted the Italian National Federation of Medical Associations (FNOMCEO) to amend Article 17 of the Code of Medical Ethics, which in its original wording prohibited any form of facilitation of a patient's death¹⁰.

In its new wording, approved on 6 February 2020, article 17 fully incorporates the principle established by judgment No. 242/2019, providing for the non-punishability – from a disciplinary point of view – of the physician who materially facilitates the patient's independently formed suicidal intention¹¹. This represents a significant revolution, given the essentially static nature of the Italian code of medical ethics, which has little inclination to evolve in response to changes in society^{12,13}.

Despite the importance of the legal principle asserted, the ruling of the Constitutional Court did not explain the implementation procedures, i.e., it did not go into the substance of the matter by fully explaining the modalities and conditions for the feasibility of the procedure of medically assisted death. This regime of uncertainty gave impetus to the birth of the draft law currently under discussion in the Italian Senate.

A systematized regulatory framework for medically assisted death would complement the regulation of passive euthanasia, made *de facto* legitimate with the enactment of law 219/2017¹⁴. This law, which came as a result of tumultuous doctrinaire controversies of a jurisprudential and bioethical nature arising in connection with the Eluana Englaro and Piergiorgio Welby cases, gave full effect to the principle enshrined in article 32 of the Italian Constitution (“Nobody may be forcefully submitted to medical treatment except as regulated by law”)¹⁵, establishing the right of the patient to refuse the proposed treatment, including artificial nutrition and hydration.

Law 219/2017 also provided for the possibility of indicating one's wishes regarding medical treatment in anticipation of a possible future incapacity for self-determination, effectively introducing the so-called “living will” in Italy.

Concerning active euthanasia (i.e., by administering lethal substances to the person who intends to die), a popular initiative referendum proposing its lawfulness was recently declared illegitimate by the Constitutional Court.

The referendum, which aimed at decriminalizing the crime in Article 579 of the Penal Code (“murder of a consenting person”), was declared unconstitutional on 15 February 2022, as it failed to preserve the constitutionally necessary minimum protection of human life.

The legitimate fear of the constitutional judges was that making homicide of the consenting party non-punishable might have opened the way to practices well beyond euthanasia, failing to protect the good of life, especially for the most psychologically fragile persons^{16,17}. Therefore, the possible approval of the law on assisted suicide, could represent a historic turning point in the evolution of the end-of-life issue in Italy, going so far as to legitimize a practice of interruption of human life carried out in an “active” way (although the final effect of such a way should be realized through an action directly carried out by the person who intends to die).

However, there are lively and sometimes fierce criticisms of the path that led from judgment no. 242/2019 to the law on medically assisted death. The formulation of the law was supposed to theoretically represent the systematization and regulation of the legal principle enshrined by the Constitutional Court in 2019. However, according to many observers, the draft law, approved by the Italian Chamber of Deputies, as formulated, would represent a step back from judgment no. 242/2019, restricting its innovative scope. In other words, the law would have failed to give full effect to the legal principle of openness to the possibility of medically assisted death enshrined in 2019 by the Constitutional Court.

The first weak point in the text of the law would be the definition of the conditions necessary for accessing the medically assisted death. According to the law approved by the Italian Chamber of Deputies, in order to request medically assisted death, two conditions must be simultaneously met:

1. The disease must be irreversible and have an unfavourable prognosis, or it must be irreversible and cause intolerable physical and psychological suffering.
2. The person must be kept alive by life-sustaining medical treatments.

Concerning the first point, it is essential to note that the inauspicious nature of the prognosis has been introduced, a concept absent in ruling No. 242/2019.

If the draft law currently under discussion in the Italian Senate had been in force at the time of Fabiano Antoniani's case, the conditions for accessing medically assisted death would not have been met, as the person was suffering from a severe and irreversible paralytic condition, but with a prognosis that was not configurable as inauspicious. However, the law allows the person to request medically assisted death even in cases of "physical and psychological" suffering. The criticism of many experts focuses on the conjunction "and", since the law should also protect subjects with merely psychological suffering.

Regarding the second procedural condition, it is clear that it decisively restricts the scope of the applicability of medically assisted death, since patients without external life support very often ask for assisted suicide (e.g., cancer patients).

Another much-discussed point in the law is the palliative care. The law stipulates that the person must undergo palliative care before requesting to die. This provision appears to limit further the scope of the protection envisaged by judgment No. 242/2019, effectively requiring the patient who intends to die to undergo a compulsory medical treatment, a principle that is contrary to Article 32 of the Italian Constitution. Moreover, the obligation to undergo palliative cares would represent an element of time dilation that would risk prolonging the patient's suffering while waiting to access medically assisted death.

The last critical point of the law is that of conscientious objection. Judgment No. 242/2019 established the legitimacy of conscientious objection in assisted suicide. The Italian law on medically assisted death approved by the Chamber of Deputies follows the principle outlined by the Constitutional Court, providing for the doctor the possibility to abstain from participating in the procedure. The legitimization of conscientious objection evidently represents an enormous obstacle to the actual applicability of the law, similarly to what happened with the voluntary interruption of pregnancy, which is increasingly challenging to implement in Italy due to the high number of objecting gynaecologists.

In conclusion, the complex legal and ethical-deontological debate on the end of life in Italy has seen decisive turning points in the last five years, the main one being the ruling by the Constitutional Court in 2019, opening the way to the possibility of medically assisted death.

The judgement had been preceded one year earlier by an ordinance essentially establishing the same principle but postponing the formulation of a final decision pending legislative intervention. The legislator's immobility forced the Court to define an innovative legal principle on which the legislature would be called upon to modulate a concrete and systematic law.

However, the transition from the principle established by the Court to creating an unanimously agreed text has been proved to be very difficult. Difficulties lie in finding a fair balance between protecting human life and the right to self-determination of the patient.

In our opinion, as currently drafted, the law under discussion in the Senate risks to be unbalanced in the sense of the protection of human life, restricting in a far too marked way the applicability of the perspectives introduced by the Constitutional Court in 2019.

Conflict of Interest

The Authors declare that they have no conflict of interests.

References

- 1) Mroz S, Dierickx S, Deliens L, Cohen J, Chambaere K. Assisted dying around the world: a status quaestio- nis. *Ann Palliat Med* 2021; 10: 3540-3553.
- 2) Cioffi A, Zaami S. Italian Law no. 219/2017: consequences on the informed consent of the psychiatric patient and on the therapeutic privilege. *Riv Psichiatr* 2020; 55: 129-130.
- 3) Busardò FP, Bello S, Gulino M, Zaami S, Frati P. Advance health care directives and “public guardian”: the Ital- ian supreme court requests the status of current and not future inability. *Biomed Res Int* 2014; 2014: 1-4.
- 4) Montanari Vergallo G, Spagnolo AG. Informed Consent and Advance Care Directives: Cornerstones and Out- standing Issues in the Newly Enacted Italian Legislation. *Linacre Q* 2019; 86: 188-197.
- 5) Montanari Vergallo G, Busardò FP, Berretta P, Marinelli E, Zaami S. Advance healthcare directives: moving towards a universally recognized right. *Eur Rev Med Pharmacol Sci* 2018; 22: 2915-2916.
- 6) Montanari Vergallo G. The Marco Cappato and Fabiano Antoniani (dj Fabo) Case Paves the Way for New As- sisted Suicide Legislation in Italy: An Overview of Statutes from Several European Countries. *Eur J Health Law* 2019; 26: 221-239.
- 7) Court of Assize of Milan. Ordinance no. 1/2018. Order of remittance to the Constitutional Court, 14 February 2018.
- 8) Turoldo F. Aiding and abetting suicide: the current debate in Italy. *Camb Q Healthc Ethics* 2021; 30: 123-135.
- 9) Italian Constitutional Court. Ordinance no. 207/2018, published in Official Gazette of 21/11/2018, no. 46.
- 10) Italian National Federation of Medical Associations (FNOMCEO). “Italian Code of Medical Ethics”.
- 11) Marinelli E, Busardò FP. Assisted suicide: article 17 of the Italian Code of Medical Ethics follows in the footsteps of the Italian Constitutional Court’s landmark ruling. *Eur Rev Med Pharmacol Sci* 2020; 24: 10309-10312.
- 12) Montanari Vergallo G, Busardò FP, Zaami S, Marinelli E. The static evolution of the new Italian code of medical ethics. *Eur Rev Med Pharmacol Sci* 2016; 20: 575-580.
- 13) Ricci G, Vitali M, Tambone V. Comment on “The static evolution of the new Italian code of medical ethics”. *Eur Rev Med Pharmacol Sci* 2016; 20: 2760-2761.
- 14) Law 219/2017 “Provisions for informed consent and advance treatment directives” in *Gazzetta Ufficiale della Repubblica Italiana*, n. 12, 16 January 2018.
- 15) Montanari Vergallo G. Advance Healthcare Directives: Binding or Informational Value? *Camb Q Healthc Ethics* 2020; 29: 98-109.
- 16) Italian Penal Code, Art. 579.
- 17) Rinaldi R, Bersani G, Marinelli E. Medico-legal notes for a new set of standards in the assessment of penal liability in psychiatry. *Riv Psichiatr* 2017; 52: 16-23.