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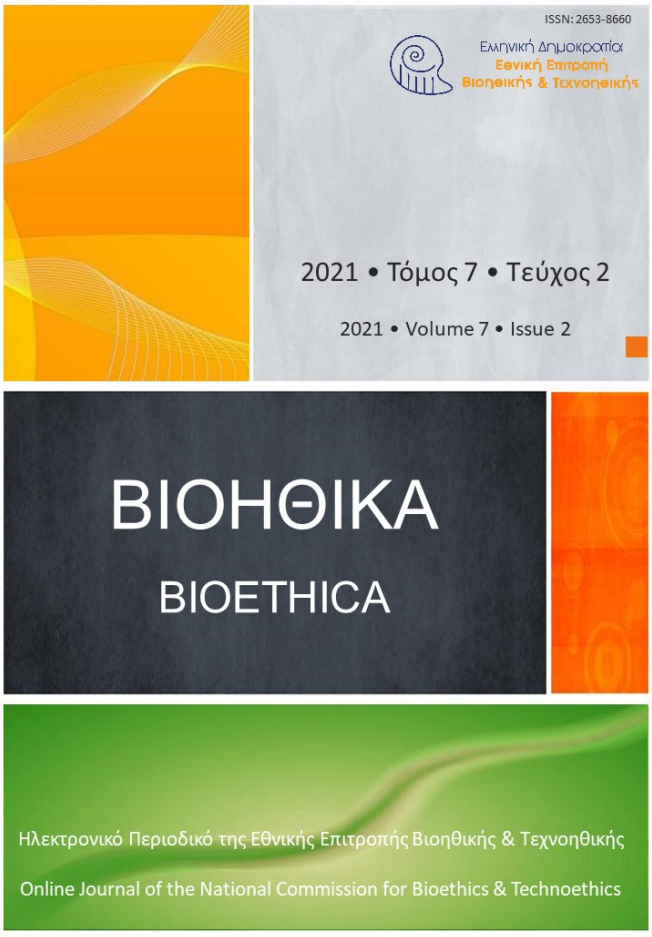

Along the Italian route of End-of-life: the latest judicial evolution on assisted suicide

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Along the Italian route of End-of-life: the latest judicial evolution on assisted suicide

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Abstract

In the last three decades, the dilemma of End-of-Life is one of the most disputed bio-juridical questions Italy is confronting with. By raising highly sensitive ethical, legal and political dilemmas, it has deeply divided the Italian society, the scientific community and the political arena. In the context of a raging controversy, the Italian Parliament has opted for silence. Thus, an evolutive, judicial route has marked the legal frame in response to numerous, concrete demands of recognition of the freedom of self-determination and value of dignity in the final phase of life. In this review article, an overview of the judicial evolution of the complex mosaic of end-of-life issues will be firstly offered through three cases, pillars on which the latest judicial evolution on assisted suicide lays its foundations. Secondly, the issue of assisted suicide will be singularly addressed through the examination of the Cappato case which has outlined the path for the historical ruling of the Italian Constitutional Court, no'242 of 2019 on the constitutional illegitimacy of the crime of assistance to suicide under article 580 of the Italian Criminal Code. Precisely, the Court has pointed out several, concurrent requirements in presence of which an active conduct directly connected with suicide is not criminally relevant: the autonomous and free formation of the individual will, the irreversible nature of the disease, the ongoing practice of a life-saving treatment, the intolerability of the physical or psychological sufferings and the mental capacity to self-determination. Among the numerous, emerging, interpretative questions, the latest Trentini case, in which the requirement of life-saving treatment has been interpreted as inclusive of pharmacological therapy and of every material, sanitary life-saving assistance, will be further evaluated. Conclusively, a cross section of the fragile interplay between the legislative power and the judiciary power will be depicted in reference to the main open interpretative questions related to the enforcement of the constitutional ruling and a portrait of the upcoming scenerios, as the existing legislative drafts and the prepositive referendum question, will be concisely examined.

Keywords: Italy, end-of-life, assisted suicide, judiciary constitutionalism, balance of powers.

Η αντιμετώπιση του τέλους της ζωής στην Ιταλία: οι πρόσφατες νομολογιακές εξελίξεις στην υποβοηθούμενη αυτοκτονία

Teresa Andreani

Φοιτήτρια της Νομικής Σχολής του Πανεπιστημίου Trento και ασκούμενη στην Εθνική Επιτροπή Βιοηθικής & Τεχνοηθικής

Περίληψη

Τα τελευταία τριάντα χρόνια στην Ιταλία τα ζητήματα σχετικά με το τέλος της ζωής ανήκουν στα πιο αμφισβητούμενα στο πεδίο του Βιοδικαίου. Αναδεικνύοντας κρίσιμα ηθικά, νομικά και πολιτικά διλήμματα, δίχασαν βαθιά την ιταλική κοινωνία, την επιστημονική κοινότητα και τον πολιτικό κόσμο. Σε αυτό το περιβάλλον, το ιταλικό κοινοβούλιο προτίμησε τη σιωπή, ανοίγοντας έτσι τον δρόμο για τη νομολογία των δικαστηρίων. Εκείνη είναι που σταδιακά καθόρισε το νομικό πλαίσιο για την αντιμετώπιση πολλών αιτημάτων αναγνώρισης της ελευθερίας αυτοκαθορισμού και της ανθρώπινης αξιοπρέπειας στην τελευταία φάση της ζωής. Στο άρθρο αυτό επιχειρείται, πρώτα, μια παρουσίαση αυτής της νομολογιακής εξέλιξης, με αναφορά σε τρεις αποφάσεις-σταθμούς, στις οποίες βασίζεται η νομική αντιμετώπιση της υποβοηθούμενης αυτοκτονίας. Στη συνέχεια, παρουσιάζεται ειδικά η υπόθεση Cappato, που προετοίμασε το έδαφος για την ιστορική απόφαση του συνταγματικού δικαστηρίου της Ιταλίας 242/2019, με την οποία κρίθηκε αντισυνταγματική η ποινικοποίηση της υποβοηθούμενης αυτοκτονίας από το άρθρο 580 του ιταλικού Ποινικού Κώδικα. Το δικαστήριο τόνισε ορισμένες κρίσιμες προϋποθέσεις που αποκλείουν εν προκειμένω την ποινικοποίηση: την αυτόνομη, ελεύθερη βούληση του ενδιαφερόμενου προσώπου, τον αναπότρεπτο χαρακτήρα της ασθένειας, την ανάληψη θεραπευτικής προσπάθειας για τη σωτηρία της ζωής, την αδυναμία του προσώπου να υποφέρει σωματική και ψυχική ταλαιπωρία και την διανοητική του ικανότητα να αυτοκαθορίζεται. Μεταξύ των πολλών σχετικών νομικών ζητημάτων, η πρόσφατη υπόθεση Trentini ανέδειξε την ανάγκη ανάλυσης του όρου της θεραπευτικής προσπάθειας, που πρέπει να περιλαμβάνει τη φαρμακευτική αγωγή, αλλά και κάθε άλλο μέσον σωτηρίας της ζωής. Συμπερασματικά, το άρθρο επιχειρεί να μελετήσει τη διάδραση μεταξύ νομοθετικής και δικαστικής λειτουργίας στην αντιμετώπιση αυτών των ζητημάτων σε αναφορά με τα σημαντικότερα ζητήματα ερμηνείας των σχετικών συνταγματικών διατάξεων, συμπεριλαμβανομένων των πρωτοβουλιών νέας νομοθεσίας που έχουν εκδηλωθεί, καθώς επίσης και της διενέργειας πιθανού δημοψηφίσματος.

Λέξεις κλειδιά: Ιταλία, τέλος της ζωής, υποβοηθούμενη αυτοκτονία, νομολογιακός συνταγματισμός, ισορροπία εξουσιών.

1. Introduction

Since the last three decades, the end-of-life is the most disputed bio-juridical theme Italy is confronting with. Due to its highly sensitive and divisive range, the Italian Parliament has only marginally and lately regulated the related issues.[1] Thus, in lack of regulation and surrounded by an immobile and alarmed political climate, the evolution of end-of-life in the country has been mostly conveyed by the judiciary power. In line with a transnational, ongoing tendency, the Italian Courts have dealt with claims of recognition of rights on the ground of the freedom of self-determination and the value human dignity in the final phase of life, directly enforcing constitutional rights.[2] In doing so, numerous interrelated issues have been gradually distinguished and addressed as components of the complex mosaic of end-of-life.

In the first section of this review article, an historical overview of the judicial route on the issues of informed consent, the right to refuse life-saving treatments, the practice of deep sedation and the enforcement of the written living will, will be respectively proposed through a concise analysis of Englaro, Welby and Piludu cases. In the second section, on the ground of that foundational cases, the evolution of the legal frame of assisted suicide will be detailly addressed through the examination of Cappato case, the constitutional ruling no' 242 of 2019 and its revolutionary range and aspects of critique. Having identified one of its most disputed, emergent interpretative question, the Trentini case will be further evaluated as a step towards the enforcement and interpretation of the constitutional ruling. At third, final stage, a cross section of the fragile interplay between the legislative power and the judiciary power will be conclusively depicted in reference to the main, open interpretative question related to the enforcement of the constitutional ruling; further, the upcoming sceneries of the pending legislative drafts and the referendum on assisted suicide and euthanasia will be concisely examined.

2. The judicial evolution of end-of-life issues in Italy: an historical overview

The interrelated pieces of the complex mosaic of end-of-life begun to be discussed in Italian Courts at the end of the Nineties when the judiciary was increasingly appealed by numerous, civic claims of rights in the final phase of life. By untying the tight knots among the involved constitutional, civil and criminal levels, the Courts have addressed the issues of the principle of informed consent and the right to refuse life-saving treatment, deep sedation and the enforcement of the written living in three, foundational cases which have outlined the pathway to the judicial recognition of the right to die with dignity: Englaro, Welby and Piludu cases.

2.1. Englaro case: informed consent and the right to refuse life-saving treatment

The legal parable of Eluana Englaro traces back to 1992 when the young woman was tragically involved in a car accident, reporting severe brain lesions and the fracture of cervical spinal bone. Despite the dissent of the family founded on the woman's reconstructed will, Eluana was tracheotomized. After a while she fell into an irreversible, permanent vegetative status: even if she could autonomously breathe, she was artificially fed and had totally lost her

[1] Casonato C. Introduzione al Biodiritto. Giappichelli Editore, 2014: 105-117.

[2] Casonato C. *Idem*: 183; Romboli R. Il caso Englaro: La Costituzione come fonte immediatamente applicabile dal giudice. Quaderni Costituzionali 2009: 91.

cerebral functions. In 1999 her father was appointed as her legal guardian and he appealed the Tribunal to obtain the suspension of the sanitary treatment of artificial alimentation. The Court refused his appeal on the ground of the non-negotiability and legal supremacy of the right to life and on criminal relevance of any euthanasic act directly connected to the death of the patient.[3] In line with these argumentations, the Court of Appeal of Milan rejected his appeal, too.[4] In 2002, the same demand was againrejected on the same legal ground.[5]

In 2006, after a third denial, the father finally recurred to the Italian Court of Cassation. The Supreme Court opted for an interpretative reconstruction of the principle of self-determination in care, the principle of informed consent and the right of treatment refusal on the ground of articles 13 and 32 of the Italian Constitution, the Oviedo Convention and the European Union Charter of rights.[6] The demand to suspend the artificial alimentation was finally accepted. However, a wind of political battle and dissent blew against the judiciary power. The Italian Government of the time firstly tried to emanate a personal decree to halt the suspension of the treatment: the President of the Italian Republic refused to sign it. A deep institutional and constitutional crisis erupted.[7] At a second stage the Government appealed to the Constitutional Court arguing that the judicial decision of the Court violated the separation of powers.[8] The Court finally declared the appeal inadmissible: the government's competence to regulate in general, abstract terms was not violated by the decision, a legitimate judicial act on the ground of the judiciary's power and duty to decide in the single, concrete case.[9]

Seventeen years after the accident and her fall in vegetative status, Eluana spired in a raging social and political context. With the Englaro case, the judicial route of end-of-life reached a first, essential step: the judicial recognition of the right to refuse sanitary treatment as a constitutionally protected right which, in case of the patient's loss of mental capacity, is enforceable by the legal guardian. In the same years, several, diverse aspects of the end-of-life issue in question were further examined in the Welby case.

2.2. Welby case: doctor's criminal exculpation for interrupting life-saving treatment and deep sedation

Piergiorgio Welby was affected by a degenerative pulmonary and muscular dystrophy. In 1997, he was attached to an automatic respiratory ventilator with the aim to maintain his biological functions on while his mental capacity was entirely preserved. After eight years, in the light of the gradual worsening of the acuteness of the irreversible disease which immobilized him, the man inquired how to die painlessly and with dignity. Firstly, he appealed the Tribunal to suspend the life-saving treatment and to halt what he considered therapeutic obstinacy: in line with the sequence of denials in

[3] Englaro case, Tribunal of Lecco, decree 1 March 1999.
[4] Englaro case, Court of Milan, decree 26 November 1999.
[5] Englaro case, Tribunal of Lecco, sentence 26 July 2002; Court of Milan, sentence 17 October 2003.
[6] Englaro case, Supreme Court of Cassation, sentence no 21478, 16 October 2007.
[7] Groppi T. Il caso Englaro: un viaggio alle origini dello stato di diritto e ritorno. Politica del diritto 2009: 149-170.
[8] Deliberation of the appeal for the conflict of competences before the Constitutional Court against the Supreme Court of Cassation and the Court of Appeal of Milan, 30 July 2008.
[9] Italian Constitutional Court, ordinance no 334, 8 October 2008.

the Englaro case, the demand was rejected in 2006 on the ground of the absence of primary regulation.[10] Consequently, he publicly claimed for the medically assistance to suicide or for euthanasia. In response to his open letter of help,[11] the President of the Italian Republic recalled the Parliament to its duty to legislate.

In the same year, Welby was helped by the anesthetist Mario Riccio who accepted to suspend the ventilation and to practice him the deep sedation. The anesthetist publicly declared and revendicated the deontological legitimacy of his action. While the Italian medical association supported the actions in question as legitimate from a medical, ethical and professional viewpoints, the doctor was subjected to a criminal investigation under article 579 of the Italian Criminal law, which punishes consented murder or euthanasia.

With a detailed insight in the patient's health condition and will, the criminal proceeding verified that the cause of death was a cardio-respiratory block. Thus, firstly the action of deep sedation was found not to be directly connected to the death: it was demonstrated to be exclusively as a direct consequence of respiratory insufficiency induced by the suspension of artificial ventilation. Secondly, the act of suspension of the treatment in question was criminally exculpated under the compliance of the medical duty to respect the patient's will and constitutionally protected right to refuse sanitary treatment.[12]

With the Welby case, the judicial evolution led to a second, crucial step: the recognition of the right to sanitary treatment refusal as the legal ground on which the criminal exculpatory cause of the doctor's act of suspension of the life-saving treatment relies.[13] Further, the practice of deep sedation was found to be criminally irrelevant, lawful in accordance with the renovated frame of therapeutic relation of care. Ten years later, on the ground of the legal rationale enforced in this case, the Piludu case has further developed.

2.3. Piludu case: legal enforcement of written living will

In 2011, Walter Piludu was diagnosed to be affected multiple sclerosis. The year after, he began to write his personal will with regards to future, invasive treatment: he declared that, in case of loss of mental capacity, he would have wanted the life-saving treatment to be suspended and the deep sedation to be practiced. He wrote several, detailed private living wills and appointed a legal guardian to enforce them. In 2016, after Walter's loss of mental capacity, the representative appealed the Tribunal and demanded the suspension of the treatment. Finally, the Court authorized the suspension in question on the ground of the patient's unquestionably clear will and in accordance with the uniform jurisprudence on informed consent, freedom of self-determination in care and the right to refuse sanitary treatment as constitutionally protected and judicially recognized.[14]

With the Piludu case, a crucial, third step of the judicial evolution in question was reached: the judicial recognition of the right to suspend the life-saving sanitary treatment enforced by the

[10] Welby case, Tribunal of Rome, ordinance 16 December 2006.

[11] Answer of the President of the Italian Republic, Giorgio Napolitano, to Piergiorgio Welby's open letter, 23 September 2006.

[12] Welby case, Tribunal of Rome, sentence no'2029 of 17 October 2007.

[13] Pizzorusso A. Il caso Welby: il divieto di non liquet. Quaderni Costituzionali 2007: 355-356.

[14] Piludu case, Tribunal of Cagliari, decree of 16 July 2016.

legal guardian on the ground of the patient's previously written living will.[15]

2.4. On the judicial roots: Act 219 of 2017

The above-examined Englaro, Welby and Piludu cases have fundamentally redrawn the Italian legal frame of end-of-life. It can be capsulized that, in absence of primary regulation, the judiciary power has laboriously but revolutionarily recognized the existence of the principle of informed consent in a renovated frame of the therapeutic relation of care and the right to refuse life-saving sanitary treatment in the existing, constitutional legal order. Only in 2017, eighteen years after the beginning of the Englaro case, the Italian Parliament has finally regulated these end-of-life issues with Act 219 of 2017 on the roots of the judicial evolution.[16]

The regulatory frame on end-of-life currently relies on Act 38 of 2010, which is composed of a dense set of norms on the introduction, organization and effectiveness of palliative care and pain therapy,[17] and on Act 219 of 2017. The latter ultimately regulates the renovated, patient-centered therapeutic relation on the ground of the principle of informed consent and states the right to refuse sanitary treatments and disciplines the advance directives of treatment (DAT) to be respected in case of the patient's loss of mental capacity.[18]Essentially, the Act reproduces the afore-described judicial advancements in an organic regulatory frame.[19]Voluntarily, the legislator has omitted to regulate the two consequent, intimately related end-of-life issues: assisted suicide and euthanasia, which continued to be criminalized under articles 580 and 579 of the Italian Criminal Code. However, the two issues in question have further forcefully resurfaced along the subsequent steps of the ongoing, judicial route.

3. A breach in the criminalization of assisted suicide: Cappato case

In 2014, a young man, Fabiano Antoniani, was involved in a car accident and reported severe spine lesions which caused him total paralysis and blindness. Deprived of any motorial ability while maintaining mental capacity, he was further subjected to artificial respiration and alimentation. For three years, he was engaged in numerous therapeutical, experimental processes with the support of the family, without any success: the quadriplegia was irreversible. In 2017, suffering from constant, painful respiratory crisis, he began to express the will to end is life and asked the family to inquire the viable alternatives. In the meanwhile, the severeness of his sufferings increased as well as the intensity of his intention despite the family's dissent. Fabiano's relatives reached Marco Cappato, a political activist patronizing numerous, radical battles for the enforcement of civil rights, who informed them about the two, existing alternatives to die with dignity: the suspension of the life-saving sanitary treatment and the concurrent deep sedation, in accordance with the legal judicial frame delineated in Englaro and Welby cases; or the recurrence to assisted suicide or euthanasia in a

[15] Pizzetti FG. Considerazioni a margine del caso Piludu fra principi costituzionali e pronunce giurisprudenziali in materia di rifiuto di trattamenti sanitari salvavita. Rivista BioDiritto 2017: 221.

[16] Act 219 of 2017: "Norms on informed consent and advance directives of treatment".

[17] Act 38 of 2010: "Norms to guarantee access to palliative care and pain therapy".

[18] Fasan M. Consenso Informato e Rapporto di cura: una nuova centralità per il paziente alla luce della legge 22 dicembre 2017, no 219. Giurisprudenza Penale Web 2019.

[19] Canestrari S. Una buona legge buona. Rivista Italiana di Medicina Legale 2017: 975-980.

foreign country and sanitary structure, as the Swiss Clinic Dignitas. The medical feasibility of the first alternative was excluded: for his peculiar conditions, Fabiano would have died in numerous hours or several days of convulsions after the suspension, at the emotive expense of his family.[20]

In absence of any legal ground for assisted suicide or euthanasia in Italy, he finally opted for the practice of assisted suicide in Switzerland. However, according to the article 580 of the Italian criminal code: "*whoever determines, reinforces other's people suicidal proposal or assists it in any way its execution is punished to from five to twelve years of detention*":[21] on this ground, his partner and mother would have been persecuted for their conduct of material assistance. In light of these circumstances, Marco Cappato consented to help him by furnishing the material actions needed: in February 2017, he drove Fabiano to Switzerland where the latter, after having pressed a button connected to a narcotic injection with his mouth, immediately and painlessly died.

In the following days, Cappato reported reported to have committed the crime of assistance to suicide under article 580 of the Criminal Code: an investigation begun. At the very initial stage of the proceeding, the public prosecutor tried to enforce a constitutionally oriented interpretation of the concept of "*assistance*" with the aim to exclude the criminal relevance of the conduct in question.[22] By arguing that the exclusive interest of the crime was the protection of vulnerable people, the will of whom can be considerably determined and reinforced by others, and by reconstructing of the right to die with dignity on the ground of the constitutional and international frame, the public prosecutor demanded the dismissal of the charge. However, the interpretative attempt in question was preliminarily rejected on the ground that it was *contra legem* and, in the frame of such a sensitive ethical issue, it was in direct contrast with the mandatory prosecution principle and the legislative power of the Parliament.[23] Therefore, Marco Cappato was finally charged under article 580: the criminal trial begun.

In light of the factual, peculiar traits of the Cappato case, the public prosecutors questioned the constitutional legitimacy of article 580 before the Court of Assize of Milan. So, the latter appealed the Italian Constitutional Court, claiming that the criminalization of the mere conduct of material assistance, which does not play any role in the reinforcement of the suicidal intent voluntarily and freely matured by the person, was in contrast with the constitutional principle of self-determination as well as with the international obligations.[24]

In October 2018, having examined the case, the Italian Constitutional Court enacted an ordinance of suspension of the judgment, recalling the Parliament to its duty to intervene in the span of time of one year.[25] In the ordinance, the first and unique one of this sort, the Court highlighted the paradoxical and

[20] Santosuosso A. Belloli P. Paradossi nel procedimento Cappato. Tre aporie generate dall'art. 580 a proposito dell'aiuto al suicidio. Giurisprudenza Penale 2018: 1-13.

[21] Article 580 of the Italian Criminal Code titled "incitement and assistance to suicide".

[22] Cappato case, Prosecution Division, Tribunal of Milano, motion of dismissal, 2 May 2017.

[23] Cappato case, Office of the judge of preliminary investigation, Tribunal of Milan, ordinance for the coactive formulation of the charge on the ground of the rejected motion of dismissal, 10 July 2017.

[24] Cappato case, Tribunal of Milan, ordinance of referral to the Italian Constitutional Court, 14 February 2018.

[25] Cappato case, Italian Constiutional Court, ordinance 2017 of 2018.

discriminatory outcome emerging from the Italian legal frame: on the one hand, in accordance with Act 219 of 2017 a patient can decide to end his life painlessly by suspending the life-saving treatment and being deeply sedated while, on the other one, the same patient affected by an acuter health condition, to whom the suspension of the treatment cannot guarantee a painless, decent death, is prevented to be helped to die.[26] On this ground, the constitutional illegitimacy of the norm was argued in relation to the personalist principle, the freedom of self-determination and the fundamental right to health. However, the Court decided opted for a self-restrain on the ground of the concern to leave a dangerous, legal void in the criminal frame and of the necessity to balance the extremely significant values involved: the exclusive, constitutional role and duty of the legislative power.[27]

3.1. The historical intervention of the Italian Constitutional Court: ruling 242 of 2019

Due to the abstention of the Italian Parliament from any regulatory intervention on the issue in the relevant year, the Constitutional Court finally intervened.[28] With the ruling 242 of 2019, the Court has declared the partial constitutional illegitimacy of the crime of incitement and assistance to suicide under article 580 of the Criminal Code. As announced in the ordinance, the criminalized conduct of material assistance to suicide in the specific case of Fabiano was found to be in contradiction with the right to refused life-saving sanitary treatment and to consequently die as regulated in Act 217 of 2019.[29] On the ground of the latter's renovated regulatory frame, the Court has enforced the interpretation of the constitutional frame and has declared the partial illegitimacy of the article in question. Precisely, at the core of the ruling, it is stated that the material conduct of assistance is criminally irrelevant in presence of four, concurrent requirements: a) the irreversible nature of the disease, b) the intolerability of the physical or psychological sufferings, c) the ongoing practice of life-saving treatment, d) the mental capacity to freely and consciously self-determinate.

The Court has further addressed several, interrelated insights on the medical service of assisted suicide. As essential premise on which the legal and moral discourse can be built, the Court has forcefully highlighted the necessity to guarantee the effectiveness and the homogeneity on the national territory of palliative care services. Recalling for the necessity of a detailed, regulatory intervention, the Court has further outlined the administrative lineaments of the medical treatment of assisted suicide: the treatment must be practiced exclusively in the frame of the National Sanitary System, the local sanitary structure is competent to verify the recurrence of the relevant requirements and, ultimately, the medical staff's right to conscientious objection has to be guaranteed. In addition, the territorial, ethical Committees have

[26] The critical remark moved by the Court had been further addressed by the scholars: Pizzetti F. L'ordinanza no 207/2018 della Corte Costituzionale pronunciata nel corso del "Caso Cappato", e il diritto del paziente che rifiuta le cure salvavita ad evitare un'agonia lenta e non dignitosa. Rivista di BioDiritto 2019.

[27] Razzano G. La Corte costituzionale sul caso Cappato: può un'ordinanza chiedere al Parlamento di legalizzare il suicidio assistito? Dirittifondamentali.it 2019: 1-25.

[28] Bin R. Tanto tuonò che piovve. Pubblicata finalmente la sentenza sull'aiuto al suicidio. LaCostituzione.info, 22 novembre 2019.

[29] Cappato case, Italian Constitutional Court, sentence 242 of 2019.

been appointed as the competent bodies to release a mandatory but consultative opinion the single, concrete patient's request of assisted suicide.

It can be argued that, in the ruling in question, the Constitutional Court has addressed the disputed and sensitive issue of assisted suicide by adopting two different registers. In regulating the administrative, organizing and operational profiles of enforcement of sanitary treatment of assisted suicide, it has suggested general and abstract rules in attendance of the auspicial exercise of the legislative discretion. Differently, at the core of the ruling, the Court has utterly shaped the requirements in question on personal and medical conditions of Fabiano Antoniani in line with the evaluation of his specific, concrete case.[30]

The constitutional ruling gives the floor to numerous, interpretative open questions which have been immediately raised and discussed by the scholars:[31] on the administrative visualization of the treatment of medically assisted suicide and the related clash with the doctor's deontology, medical autonomy and right to conscientious refusal; on the role of the ethical Committees; in particular, on the four concurrent requirement and the related, emerging consequences.

Among all the interpretative open questions, one requirement has been critically questioned and vastly addressed: the practice of a life-saving treatment. Precisely, this prerequisite is exposed to two, relevant critical remarks. The first one is of constitutional nature: it can be found unreasonable and discriminatory under article 3 of the Constitution on the ground that, in relation to the access to the practice of medical assisted suicide, it prevents the patient who is not, or not yet, subjected to a life-saving treatment to have practice assisted suicide. Consequently, it is arguable that the latter category of people is forced to proceed to the sanitary treatment in question in order to have access to assisted suicide. The second remark, deeply tied to the first, is of theorical and interpretative nature: there is no legal definition of the concept of life-saving treatment, which can be variously and differently conceptualized. The latter issue has been further judicially evaluated in Trentini case.

3.2. Enforcing the constitutional ruling: Trentini case and the interpretation of life-saving treatment

In 2017, Davide Trentini decided to recur to assisted suicide in Switzerland when, due to multiple sclerosis and despite the complex pharmacological treatment, he became permanently and totally disabled while entirely maintaining his mental capacity. Among the numerous similarities with Fabiano Antoniani, the man collected information on the existing, viable alternatives to end his life through Marco Cappato, the well-known political activist, and Mina Welby, wife of Piergiorgio Welby and eminent figure of the political battle in question, both exponents of Luca Coscioni Association.[32] The first helped him to organize a fundraising in

[30] Bilancia P. Riflessioni sulle recenti questioni in tema di dignità umana e fine vita. Federalismi.it 2019: 19.

[31] Among numerous remarks both from constitutional and criminal viewpoints: D'Avack L. L'aiuto a morire medicalizzato sotto il controllo della Corte Costituzionale. Rivista di BioDiritto 2019: 1-13; Canestrari S. Una sentenza "inevitabilmente infelice": la riforma dell'art. 580 c.p. da parte della Corte Costituzionale. Rivista Italiana di Diritto e Procedura Penale 2019: 2160-2179.

[32] The Luca Coscioni Association is the most politically active association in Italy involved in the advancement and liberalization of end-of-life, as well as the complex interplay between freedom of self-determination and scientific progress.

order to cover the financial expenses of the travel and the sanitary treatment; the second helped him by translating the bureaucratic procedure and physically accompanied him to Switzerland. In April 2017, activating the fatal injection by moving his hands, Davide Trentini voluntarily died in a Swiss clinic. Soon after, Cappato and Welby reported their commission of the crime of assistance to suicide under article 580 of the Italian Criminal Code. Precisely, it was during the investigation that the Constitutional ruling 242 of 2019 intervened and transformed the legal frame on assisted suicide: rooted on the specific traits of the Antoniani-Cappato case, the crime of assistance to suicide was now criminally irrelevant in presence of four, concurrent requirements.

On the ground of the constitutional ruling, Trentini's personal and health conditions were vastly verified during the trial and examined in the decision.[33] The irreversible nature of the disease was verified, his mental capacity to self-determine at the time of the event and his strong will to die was demonstrated, as well as the intolerable physical and psychological sufferings affecting him. The main interpretative question concerned the fulfillment of the fourth requirement: precisely, whether the complex pharmacological therapy and material assistance he was subjected to could be considered a life-saving treatment.

The Court has embraced a teleological and an analogical *pro reo* interpretation of the requirement in question: enforcing the ultimate objective of the *regula iuris* imprinted in constitutional ruling, the judge has interpreted the requirement not as exclusively related to mechanic treatments, as the artificial ventilation or alimentation, but rather as inclusive of "*every sanitary treatment in absence of which the patient's death would occur*".[34] Having framed in detail the patient's complex and fragile health conditions, the Court has taken into account the dependence of his survival both on the pharmacological therapy and on the material assistance of others. The Court has verified that, first, the interruption of the pharmacological therapy would have provoked a cardio-respiratory deficiency and the deterioration of his dysfunctions, the combination of which would have ultimately led to his death; second, that, in general terms, the suspension of the material assistance to satisfy every vital need, as feeding and ambulating, would have prevented his survival and, in specific terms, of the material help to expel faces and urine would have provoked a fatal intestinal block. On this ground, having verified the successful and complete fulfillment of the four requirements set in the constitutional ruling, Cappato and Welby were finally acquitted. Further, the decision has been lastly confirmed in appeal.[35]

In the Trentini case, the judiciary has further extended the revolutionary range of the constitutional ruling 242 of 2019: enforcing a teleological and analogical interpretation, the requirement of life-saving treatment has been declared to be inclusive of every sanitary treatment, both of pharmacological or material nature, on which the person's survival relies.

4. Conclusive remarks and upcoming sceneries: unbalance of powers, legislative drafts and referendum

The evolutive and ongoing judicial route of end-of-life in Italy is markedly moved by the absence of an organic, primary regulation. The

[33] Trentini case, Court of Assize of Massa, sentence of 27 July 2020.

[34] *Idem*, paras. 15, 30-37.

[35] Trentini case, Appeal Court of Assize of Genova, sentence of 29 April 2021. The motivations are still not public.

long-lasting resistance of Parliament to any attempt to discuss the end-of-life issues in question promoted by the civil society has deepened the legislative power's institutional decline. From being the living core of the democratic life in which the civil interests and motions are discussed and pondered, it has neglected its constitutional role by silently structurally dismissing the civic demands of justice and freedom at the final phase of life. This remissive behavior has markedly affected the balance of powers as rooted in the Constitution: on that ground, the judiciary power has assumed a prevalent and active role and has gradually reshaped the legal frame of end-of-life. The judicial route in question is the ultimate expression of the structural absence of the dialectics among the constitutional powers.[36]

The active intervention of the Parliament on assisted suicide and euthanasia is of extreme importance and urgence: the legal equilibrium created gradually and laboriously developed by the judiciary is, in facts, fragile. The revolutionary range of the constitutional ruling 242 of 2019 has been further forcefully challenged by a formal judicial interpretation of the interplay between criminal law and administrative law. In March 2021, the Tribunal of Ancona has rejected the recourse of a terminally ill patient to have access to medically assisted suicide within the National Sanitary Service on the ground of the absence of a primary regulation which detailly disciplines the administrative profile of the sanitary procedure.[37] In other words, the constitutional ruling has been claimed not to be self-executing and to be enforceable exclusively on the criminal level.[38] In appeal, the interpretation in question has been partially reformed: having claimed the obligation of the Parliament to intervene, the Tribunal has finally ordered the national sanitary structure to verify the recurrence of the four requirements established in the constitutional ruling.[39]

Furthermore, the Regional Commission of Bioethics of Tuscany has tried to frame an *interim* administrative procedure to regulate the access to the sanitary treatment of assisted suicide within the regional sanitary service.[40] In the enduring lack of primary regulation, it is noble attempt to discuss the open interpretative questions emerged in the constitutional ruling and to give an answer to the civic claims of assisted suicide.

The adoption of an organic, regulatory frame on assisted suicide and euthanasia is the main, vexed issue of today. Eight legislative drafts on assisted suicide and euthanasia are currently pending before the Italian Parliament. In the last two years, due to the above-illustrated, numerous cases of assisted suicide and public demands of euthanasia, the inert political climate has been forcefully questioned both by the judiciary and by the citizenry. On opportunity to frame and adopt a primary regulation there is a wide scholar consensus. Without any doubt, it can be said that the legal core of the regulation has been already written along the judicial route of end-of-life:[41] on this ground, the Act should follow the principles of self-determination in

[36] Ferrajoli CG. Undermining the Parliament. A prime example of the decline of representative democracy. Teoria Politica 2020: 155-187.

[37] Tribunal of Ancona, decree of dismissal of 26 March 2021.

[38] *Idem*: 2.

[39] Tribunal of Ancona, ordinance of 9 June 2021.

[40] Regional Commission of Bioethics of Tuscany, Opinion "Conditioned legitimacy of medically assisted suicide and regional sanitary service", 14 February 2020.

[41] Tamburini C. Let's not die of inertia: suggestions for reflection in view of an Italian Law on some aspects of the end of life. BioLaw Journal 2020: 7-9.

care and of human dignity within the frame of moral pluralism. Due to the highly fragmented, dysfunctional and politically divisive climate affecting the Parliament, the adoption of an organic Act is not exempt from risks. However, a first step towards the adoption in question has taken place: on the 6th of July 2021, the parliamentary commission of Justice and Social Affairs has approved the baseline of an organic, legislative draft which exculpates the criminal responsibility of the doctor and of the sanitary staff for the conduct of assisting or provoking the voluntary death of a patient who fits the four, concurrent requirements ruled by the Constitutional Court and frames the involved principles, the modalities of the practice and role of bioethical committees.[42]

Lastly, in permanent lack of political discussion and advancement, another viable path has been traversed: the referendum. The political campaign to support the referendum on euthanasia has forcefully started in the country and it is largely supported and promoted by numerous segments of the society. On the roots of the criminal irrelevance of assistance to suicide as framed in the constitutional ruling 292 of 2019, the one in question is an abrogative referendum which aims to partially expel the crime of euthanasia. The success of that initiative will be soon unveiled: in any case, for its inner limits, the referendum will not satisfy the sensitivity and the complexity of the numerous legal, ethical and medical profiles involved in the issues in question. The legislative path remains the foremost legal and political battlefield which assisted suicide and euthanasia deserve.

[42] Commission of Justice and Social Affairs, legislative draft titled "Norms on voluntary medically assisted death", 6 July 2021.