Press Office of the Constitutional Court

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END-OF-LIFE TREATMENTS: WHEN ASSISTANCE TO SUICIDE CANNOT BE PUNISHED

The need to ensure observance of the Constitution must prevail with respect to the need to afford the legislator room for discretion. If a declaration of unconstitutionality risks creating a legislative vacuum that poses fundamental rights at risk, the Constitutional Court must strive to avoid such gaps by establishing, on the basis of the law currently in force, criteria to address them, pending Parliament's intervention.

This was decided in Judgment no. 242, filed today (Judge Rapporteur: Franco Modugno). In the text, the Constitutional Court explains the reasons for its decision on end-of-life treatment, which it had anticipated earlier this year in the press release of 25 September 2019. In particular, the Court issued a decision because the one-year period it had given Parliament to pass legislation on the subject has expired (Order no. 207 of 2018).

As a preliminary matter, the Court confirmed the conclusions reached in Order no. 207. First, the Court reiterated that criminalising assistance to suicide is not *per se* unconstitutional. Rather, such criminalisation is justified by the need to protect the right to life, especially of the weakest and most vulnerable persons. The legal system seeks to protect these persons by preventing external parties from interfering in a decision as extreme and irreparable as suicide.

However, it is unconstitutional to criminalise assistance to suicide in certain limited circumstances. That is, when the assistance in question is given to a person on life support (such as artificial hydration and nutrition), who is afflicted by an incurable illness that gives rise to intolerable physical or psychological suffering, and who is fully capable of taking free and informed decisions.

According to the current law on advance treatment directives (*disposizioni anticipate di trattamento*, or DAT – see Law no. 219 of 22 December 2017), patients who meet the above conditions may ask to be allowed to die by having their life support interrupted and being placed under heavy sedation, which will make them unconscious until they die. Doctors are obliged to follow these decisions.

However, the law does not allow doctors to provide treatments that can bring about the patients' death. Therefore, to take their leave of life, patients must endure a process that is slower and that causes more suffering for their dear ones. This leads to an unreasonable limitation of sick persons' freedom of self-determination in choosing their treatments – including those intended to end their pain –, a freedom that is guaranteed by Articles 2, 13 and 32 of the Constitution.

In the Court's view, however, this unconstitutionality cannot be resolved by simply stating that assisting the suicide of people who meet the above conditions cannot be punished. Indeed, without legislation to regulate the provision of assistance to suicide, there could arise a serious risk of abuse being committed against vulnerable persons. Moreover, many aspects of such legislation could be regulated in several different ways, on the basis of discretionary choices – which pertain to the legislator.

For this reason, in the Order issued last year, the Constitutional Court postponed the hearing on the questions to give Parliament time to legislate on the subject (see also the press releases of 24 October and 16 November 2018).

However, as no law has been passed to date, the Court deemed that it must remedy the violation found.

In the present case, a relevant "reference" is the law on DAT, in particular its provisions on refusing health treatments that are necessary for the patient's survival and on guaranteeing the administration of appropriate painkilling medication and palliative care (Articles 1 and 2 of Law no. 219 of 2017). These provisions establish a "medicalised procedure" that meets most of the needs identified by the Court.

In addition, the constitutional judges held that pending the enactment of legislation, the national health service should be tasked with verifying whether the conditions for providing the assistance to suicide, and the means of carrying out that assistance, have been met. This is in line with the Court's previous case law on similar events.

This verification is to take place after the relevant local ethical committee has issued an opinion. These committees are advisory bodies that deal with the ethical problems arising in the administration of healthcare, especially with a view to protect vulnerable persons.

Thus, Article 580 of the Criminal Code was declared unconstitutional insofar as it fails to exclude punishing assistance to suicide, in cases where the intention to commit suicide was formed autonomously and freely and the patient meets the conditions set out above. However, the assistance must be given in accordance with the aforementioned Articles 1 and 2 of Law no. 219 of 2019; in addition, a public body within the national health system must verify that the conditions concerning the patient and the law have been satisfied, after the local ethical committee has rendered its opinion.

The procedural conditions established in this judgment apply only *pro futuro*, and not to past cases such as that of DJ Fabo-Cappato.

For past cases, suicide may have been assisted according to other procedures; however, substantially equivalent protection must have provided, especially in terms of the medical checks on the patient requesting the assistance, how the patient has expressed his or her intention and providing adequate information on the alternative treatments available.

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