Assisted suicide in Italy

I. Introduction

i. Preamble

The development of technologies in medicine, on the one hand, allows to treat patients who until a few years ago had no chance of survival, and, on the other, in some cases prolongs life in precarious conditions and of great suffering.

Alongside technological changes, social sensitivity to suffering has also changed.
For these reasons, too, death today gives rise to a great amount of reflections on ethical, legal, social and economic issues.

In this situation, fundamental issues such as the value of human life, human dignity and other fundamental rights (such as right to freedom, equality, health, etc.) are at stake; as well as the values of medicine, the role of the doctor and the value of the legal options provided by public policies.

As the Italian National Committee on Bioethics recently pointed out[1], end-of-life decisions must take into account the specific nature of patients' requests, which can be very different from each other.

In many cases, in fact, patients ask to be "accompanied in dying", with ethical and legal consequences that do not fall within the scope of euthanasia.

In other cases, there may be a demand to be helped in dying without suffering, which results in a request for palliative care;

In others there is a demand to avoid aggressive medical treatment or the refusal of life-saving treatments.

Finally, as reported by the Italian latest statistic data, in many cases there is a request for assisted suicide, issue that was recently brought to public attention by the "Cappato Case"[2].

[1] Opinion of the National Bioethics Committee, *Bioethical reflections on medically assisted suicide* - 18 July 2019. See Below (IV. "Law in progress").
[2] See Below (III. "Case Law").

ii. Definitions

The *Assisted suicide* is "the deliberate hastening of death by a terminally ill patient with assistance from a doctor, family member, or another individual"[3].

More specifically, in the *Physician-assisted suicide,* the person that helps the sick person to die is a doctor, "who either acts on the patient's behalf or provides the means for a patient to kill him- or herself"[4].

What generically we will call "Assisted suicide" is a practice that can be included in the "active euthanasia" practices.

As a matter of fact, according to the majority of the experts, it is possible to distinguish between "active" and "passive" euthanasia.

Passive euthanasia concerns the interruption of medical treatments, such as hydration, artificial nutrition and other life-support treatments.

Active euthanasia entails the use of lethal substances, such as the administration of a lethal injection, that cause the death as direct and external factor.

iii. The topical importance of the issue – a comparative overview

The law that regulates, in general, end-of-life issues and, more specifically, assisted suicide has been recently marked by a series of events of different nature and of different mark.

In September 2015, the British House of Commons voted by a large majority against the adoption of a draft law that would allow people with terminal illness to obtain a prescription for lethal doses of pharmacies[5] even if a survey conducted by "Populus" in 2015 on a sample of about 5,000 people had given the result that 82% of respondents agreed with the principles of the draft law.

In September 2015, by contrast, the California Senate passed the "End of Life option Act", a regulation that allows sick residents in California, under certain conditions, to receive a preparation capable of ending their life.

In a similar way to California, at the end of 2016 Colorado has recognised that assistance to suicide is not punishable under certain conditions.

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[3] Definition of *assisted suicide* given by Doctor William C. Shiel Jr. on medicinenet.com.

[4] Definition of *physician-assisted suicide* on encyclopedia.com.

[5] Originally presented in 2014 by Lord Falconer, the *assisted dying Bill* was re-proposed by Labour MEP Rob Marris after that, in *UKSC - R (on the application of Nicklinson and another) v ministry of Justice* on 25 June 2014, two Supreme Court judges had doubted the compliance with the ECHR of the crime of assisting suicide as regulated by sec. 2 of the Suicide Act.
See E. Wicks*, Nicklinson and Lamb v. United Kingdom: Strasbourg fails to assist on assisted dying in the UK, in Medical Law Review*, First published online: June 16, 2016.

To date, in the United State assisted suicide is not punished, under certain conditions, in California, Colorado, Oregon, Washington state, Montana, Vermont, Washington D.C., Hawaii and, most recently, in New Jersey and Main (since 2019)[6].

In June 2016, following the declaration of unconstitutionality of the crime of assisted suicide by the Supreme Court (*Carter v. Canada*)[7], the Canadian Parliament adopted the law that regulates and permits, under certain conditions, such conduct.

In Europe, assisted suicide has been legalized in Austria, Belgium, Finland, Germany, Luxembourg, the Netherlands and Switzerland. Furthermore, after the recent decision of the Italian constitutional court within the so called "Cappato Case", we can add Italy to the list[8].

In France, the issue concerning the "légalisation de l'assistance au suicide" has been deeply discussed, even if not solved in the direction of legalisation, on the occasion of the "General States of bioethics" that has engaged experts and public opinion in 2018.

II. Italian Legal Framework

i. The right to refuse treatment (or passive euthanasia)

Concerning end of life issues within the Italian legal system, the first rule that stands out is Article 13 of the Italian Constitution which provides that "personal liberty is inviolable".

In addition, Article 32[9] (the right to health), by stating that "no one may be obliged to undergo any health treatment except under the provisions of the law", also includes the right to refuse or interrupt any medical treatment.

According to the more recent interpretation of the Italian Constitutional Court, developed from the 1990s, the imposition of a health treatment authorized by Article 32 of the Constitution must be finalised to protect not only the individual health of the patient, but also the health considered as a common interest. In the Court's opinion, only this goal, which can be found for example in the legislation on compulsory vaccination, can justify such a compression of the patient's self-determination[10].

[6] https://healthcare.findlaw.com/patient-rights/death-with-dignity-laws-by-state.html.

[7] *Carter v. Canada*, SCC, 2015.

[8] Italian Constitutional Court, press statement, 25 September 2019. The judgement has not been published yet. See below (III. case law).

[9] Italian Constitution, Art. 32: The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent.
No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by the respect for the human person.

[10] Principe stated by the Italian Constitutional Court in the decision No. 307/1990.

Furthermore, this right to refuse medical treatments was strengthened in 2017 by a recent law[11], that also regulates the anticipated guidelines on the end of life.

More in details, the law recognizes the right to refuse or stop any medical treatment, even if necessary for survival, including treatments for ventilation, hydration and assisted nutrition (Art. 1).

The exercise of this right is considered within the context of a "relationship of care and trust" based on informed consent, in which the patient's decision-making autonomy meets the physician's competence and responsibility.

It is possible to remark a radical change in the relationship between the doctor and the patient, which goes beyond the old paternalistic conception and is valued here as a true therapeutic alliance.

Furthermore, in case of adverse prognosis, aggressive medical treatment is forbidden.

The law allows the physician to administer, with the consent of the patient, a "deep and continuous palliative sedation", in combination with pain management, to relieve the suffering of the patient (Art. 2).

However, the doctor is not allowed to administer to the patient a lethal dose of an analgesic or anaesthetic (active euthanasia).

According to the National Committee on Bioethics' opinion and in conformity with what the scientific societies of palliative care claim, the deep sedation is not comparable to euthanasia, because, while the former is an act aimed at relieving suffering, the latter is an act aimed at death.

Furthermore, the medicines administered in the two procedures, euthanasic and palliative, are different.

Another difference between the two medical procedures can be found in the different outcome of the acts: in the deep sedation the patient goes, without conscience, towards his natural death, while in the euthanasia the death is provoked in the immediate by an "external factor".

Article 4 of the law No. 219/2017 regulates the so called "advance directives", also imprecisely known as the "living will". They allow adult and competent citizens to choose in advance what medical treatment to undergo and which one to refuse at the end of their life.

In forecast of a potential and future legal incapacity, it is also possible to appoint a "trustee" to represent the patient in the relationship with the physician.

[11] *Law No. 219/2017, provisions for informed consent and advanced directives* was approved on the 14th December 2017 by the Italian Senate, it was published on the 16th January 2018 on the Italian Official Gazette and it came into force on the 31st January 2018.
The law develops the principles set out in the Italian case law, in particular in the "Welby case" (*Court of Cassation 16 October 2007, n. 21748*) and in the "Englaro case" (*Tribunal of Rome, 17 October 2007, n. 2049*) and constitutional jurisprudence on informed consent.

ii. Active euthanasia

In the Italian legal system, there is no specific regulation of euthanasia and assisted suicide, which are treated as aspects of the general figures of "crimes against life".

Therefore, according to Italian Criminal Code (the so called "Code Rocco"), every form of "active euthanasia" is still illegal. As a matter of fact, the Code Rocco, dating back to the fascist period[12], punishes severely both the crimes of assisted suicide and mercy killing.

Article 579 of the Italian Criminal Code, concerning "consensual murder", states that "anyone who causes the death of a person, with his consent, shall be punished by imprisonment ranging from six to fifteen years".

Article 580, concerning "instigation or assistance to suicide", states that "anyone who causes others to commit suicide or reinforces another's intent to commit suicide, or facilitates it in any way, shall be punished, if the suicide occurs, by imprisonment ranging from five to twelve years. If the suicide does not occur, he shall be punished by imprisonment ranging from one to five years, as long as there is a grave or very grave personal injury resulting from the suicide attempt".

Within the "instigation or assistance to suicide" (Art. 580), unlike the "consensual murder" (Art. 579), the victim has carried out his purpose, even materially, by his own hand, despite the presence of a third party's behaviour of determination or help in the realization of his purpose.

The dividing line between the two different crimes under Art. 579 and Art. 580 of the penal code consists, therefore, in the fact that the last causative act of death is carried out by a third party or instead by the patient, and this determines a decisive importance on the level of criminal responsibility with a reduction of the penalty.

However, the crime of assisted suicide, provided for by the Article 580 of the Criminal Code, has recently been declared non punishable, under certain conditions, by the Italian constitutional court within the controversial "Cappato case"[13].

Unlike assisted suicide, in the Italian system as in most legal systems, suicide is no longer the object of a legal ban.
However, it does not constitute the exercise of a right constitutionally guaranteed, but it is understood as a simple factual freedom or a mere exercise of it.
In line with the personalistic principle stated in the Italian constitution and its perspective of solidarity, preventing suicide is an important aim pursued by the State.

[12] The Code Rocco was published on the 19th October 1930 by the Royal Decree n° 1398.
[13] Italian Constitutional Court, press statement, 25 September 2019. See below.

III Case law

i. Introduction – facts and numbers

There are 761 people who, since 2015, have turned to the *Luca Coscioni Association*[14] in order to get information on how to obtain assisted suicide abroad: of these, at least 115 actually turned to clinics in Switzerland but some of these patients later changed their minds. These are the latest data on the requests for assisted suicide received by the Luca Coscioni Association.

According to the *Exit-Italia Association*[15] the numbers are growing and, on average, about 100 Italians a year would be applying to, and in various cases obtaining, assisted suicide in Switzerland.

The assisted suicide is a procedure that takes about 10-15 minutes from the time of activation of medical and pharmacological practices.

However, according to the Swiss law, it is only on the basis of a precise protocol on "voluntary assisted death" that the patient can end his or her life.

There are strict requirements required by Swiss law in order to be able to access assisted suicide: the presence of a serious, irreversible, clinically proved disease, with no chance of recovery and the patient's mental capacity.

The first step of the procedure implies establishing contact with the structure in Switzerland and the submission of medical documentation certifying the pathology that affects the patient.

After acceptance by the structure, a meeting with the doctor responsible for the procedure is planned.

The so-called "sweet death" was obtained in the same way by Fabiano Antoniani in 2017. However, the case in question was bound to shake public opinion and refocus our attention on the decriminalisation of assisted suicide in Italy.

ii. The "Cappato case"[16] – a different case

[14] The *Luca Coscioni Association for the freedom of scientific research* is an Italian no profit association founded in 2002 that promotes human rights and civil liberties, especially in the fields of scientific research, health, end-of-life choices, abortion and medically assisted reproduction.

[15] *Exit Italia* is an a-confessional and a-political association, recognized as "non-profit organization of social utility" by the Italian State. It was founded in 1996 and its main purpose is the promotion of the right to euthanasia.

- **Facts**

  The Italian disc jockey Fabiano Antoniani, known as DJ Fabo, chose to die at the Swiss euthanasia "Dignitas" clinic on the 27th of February 2017, after being left blind and tetraplegic by a car accident in 2014.

  DJ Fabo chose to request the assisted suicide, illegal in Italy, instead of exercising his right to discontinue artificial alimentation and hydration while being under deep sedation, possibility provided by the Law 219/2017.

  This case, unlike many similar ones fallen into oblivion, came to trial because Mr. Marco Cappato, member of the Italy's Radical party and activist of the *Luca Coscioni* association, decided to assist DJ Fabo to travel to Switzerland in order to obtain assisted suicide and reported himself to the authorities as an act of civil disobedience, pointing out that assisted suicide was a privilege of those with the physical and financial means to travel to Switzerland.

  As a consequence, Mr Cappato was prosecuted for the crime of instigation and assistance to suicide, risking from five to twelve years of detention under Article 580 of the Italian Criminal Code[17].

- **Tribunal of Milan (GIP), 2017**[18]

  The tribunal, refusing the prosecutor's request of closing the procedure, ordered to proceed with the charge of assisted suicide.

- **Milan Court of Assize, 2018**[19]

  The court remarked that Marco Cappato's behaviour facilitated DJ Fabo's suicide but, unlike what was claimed by the GIP, it had not strengthened his decision to commit suicide.

  The court suspended the criminal trial and raised an issue of constitutionality concerning Article 580 of the Penal Code in so far as it criminalizes assisted suicide regardless to the contribute given to the determination and strengthening of the suicidal ideation and it threatens the same severe penalty for instigation and assisting suicide.

  More precisely, the court assumed a violation of Arts. 3, 13.2, 25.2 and 27.3 of the Italian Constitution that identify the reasonableness of the penalty depending on the offensiveness of the behaviour.

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[16] *The Cappato Trial step by step*, https://www.associazionelucacoscioni.it/.

[17] See above, II. Italian Legal Framework.

[18] Tribunal of Milan (GIP), order 11 July 2017.

[19] Milan Court of Assize, order 14 February 2018.

- **Constitutional Court, 24 October 2018**[20]

  The Constitutional Court, requested to pronounce on the constitutional review of the criminal provision about "assisted suicide" (art. 580 Criminal Code), decided to suspend the judgment and to reconvene on the 24th of September 2019, inviting the Parliament to intervene by the date in order to offer « the respect of certain situations deserving protection and to balance them with other constitutionally relevant goods ».
  In the grounds for the judgment, the Court declared that the crime of assisting or inducing somebody to suicide cannot be considered *per se* against the Italian Constitution.
  In fact, the crime in issue, as in the case of many contemporary legislations, is functional to the protection of the right to life, especially for those more vulnerable and weaker who need to be protected from the irreversible choice to commit suicide.
  As a consequence, the State has got a compelling interest in protecting the life of the human person against interventions by third parties in helping one to suicide, under the constitutional personalist principle (Art. 2 Const.[21]).
  These arguments were reinforced by referring not only to the Italian Constitution but also to the European Convention on Human Rights (Arts. 2[22] and 8[23]) and on the ECHR jurisprudence (*Pretty v. UK*, *Haas v. Switzerland*, *Koch v. Germany*).

  However, « the current legal framework concerning the end-of-life deprives of adequate protection specific situations » like the one in issue, unimaginable at the

[20] Italian Constitutional Court, order No. 207/2018, 24 October 2018.

[21] Article 2, Italian Constitution: The Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which one's personality finds expression, and it requires the performance of imperative political, economic, and social duties.

[22] Article 2, ECHR – *Right to life*:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
a. in defence of any person from unlawful violence;
b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c. in action lawfully taken for the purpose of quelling a riot or insurrection.

[23] Article 8 – *Right to respect for private and family life*:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

time when the criminal code was introduced and arisen by the evolution of medical science and technology.

As a matter of fact, in the situations when a person is a) affected by an irreversible pathology, which is b) cause of physical and psychological suffering judged absolutely intolerable, and the patient is c) kept alive by life-saving treatments but is still d) capable to make conscious decisions, the assisted suicide could be the only way for the patient to refuse all medical treatment and respect his concept of dignity at the same time.
In such situations, according to the present legal framework, the affected person, who has the right to refuse all life-sustaining treatment but cannot obtain death directly with a lethal substance, « is obliged to follow a slower dying-process, possibly less correspondent to his vision of dignity in dying and with a major burden of suffering for his loved ones ».

According to the constitutional judge, the absolute and unconditioned prohibition to assisted suicide, accomplishing the patient request, is not reasonable and ends up limiting the patient's freedom of self-determination, human dignity and equality. Furthermore, the argument of the protection of weak people does not apply because in that case the patient would be paradoxically protected from his own will on account of his vulnerability.

However, regarding the outcome of the judgement, the Court considered that a declaration of unconstitutionality of Article 580 of the penal code, even if confined to the peculiar medical situations exposed in the reasoning, would leave the provision of material help to suicide without any kind of regulation « in a field with a very high ethical-social sensitivity and in respect of which any possible abuse must be firmly precluded ».

Furthermore, the establishment in detail of the conditions under which patients can be lawfully helped to put an end to their life entails the need to make discretional decisions, balancing different interests, that only belong to the legislative power.

The same reasoning was followed, in other similar cases, by the Supreme Court of Canada (*Carter v. Canada*)[24] and by the Supreme Court of UK (*Nicklinson*)[25].

This is the reason why the Italian Constitutional Court, with an unprecedented decision in the Italian scenario, suspended her judgement and gave the Italian Parliament a one-year deadline to fill a legal void and to adopt appropriate legislative protections corresponding to the principles and rights enshrined in Italy's Constitution according to the interpretation given by the Court herself.

- **Constitutional Court, 25 September 2019**[26]

[24] *Carter v. Canada*, SCC, 2015.
[25] *Nicklinson v. Ministry of Justice*, UK Supreme Court, 2014.
[26] Italian Constitutional Court, press statement, 25 September 2019.

In the absence of legislative action, the Court met to reopen the judgment of constitutionality concerning Article 580 of the Criminal Code.
Following the public hearing on the 24th of September 2019, the Constitutional Court anticipated, pending the publication of the judgement, the outcome of its decision.

In the press release, the judges declared that anyone who « facilitates the execution of the suicidal intention, autonomously and freely formed, of a patient kept alive by life-support treatments and suffering from an irreversible pathology, source of physical or psychological pain which he considers intolerable, but fully capable of making free and conscious decisions » should not be punished under certain conditions.

Notwithstanding the need for action by the legislator, the Court makes the impunity of assisted suicide subjected to compliance with certain specific rules « derived from principles already in force ».
This applies in particular to compliance with the informed consent and pain treatment rules laid down in Articles 1 and 2 of the Law 219/2017 and with the verification of the conditions and modalities of the assistance to the suicide from a structure of the national health system, having heard the opinion of the competent Ethical Committee.

This was necessary – declared the Court – « to avoid the risk of abuse towards particularly vulnerable people, as already pointed out in Order No. 207/2018 ».

IV. “Law in progress”

As the one in issue is an evolving subject on which the Italian Parliament is called upon to legislate, I will analyse the recommendations and proposals for reform that exist both at legislative and doctrinal level.

i. Opinion of the National Bioethics Committee - July 2019[27]

The National Bioethics Committee (CNB), following up its mandate to stimulate public discussion on ethical issues and to advise on policy decisions, considered it necessary, with its opinion of July 2019, to reflect on the aid to suicide following Order No. 207/2018 of the Constitutional Court.

[27] Opinion of the National Bioethics Committee*, Bioethical reflections on medically assisted suicide* - 18 July 2019.

The Committee wanted to address the issue of suicide aid with the awareness that there are different orientations both within the Committee itself and in society and that it is one of the most controversial issues in the current bioethics debate in our country.

According to the Committee, the diversity of opinions also has the possibility of providing elements of reflection that could be useful for the society to address an issue such as that of suicide aid, which presents a series of problems and questions to which it is not possible to give a clear answer.

The public debate on assisted suicide illustrates the great difficulty of reconciling the two principles, so bioethically important, of safeguarding life on the one hand and of self-determination of the individual on the other.

We can register different opinions within the Committee.

Some members are opposed to the legitimisation, both ethical and legal, of assisted suicide and agree that the protection of human life should be affirmed as an essential principle in bioethics and that the doctor's main task is the absolute respect for patients' lives.

Other CNB members are morally and legally in favour of legalising medically assisted suicide on the assumption that the value of life protection should be balanced with other constitutionally relevant assets, such as patient self-determination and the dignity of the person. This balance must take particular account of conditions and procedures that serve as security for both the sick person and the doctor.

Others point out that there is no immediate translation from the moral to the juridical sphere. Moreover, they highlight the concrete risks of a slippery slope to which the decriminalization or legalization of the medically assisted suicide would lead, in the current Italian sanitary reality, if modelled on those made by some European countries.

In spite of these divergent positions, the Committee has arrived at the formulation of a number of shared recommendations.

First of all, the CNB hopes that wherever it takes place - including the parliamentary forum - the debate on medicalized suicide aid develops with full respect for all opinions on the subject, but also with due attention to moral issues, constitutional ethics and jurisprudence and with the due deepening that such a sensitive issue requires.

In addition, the Committee

- Recommends that efforts be made to provide adequate care for incurable sufferers;
- Calls for appropriate information to be provided to the patient on treatment and palliation opportunities;
- Considers it essential that every effort should be made to implement the information notice to citizens and health professionals of the regulations concerning access to palliative care;

- Calls for the promotion of a broad participation of citizens in the ethical and legal debate on this issue as well as the promotion of bioethics training of health workers in this field.

ii. The legislative proposal on euthanasia

The draft law concerning refusal of medical treatment and euthanasia[28], already presented to the Chamber of Deputies on 13 September 2013, was incardinated at the Justice and Social Affairs Commission on 30 January 2019.

The preamble to the legislative proposal highlights that, according to a statistical survey, over half of Italians would be in favour of legalising euthanasia and it is alleged that the constitutional right to refuse medical treatment is constantly violated. These conditions lead, on the one hand, to the strengthening of clandestine euthanasia and, on the other, to aggressive medical treatment.

The draft law would set itself as a "remedy" for this situation, providing clear rules to respect the personal decisions of each individual in end-of-life matters.

More in details, article 1 provides that every citizen can refuse the protraction of health treatments as well as any type of life-support treatment or nutritional therapy.

Medical staff is obliged to respect the patient's decision provided that he is over 18 and mentally competent, unless he is incompetent but he has previously arranged anticipated guidelines in this regard. The decision must be unambiguous.

In case of failure to comply with the wishes of the citizen, medical personnel is liable, independently from the possible civil or criminal responsibility, for moral and material damage (Art. 2).

Article 3 presents a special exonerating circumstance applicable to doctors and healthcare professionals charged with the crimes under Articles 575, 579, 580 and 593 of the Criminal Code (respectively: murder, consensual murder, assisted suicide and failure to rescue).

They will not be prosecutable for having caused the death of the patient if the following conditions are compelled and certified in writing by the doctor:

- the death of the patient must result from a motivated and conscious request
- the claimant must be of age and competent
- the relatives within the second grade and the spouse, if any, must be informed and in a position to communicate with the claimant
- the euthanasia treatment must respect the dignity of man and not cause him physical suffering

[28] Draft law of popular initiative (A.C. 2, XVIII legislature): *Refusal of medical treatment and lawfulness of euthanasia*, 2019.

The patient may also be incompetent when subjected to euthanasia treatment provided that he has previously stated his intention by written act and authenticated signature; in addition, he must have appointed a trustee who can then confirm his request (Art. 4). In this case, the clear and unambiguous request must be accompanied by a self-declaration certifying that the patient has been adequately informed about the medical, ethical, and human treatment profiles.

iii. Doctrinal criticism

- **Against the lawfulness of assisted suicide**

Some authors highlight the State interests underlying the prohibition of assisted suicide that can be traced back to three orders of reasons, on the basis of a summary comparative analysis.[29]

1. The sanctity of life

First of all, it stands out the general interest in preserving life, sometimes in terms of sacredness (the Sanctity of Life).

It is an interest typically mentioned at the jurisprudential and doctrinal level, as well as in the reports accompanying the laws or articles of the Penal Code, as a cause justifying the not full availability of life on the part of the person.

The right to life, more generically, is stated at Article 2 of the European Convention on Human Rights: “Everyone’s right to life shall be protected by law”.[30]

2. The slippery slope and vulnerability of sick people

[29] C. Casonato, *Self-determination and the law at the end of life: a critical analysis,* published in “Il Mulino” Journal, Dossier 1, January-March 2018.
C. Casonato, *Introduction to Biolaw*, edited by “Giappichelli”, 2015.

[30] Art. 2, ECHR – *Right to life*:
1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
a. in defence of any person from unlawful violence;
b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Fears related to the risks of the "slippery slope" and the dangers of stigmatization of the weakest and most vulnerable categories of the population constitute a second order of reasons typically brought to justify the limits to personal autonomy at the end of life.

Concerning the “slippery slope” argument, the regulation of assisted suicide would create a risk of abuse as well as "social addiction", i.e. the social tolerance of certain practices that can lead to a risk of slippage. For example, Belgium, after having legalized the practice of euthanasia, ended up legalizing juvenile euthanasia too.

The argument on the vulnerability relies on the fact that the patient may not be able to make an authentic choice because he or she is dominated by emotion or pain.

As a matter of fact, in a psychological state of particular fragility, the choice to die, instead of being authentic and conscious, could be an alternative forced by the condition of weakness or dependence.

As a consequence, it is the State’s duty to ensure special support and protection to sick people in the most difficult phase of their existence.

Therefore, as declared by the Court of Strasbourg in the *Pretty v. UK* case[31], the prohibition of euthanasia is justified by the need to protect the weakest and most vulnerable people.

3. The role of the doctors

In addition to these two profiles, there is a third reason relating to the social perception of medical personnel as a category of professionals who work to ensure the care of people and not to promote their death.

One of the professional duties of doctors, therefore, is to safeguard the health and existence of sick people and not to assist them in taking their own lives.

- **in favour of the lawfulness of assisted suicide**

[31] European Court on Human Rights, *Pretty v. the United Kingdom*, 29 April 2002.

Other authors[32] have put forward a critical reflection concerning the States that, while recognising the right to refuse medical treatment (including life-sustaining treatment), prohibit any form of assistance to suicide.

Today, the large majority of the States belongs to this model that can be defined as "closed model", as opposed to the so called "open model", where it is recognized, under certain conditions, the impunity for assisted suicide and/or euthanasia.

For instance in Italy, before the recent decision of the Constitutional Court[33], while, on the one hand, it was guaranteed the constitutional right to refuse any medical treatment (even of vital support), on the other, the behaviours aimed to cause directly the death of the patient (assisted suicide and mercy killing) were strictly punished under criminal law.

The "closed model" may be criticized in many respects.

More in details, three different but linked critical profiles may be highlighted:

1. the cruelty of the practical consequences of the discipline;

2. the tightness of the principle of equality and the possible discriminatory effects;

3. the compatibility with the connotative features of the constitutional State and with the liberal-democratic form of State;

1. The cruelty

First of all, it is possible to highlight how prohibiting the assisted suicide could be, in some cases, cruel towards the patient, who could be obliged to anticipate his death when still physically able to commit suicide or, otherwise, die in a slower and undignified way.

This argument was pointed out in the *Carter v. Canada* case[34] by the Supreme Court of Canada. The SCC declared the crime of assisted suicide unconstitutional on the grounds that Gloria Taylor[35], who suffered from a neurodegenerative disease, "was left with the "cruel choice" between killing

[32] C. Casonato, *Self-determination and the law at the end of life: a critical analysis*, published in "Il Mulino" Journal, Dossier 1, January-March 2018.

[33] Italian constitutional court, press statement, 25 September 2019. See above (III. "case law").

[34] *Carter v. Canada*, SCC, 2015.

[35] With the words of Gloria Taylor: «My present quality of life is impaired by the fact that I am unable to say for certain that I will have the right to ask for physician-assisted dying when that "enough is enough". moment arrives. I live in apprehension that my death will be slow, difficult, unpleasant, painful, undignified and inconsistent with the values and principles I have tried to live by»
«I want the legal right to die peacefully, at the time of my own choosing, in the embrace of my family and friends»

herself while she was still physically capable of doing so, or giving up the ability to exercise any control over the manner and timing of her death".

Furthermore, in 2012 the French *Commission de réflexion sur la fin de vie* declared in the so called *Rapport Sicard*: "When the person at the end of life, or according to his or her advance directives, expressly requests to interrupt any artificial nutrition and hydration or other life-support treatment, it would be cruel to let him/her die or let him/her live, without offering the possibility to benefit from an act performed by a doctor accelerating his/her death."[36]

2. The discriminatory effects

This second argument, concerning the possible discriminatory effects that this legal framework could lead to in practical cases, is strictly linked to the first one.

In the case of assisted suicide (active euthanasia) there is an external cause of death, whereas in the refusal to life-saving treatments (passive euthanasia) the disease is let follow its course until death.

The question that arises is whether this different cause of death can justify such a different legal regime, that is to say the provision of a constitutional right in the first case and the penalty in the second, or we are dealing with a case of discrimination based on the different clinical condition of the patient.

Taking the Italian case law as an example, Mr Welby[37] suffered from muscular dystrophy that progressed to the point where he could no longer breathe without the support of an artificial respirator and this allowed the doctor to cause the patient's death by disconnecting the devices.

On the contrary, DJ Fabo, quadriplegic, by refusing nutrition and artificial ventilation treatments could not have achieved a direct death but only a slow death due to malnutrition or asphyxia.

As seen, the "closed model" may give rise to the risk of unreasonably differentiating between categories of patients who appear to be homogeneous overall.

[36] Commission de réflexion sur la fin de vie en France, *Penser solidairement la fin de vie (Rapport Sicard)*, 18 December 2012: « Lorsque la personne en situation de fin de vie, ou en fonction de ses directives anticipées figurant dans le dossier médical, demande expressément à interrompre tout traitement susceptible de prolonger sa vie, voire toute alimentation et hydratation, il serait cruel de la "laisser mourir" ou de la "laisser vivre", sans lui apporter la possibilité d'un geste accompli par un médecin, accélérant la survenue de la mort ».

[37] Piergiorgio Welby was an Italian patient who, after having unsuccessfully battled in court for his right to die for years, obtained the interruption of medical treatments in 2006.

3. The constitutional State

The third critical point concerning the "closed model" refers to the compatibility of the prohibition of assisted suicide with the connotative features of the form of State of liberal derivation and of the constitutional State itself.

The right of self-determination of the patient may be subject to exceptions, in line with a relative and not totalising-concept of freedom, certainly compatible with the constitutional bases of a liberal and democratic State.

However, the ban in issue affects an individual moral decision that has no direct impact on third parties or the community and concerns individual considerations on the tolerability of suffering and on the vision of dignity.

As a consequence, an exception to the rule of the liberal principle is, in these cases, much more problematic than the obligation to wear a helmet or safety belts and requires careful consideration of the reasonableness of the limits to self-determination and of the legitimacy of State interference.

Furthermore, the restrictions to which certain fundamental rights may be subject under the ECHR must constitute "measures necessary, in a democratic society, for public security, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".[38]

It is therefore questionable whether an absolute ban on assistance for suicide is the most reasonable and proportionate measure in relation to the pursuit of the legitimate State interests exposed above.

An interesting point of reflection in this regard is offered by the *Carter v. Canada* case.

As a matter of fact, the Supreme court of Canada, found one of the bases for the declaration of unconstitutionality of the crime of assisted suicide in the "over-breath principle":

«[t]he overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object».

«The question is […] whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature. The focus is not on broad social impacts, but

[38] Restrictions provided for in Articles 8 (*right to respect for private and family life*), 9 (*freedom of thought, conscience and religion*), 10 (*freedom of expression*) and 11 (*freedom of assembly and association*).

on the impact of the measure on the individuals whose life, liberty or security of the person is trammelled»[39].

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