Stefano Canestrari

WOUNDS OF THE SOUL AND IMPRISONED BODIES

Suicide and aid to suicide from the perspective of a liberal and solidarity-based law

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www.buponline.com
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ISBN online 979-12-5477-358-1
DOI: 10.30682/9791254773581

Typesetting: DoppioClickArt (San Lazzaro di Savena - BO)
First Edition: October 2023

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1. The reasons for an investigation. The legal status of suicide and the 'about-faces of law'

The subject of suicide forces one to confront 'ultimate things', fundamental existential questions.

The main risk in dealing with such a 'dizzying' subject is that of not recognising the difficulties and being caught in a mindset that denies its complexity. The eternal temptation of legal experts is to 'close the doors' to problematic and painful reflection by resorting to equivalences that produce simplifying effects.

This paper has the opposite goal of progressively unveiling the inadequacy of resorting to certain 'equations' – which risk making law lose its 'grip on reality' – and highlighting the multiple issues at stake.

The 'lawfulness of suicide' – a fundamental principle of criminal biolaw – does not automatically entail the 'lawfulness of aiding suicide'. The very concept of 'aiding suicide' will have to be analysed in its many facets.

The facilitation of suicide – understood in the 'traditional' sense, in its manifestations triggered by the 'wounds of the soul' caused by severe psychological and existential suffering – cannot be equated with the different and dilemmatic phenomenon of medical aid in dying. I believe that the task of clearly marking this distinction is necessary and urgent, also in the light of the recent and well-known rulings of the Italian and German Constitutional Courts, which, for different reasons, risk generating misunderstandings and misinterpretations[1].

It is my hope that the argumentative path of this book will lead the reader to be fully aware of the fact that (aiding) *suicide* and *medically*

assisted suicide are not conjoined twins, nor are they siblings – they are merely relatives rebelling against 'forced cohabitation'. In this framework, I intend to make my contribution to a thoughtful public debate on end-of-life issues.

I will proceed in order.

I consider it crucial to start with a brief framing of suicide from the perspective of criminal law. Punished under Roman law on the basis of the idea of harm to the State and under medieval law with the addition of the Christian understanding of sin and life – of which man is not the owner, but a mere 'administrator' – the non-punishability of suicide is a relatively recent phenomenon, which is, however, reflected today in all modern criminal legislation[2]. Beccaria supported the uselessness of criminalising attempted suicide because he believed it was ineffective as a deterrent[3], while Carrara did the same for reasons of criminal policy, the frustration of the intention already constituting a sort of *poena naturalis*[4].

Given that suicide (in its attempted form) is not punishable in our criminal justice system, the question arises as to its legal qualification.

A doctrinal current considers that suicide is in any case *contra jus*, as would be inferred from Article 580 of the Italian Criminal Code: if inciting and aiding a behaviour is unlawful, the incited or facilitated behaviour should also be considered unlawful[5]. Regardless of the validity of this argument[6], the unlawfulness of suicide is affirmed by several orientations.

From the point of view of religiously inspired ethics, the doctrine of the sacredness of life and, consequently, the theological and moral condemnation of suicide prevail: the Catholic teachings firmly place suicide among the intrinsically evil (*intrinsece malum*[7]) acts. The principle of the sacredness of life finds significant correspondence in the ideas of perfectionist neo-natural law, which condemn suicide as a violation of the fundamental asset of life, the preservation of which constitutes an inescapable moral principle (a 'moral absolute')[8].

Moreover, the basis for the unlawfulness of suicide is seen in a 'solidaristic' obligation to exercise those duties towards society – for example,

as a citizen, soldier, worker, taxpayer – that presuppose life[9]. As is well known, this public-authoritarian view of life as an asset – protected not in itself, but as a function of external interests – constitutes the ideological matrix of the 1930 Italian Criminal Code and must be considered definitively superseded with the promulgation of the Italian Constitution.

Having recognised that the thesis of the unlawfulness of suicide is in no way constitutionally justifiable, we should examine the other positions concerning the legal nature of suicidal conduct.

According to a minority position, suicide rises to the rank of an inviolable right and is 'guaranteed' – not merely 'granted' – by Article 2 of the Italian Constitution[10]. This position cannot be agreed with, not least in view of its – in my opinion unacceptable – consequences. First of all, if suicide really corresponded to a constitutional freedom, "inviting or aiding others to exercise that freedom should, in principle, constitute a fact approved by the legal system"[11]. Not to mention that the conduct of a third party rescuing the would-be suicide (the so-called *soccorso di necessità*, 'emergency rescue') would be chargeable – conversely, the prevention of suicide is mandatory if the requirements of Article 593 of the Italian Criminal Code (*omissione di soccorso*, 'duty to rescue') are met, and cannot therefore merely constitute private violence.

In reality, not everything that is criminally permissible represents a constitutionally guaranteed right, since the personalist conception of the Italian Constitution is not marked by individualist radicalism, but is also appropriately characterised by a solidaristic perspective. In my opinion, it therefore seems correct to embrace those reconstructions that ascribe suicide to an area of recognised freedom for the individual and consider suicidal conduct a faculty or a mere exercise of a de facto freedom[12].

This stance on the legal status of suicide has also been confirmed and reaffirmed in recent times, in the era of criminal biolaw[13]. Fittingly, authoritative doctrine states: "A favour of the legal system with regard to suicide, going so far as to qualify it as a right, must be ruled out: it is an act that falls within an area of incoercible freedom, although not deserving of approval or support. This solution – which conforms to

a personalist conception appropriately toned down by the ideology of solidarity – implies a limited enforceability of the suicide claim, which leads one to place it within the scope of faculties or, if you like, to consider it as a 'feeble' right"[14].

The reaffirmation of suicide in terms of the exercise of a faculty appears to be of fundamental importance today for three reasons: a) it allows the principle of the lawfulness of suicide to be definitively affirmed, countering the re-emergence of the theory of the unlawfulness of suicide[15]; b) it allows suicide to be placed in an 'intermediate' category[16] without resorting to a *tertium genus* connoted by a moral disapproval of the suicidal gesture as a 'tolerated act'[17]; c) it makes it possible to support the idea of a 'balancing act' between the solidaristic perspective that makes it legitimate and desirable for institutions to intervene in order to discourage suicide and the affirmation of suicide as an act of freedom[18].

And here is a decisive point, to avoid a first 'reversal' of the relationship between fact and law. The reasoning and the thesis proposed here on the legal nature of suicide take as their point of reference the *traditional concept of suicide* – in its many manifestations – and not the contemporary and in itself dilemmatic notion of medically assisted suicide.

According to the findings of the most authoritative studies on the 'classic' concept of suicide, genetics and biology may play a role, but it is above all negative emotions that afflict suicidal individuals. The suffering of these people is generally referred to as 'psychological pain'[19] – or psychache[20] – to distinguish it from physical suffering. Beyond the terminological definitions proposed in the field of suicidology – a discipline focussing on the scientific analysis of suicidal behaviour and its prevention – specialised studies emphasise the fact that every suicide is a multifactorial event with various contributing factors, but the essence of the nature of suicide is psychological[21]: for each individual, there is a specific suicidal tragedy aimed at abolishing suffering, which is experienced as unbearable and extreme, often associated with shame, guilt, anger, fear, anxiety, loneliness and despair.

For the purposes of this argument, the observation that suicide risk is a transient psychological state that is not immediately intelligible to the

interlocutor, who cannot fully comprehend the state of suffering of the would-be suicide[22], is particularly relevant. Suicide does not emerge in contexts of peace of mind and well-being, but is frequently triggered by traumatic experiences that generate severe existential suffering (death of loved ones, sentimental crises, economic difficulties, unemployment, etc.).

In the light of these considerations, talking about suicide means, first and foremost, placing oneself in a logic of prevention and recognising that would-be suicides "are precariously balanced between their desire to live and their desire to die"[23].

Seen from a preventive perspective, 'traditional' suicide – ranked by statistics as the tenth leading cause of death in the world[24] – should not be treated as a crime, nor as a 'sin'; it should not be automatically classified as a symptom of a psychiatric disorder[25]; it should be considered as an act of freedom that does not constitute a right.

Suicide is an act of self-annihilation that should not be confused with the *distinct and recent* phenomenon of medically assisted suicide, which must be analysed separately.

'Inverting', 'reversing' – i.e. changing the legal qualification of 'traditional' suicide to regulate medical assistance in dying – means abandoning a perspective of prevention of voluntary death[26] and 'overturning' a cultural model for society.

To be clearer: the classification of suicide as a right appears to be an 'equivocal reversal', being aimed at legalising or decriminalising medically assisted suicide, which is not a 'classic' type of suicide. The logical procedure should be the opposite – the question should be whether the concept of suicide should be 'broadened' to include medical assistance to die by one's own hand. Otherwise, if one starts from the assumption of an uncritical identification of two distinct phenomena, the effects produced are, in the present writer's opinion, severe.

The first of them is the inevitable weakening of a phenomenological view that, to describe suicide, emphasises the idiosyncratic psychological pain of the individual in favour of a 'clinical reading' of suicide based on diagnostic labels. And, consequently, the risk of proposing a cultural

model for society that does not place the individual, but his or her disorder, at the heart of the issue.

I continue my reasoning, which is intended as a first warning signal to avoid 'unwitting reversals' in the debate on end-of-life issues.

The definitions of suicide as a 'non-punishable act' and as a 'manifestation of an irrepressible freedom' are modelled on the different forms of the traditional concept of suicide – well known to the 1930 legislator and to the constitutional legislator – and are useful to mark and circumscribe the scope of lawfulness of possible interventions to prevent suicidal acts[27].

On the other hand, understanding suicide as an inviolable right of freedom – which finds its legal basis "not only in Article 32, but also in Article 2 of the Italian Constitution"[28] – is not a mere terminological clarification. Rather, it represents a functional step in dealing with a 'different' and recent reality, that of medical assistance in dying[29]. Within this line of reasoning, however, positions are not uniform and leave considerable room for ambiguity.

One must be fully aware of this point.

In Italy's legal literature, the majority position, which qualifies suicide as the exercise of a faculty linked to an 'irrepressible space of freedom', is based on rejecting the idea of suicide as an unlawful act – fuelled by the various theoretical and historical models (of religious and secular origin) according to which life is not ours to dispose of – and distancing oneself from the 'view' of suicide as an act that is always 'pathological' in nature.

On the contrary, the minority view in the legal literature affirming the existence of a 'right to suicide' guaranteed and protected by the Italian Constitution appears ambivalent. It is not fully understood whether this position is rooted in a philosophical and legal understanding that sees suicide as a phenomenon to be approved or valued as a free development of the human personality[30], or whether it exclusively refers to self-inflicted death in case of illness – i.e. not suicide in its 'traditional' manifestations (triggered by psychological and existential suffering), but medically assisted suicide.

2. Italian Constitutional Court Decision No. 242 of 2019. The legal pitfalls of intertwining suicide and medical aid in dying

The well-known ruling of the Constitutional Court No. 242 of 2019 – as well as, before it, Order No. 207 of 2018[31] – did not address the issue of the legal status of suicide, but the arguments put forward there embrace neither the thesis of the structural unlawfulness of suicidal conduct, nor the opposite understanding of a right to suicide pursuant to Article 2 of the Italian Constitution, which would have led to the unconstitutionality of Article 580 of the Italian Criminal Code.

Having regard to criminalising the inciting and aiding of suicide, the Court considers that it is "conducive to the protection of the right to life, especially of the weakest and most vulnerable people, whom criminal law intends to protect from an extreme and irreparable choice such as that of suicide". The prohibition, even in today's constitutional set-up, has its 'raison d'être' in that it "fulfils the purpose, always relevant, of protecting people experiencing difficulties and suffering, also to avert the danger that those who decide to carry out the extreme and irreversible act of suicide will be subjected to interference of all kinds"[32].

Consequently, again in the Court's view, the criminal legislator cannot be deemed to be prevented from prohibiting conduct which, in the name of an abstract understanding of individual self-determination, paves the way for suicidal choices, ignoring the actual conditions of distress or neglect in which such decisions are often conceived. Quite the opposite – it is the responsibility of the Italian Republic to implement public policies aimed at supporting those in such situations of fragility, thus removing any obstacles that prevent the full development of the 'human person' (Article 3, sec. 2 of the Italian Constitution)[33].

However, as is well known, the Court identified – within the referring court's main question – a circumscribed area of constitutional non-conformity for Article 580 of the Italian Criminal Code, i.e. the cases in which the would-be suicide is a person (a) suffering from an irreversible illness, (b) which is the source of physical or psychological suffering that the person finds absolutely intolerable, who is (c) kept alive by means

of life-support treatment but remains (d) capable of making free and conscious decisions. In such cases, the Court writes, "the absolute prohibition on aiding suicide ends up unjustifiably and unreasonably limiting the patient's freedom of self-determination in terms of the choice of treatments, including those aimed at freeing the patient from suffering, stemming from Articles 2, 13 and 32, paragraph two, of the Italian Constitution, ultimately imposing on the patient only one way of taking leave of life"[34].

Elsewhere, I have had the chance to offer an in-depth examination of Decision No. 242 of 2019. Starting from an analytical assessment of the four requirements pertaining to the condition of the patient requesting medically assisted suicide, I highlighted how the Court's arguments were closely linked to the peculiarities of the Antoniani-Cappato case and illustrated the chequered nature of an 'inevitably unfortunate' ruling[35].

For the purposes of the argument that I intend to make, it is now necessary to 'go backwards' and 'reread' the core of the grounds that underpinned the question of constitutionality raised by the Court of Assizes of Milan by order of 14 February 2018[36]: "Recognition of the right of each individual to self-determine even as to when and how to end his or her life makes criminal sanctions unjustified in cases where participation in the suicide was merely the implementation of what had been requested by a person who had made his or her choice freely and consciously. In the latter case, in fact, the conduct of the 'facilitating' agent is merely a tool to implement what was decided by a person in exercising his or her freedom […]".

As I have just mentioned, the approach of the Milanese judges was not accepted by the Italian Constitutional Court. However, the idea behind that reconstruction is now being vigorously revived by an authoritative voice in our criminal law literature[37]. Tullio Padovani writes: "The 'solution' that the Court proposes, albeit in its feeble terms, denies *in apicibus* the idea that suicide can and must be an expression of freedom; by postulating a review of the 'compatibility' of the suicidal choice based on the conditions of the person making it (suffering from an irreversible

illness, a source of intolerable suffering, and yet still capable of making a decision), the limits of a verification of the actual freedom of choice are widely exceeded"[38].

This position can be said to be in the minority[39], as criticism of the Court's ruling by supporters of a constitutionally guaranteed 'right to suicide' has been limited to denouncing the arbitrariness of one of the requirements for access to medical aid to suicide – that of dependence on life-support treatment. Proposals to extend the scope of admissibility of assistance to suicide have (for the most part) taken as their starting point the existence of a severe and irreversible pathological state[40].

The majority of legal literature asserting the existence of a 'constitutional right to suicide' intends, on closer inspection, to claim a 'constitutional right to medically assisted suicide'. The conceptual basis of Padovani's thinking is the opposite – understanding suicide as an individual right of freedom is completely independent of a reflection on the dilemma of medically assisted suicide.

From the first argumentative perspective, *suicide* (and aiding suicide, in its classic forms triggered by 'psychological pain') has become, following a daring and dangerous 'reversal', the 'mute servant' of a 'tyrant partner' – medically assisted suicide. In the second approach, the question of medical aid in dying 'disappears' in the context of a critical discussion of the criminal relevance of behaviours – aiding and inciting – associated with a general and traditional notion of suicide.

In my opinion, both views stem from a conceptual framework that cannot be endorsed: the idea that suicide and medically assisted suicide are comparable legal facts. We are not just dealing with twins that cannot survive together, as the judges of the Constitutional Court also understood, but with *two phenomena that can only be regulated if they are analysed from the onset as different realities*.

As one shall soon have the opportunity to verify, this conviction of mine is also confirmed by a critical examination of the grounds of the judgment of the Second Senate of the *Bundesverfassungsgericht* of 26 February 2020, which declared § 217 of the StGB punishing the so-called "commercial facilitation of suicide" unconstitutional[41].

3. The German legislator's clumsy 'hybridisation' of 2015: the "commercial facilitation of suicide" and the ruling of the Federal Constitutional Court (*BVerfG*)

§ 217 of the German Criminal Code – now declared unconstitutional by the Karlsruhe Judges – consists of two paragraphs: "(1) Whoever, with the intention of facilitating the suicide of another, offers, procures and conveys the commercial opportunity thereof, even in the form of intermediation, shall be punished by a term of imprisonment of up to three years or by a fine. (2) As a co-participant, a person who acts in a non-commercial manner and is either a relative of the person referred to in paragraph 1 or linked to him or her by close relations shall be exempt from punishment".

This provision came into force on 10 December 2015 following the passing of the law on the punishability of commercial facilitation of suicide: until then, the German Criminal Code had not provided for any offence for aiding suicide. The rationale of the 'new' § 217 was to prevent a "normalisation of the organised form of assisted suicide"[42], as well as the spread of a "suicide culture"[43] facilitated by the exploitation of requests for assistance to suicide made – for profit and in organised forms – by private individuals[44].

In spite of the literal translation of the heading of § 217 StGB, i.e. "commercial facilitation (aiding and abetting) of assistance to suicide", the objective pursued by the German legislator in 2015 appeared broader. The legislative rationale was that of establishing the criminal relevance, in a legal system lacking 'historical' criminalisation of aiding and inciting suicide, not only of the commercial exploitation of requests for assistance to suicide made by private individuals organised for profit, but also of the intermediation (at several levels) carried out, again by private individuals, not for profit – in particular, that carried out by the aforesaid persons in order to provide anyone requesting this type of intervention with medical and legal assistance and transport to *ad hoc* clinics.

Hence, an exception to a general choice of considering aiding suicide lawful, as opposed, in the StGB, to the criminal relevance of consensual

homicide (§ 216 StGB). One can therefore understand how much the German system 'profoundly' differs from the Italian one: in Germany, the legislator's 'historical' approach – the lawfulness of aiding suicide has been established since the introduction of a unitary criminal system in 1871[45] – is not only 'recovered' but extended by the aforementioned *BVerfG*'s judgment, which goes so far as to affirm a "right to suicide" (*Recht auf Selbsttötung*), even in assisted form.

According to the German Constitutional Court, the "right to self-determination in death" falls within the scope of the more general "right to the free development of one's personality" (Article 2, sec. 1, GG), which in the *Grundgesetz* is linked to the principle of human dignity (*Menschenwürde*, Article 1, sec. 1, GG)[46]. It follows from this – in the *BVerfG*'s words – that "the self-responsible decision about the end of one's life does not require any further basis or justification" and, therefore, "is not limited to the presence of severe or incurable illnesses or to certain phases of life or illness" (Rn. 210). Furthermore: "A restriction of the guarantee to specific causes and motives implies an assessment of the reasons for committing suicide and the merits of predetermination, which is foreign to the notion of human freedom, as humans conceive themselves in their own individuality and to the extent that they recognise themselves therein. […] The discriminating factor is the will of the holder of the right (*MaBgeblich ist der Wille des Grundrechtsträgers*), which eludes any assessment in the light of generally accepted values, religious precepts, socially acquired models of life and death, or purely intellectual speculations […] This right exists at every stage of human existence. The decision of the individual to end his or her life on the basis of his or her own understanding of the quality of life and the meaning of his or her existence is, in the final moment, an act stemming from an autonomous self-determination that the State and society must respect" (Rn. 210).

And here is the next passage, which is of particular relevance to the argument I intend to make. Once it has been affirmed that "the right to self-determination in death" (*Recht auf selbstbestimmtes Sterben*) – in the form of a "right to suicide" based on a free and conscious deci-

sion – cannot be circumscribed to a certain state of health, a certain phase of life or an examination of the holder's motives, it is recognised that the holder also has "the freedom to seek help for that purpose from third parties, as well as to receive such help if it has been offered" (Rn. 212).

In short, in the opinion of the German Constitutional Court, the *self-responsible* decision to end one's own life needs to be fully protected both at a 'horizontal' level, i.e. without requiring the presence of particular illnesses or certain life situations, and at a 'vertical' level, as the individual's ability to ask for and receive help for this purpose should not be prevented[47].

That being said, in the view of the *BVerfG*, the criminal prohibition introduced by § 217 StGB would in practice nullify the exercise of the "right to self-determination in death" for those who wish to be aided by third parties in committing suicide (Rn. 216 ff.). Noting the impossibility of a constitutionally oriented interpretation of the offence, the Court declares it unconstitutional (Rn. 337).

The Karlsruhe Judges draw such 'radical and painful' conclusions – it took ten months to draft the ruling and vote unanimously on it – after subjecting § 217 StGB to a complex test[48].

First of all, the German Constitutional Court poses the question whether the limitation imposed by the legislator in 2015 on aiding suicide is 'justifiable', i.e. legitimate, as State interference in the personal sphere aimed at protecting the individual. To this end, the Federal Judges use two criteria: the legitimacy of the interest pursued by the legislator, from which the suitability of the regulation ordered to pursue it derives, and the appropriateness, in terms of proportionality, of the limitation of the individual right.

First of all, the *BVerfG* states that the objective of the legal system to protect the free formation of will as a prerequisite for the right to self-determination even in death is fully legitimate. The involvement of third parties authorises the criminal legislator to step in with the aim of verifying that no abusive conduct is carried out towards persons requesting assistance to suicide and, therefore, that their self-determination is fully

respected. In this sense, the conditions of the most vulnerable human beings and the irreversibility of implementing a suicidal decision are recalled.

In particular, according to the German Constitutional Court, the risks to be faced can come both "from the outside" and from "interpersonal relationships".

On the first side, the Karlsruhe Judges consider that the dissemination of cultural models favourable to aiding suicide could lead to a social pressure capable of inspiring or consolidating suicidal choices in the most fragile and unaware individuals. In this regard, the *BVerfG* also "agrees with the legislator's assessment that the commercial aiding and abetting of suicide may lead to a 'social normalisation' of assisted suicide and that this may be established as a normal way of ending existence, especially for elderly and sick persons, as such capable of exerting social pressure to the detriment of personal autonomy" (Rn. 250).

On the second side, the risks of preventing a free and conscious suicidal decision are manifold, taking into account the possible numerous "conflicting interests" – from "emotional" to economic to, for example, hereditary – that could concretely determine the conduct of "third parties" facilitating suicide.

On the basis of these premises, which I largely agree with, I intend to analyse how the *BVerfG*'s argumentation is structured in depth. The core issue is as follows: given that the offence under § 217 StGB is framed as an offence of abstract danger with respect to the legal assets of life and self-determination, the Karlsruhe Judges wonder whether the prognostic assessment of dangerousness made by the 2015 legislator passes the empirical substantiation test.

With regard to the risk that an individual may be exposed to sociocultural pressures, the *BVerfG* emphasises that there are currently no statistical investigations that can validate the idea that the commercial offer to commit suicide in itself entails dangers for self-determination.

Mode specifically, the *BVerfG* notes the presence of statistical investigations carried out in countries where aiding suicide has been decriminalised or legalised (Switzerland, the Netherlands, Belgium), which show a

(continuous and gradual) increase in the number of medically assisted suicides. However, this assumption does not in itself provide any proof of the existence of a higher risk for the would-be suicide's self-determination.

The criminal legislator is not exempt from adducing evidence, based on verified empirical data, of the connection between the offer of commercial assistance to suicide – with the consequent ascertained increase in medically assisted suicides – and a threat to self-determination. The German Constitutional Court considers that the belief in the existence of this link is not based on sound scientific knowledge.

In this perspective, the *BVerfG*'s judgment also highlights the findings of specialist studies and the hearing of experts, where they emphasise that suicidal thoughts – frequent in persons suffering from depression – can be revoked when there is an opportunity for thoughtful reflection on existing alternatives as well. In the light of these considerations, the idea is reinforced that the most intense risks to the self-determination of the would-be suicide arise from 'interpersonal relationships', i.e. from facilitations of suicide that come from "interested" parties influenced by 'emotional', economic or even hereditary considerations.

And here is another crucial aspect of the argument that I intend to make. I wonder to what extent the empirical findings referred to by the *BVerfG* in order to assess the scientific justification for the German legislator's intervention can contribute to resolving the substantive issues raised by assistance to suicide within our legal system.

In this regard, I would immediately observe that the debate on the role and value of statistical investigations and experimental studies must take into account the cultural and criminal-political background. I do not only intend to refer to the circumstance that an increased acceptance of assistance to suicide in society – evidenced by data from Switzerland, the Netherlands and Belgium – is considered without fear by the Karlsruhe Judges.

I emphasise that the *BVerfG* focusses exclusively on one point – in order to 'break' the established cultural and legal tradition in German law of the criminal lawfulness of aiding suicide, reliable statistical data are

sought on the dangerousness of commercial facilitation of medically assisted suicide (for the sake of self-determination).
The Italian criminal law expert cannot 'transplant' this further 'reversal' – a sort of 'conceptual about-face' – into the debate on the reform of our criminal justice system. In Italy – and indeed, even in the framework of a 'thorough' debate on end-of-life issues among German criminal law experts – we cannot evade the question that should be the logical starting point for outlining scientifically grounded reform proposals.
The question must be asked: is it reasonable for a legal system to provide for a 'general' criminal prohibition on aiding suicide in its traditional forms? This also takes into account the findings of the scientific investigations examined by the *BVerfG*[49], from which it emerges that a free suicidal decision may more often than not be concretely threatened by third-party influence unconnected with the commercial offer of medically assisted suicide.
In this regard, I feel it is important to highlight two statistics that have been completely overlooked in the specialist literature.
The first one: in the context of attempted and committed suicides in Germany, the percentage of those linked to the activities of so-called *Sterbehilfevereine* (associations for aid in dying) is very small[50].
The second one: Eurostat data show that, of the 5.2 million deaths recorded in the European Union in 2015, 56,200 (1.1%) were voluntary deaths (suicides). In absolute terms, Germany (10,200) and France (9,200) are the two Member States that recorded the highest number of suicides in 2015; however, for a comparison between countries, absolute figures have to be weighted on the population size and structure of each country. That said, Germany (12 suicides per 100,000 inhabitants) is just above the EU-wide suicide rate[51], while Italy is among the countries with the lowest suicide rates (6 suicides per 100,000 inhabitants)[52].
In my opinion, these statistical investigations are not decisive empirical evidence for a scientifically based criminal legislation. However, the two figures I have reported should lead one to denounce first of all the 'about-face' of the German criminal legislator in 2015 in regulating the aiding of suicide 'backwards'. The preliminary question that the

German legislator should have asked itself – with a view to protecting the freedom and consciousness of the suicidal choice – was that of the suitability of a criminal prohibition in preventing abuse in relation to traditional types of suicide triggered by psychological or existential suffering.

Such a consideration is not taken into account, either in the debate developed within German doctrine in connection with the 2015 legislative intervention[53], or in the arguments of the Karlsruhe Judges. In Germany, no consideration is even given to 'identifying' the different identity of two 'siblings' – (aiding) 'traditional' suicide and (commercial facilitation of) medically assisted suicide – because the first(born) is not considered as 'conceived'.

This 'concealment' of the obscure phenomenon of aiding 'traditional' suicide is also evident in the concluding part of the *BVerfG*'s judgment. The Karlsruhe Judges envisage the possibility for the legislator to regulate assistance to suicide through the provision of procedural guarantees, disclosure obligations, administrative authorisations, and observation periods to verify the seriousness and persistence of the suicidal choice over time. In particular, the *BVerfG* is aware that the request for assistance to suicide may be influenced by acute mental disorders[54] or may not be preceded by a concrete offer of alternatives[55].

The indication to the legislator of a "broad spectrum of regulatory actions" is aimed at protecting the would-be suicide's freedom of self-determination – with possible recourse to criminal sanction – and in any case excludes the provision of substantive and predefined conditions for receiving assistance to suicide, such as the requirement of an incurable illness or that of prior recourse to palliative care or pain therapy.

The fact that even a non-sick person can access assistance to suicide should not be misleading. The *BVerfG* speaks of "aiding suicide" but refers exclusively to medically assisted suicide – on the other hand, the ruling clearly states that the right to assisted suicide does not correspond to an obligation to provide medical care[56].

No reflection, no 'thought' on aiding a 'classic' suicide in the form of logistical support, of a 'decisive facilitation' provided by an 'interested'

third party (e.g. a gun provided by a partner to a severely depressed businessman for economic reasons). In this connection, it should be underlined that specialist studies emphasise the existence of an often large time interval between the moment when the decision to kill oneself is made and the subsequent, distinct moment when the intention is implemented – it is immediately obvious that 'diligent' help can significantly reduce this 'deliberative space'.

The rulings of the Italian Constitutional Court and of the *BVerfG* are therefore 'inevitably unfortunate'. The former was 'forced' to bring the dilemma of medically assisted suicide under the umbrella of a provision drafted to prohibit aiding traditional forms of suicide. The latter had to 'hide' the phenomenon of aiding classic types of suicide by bringing it under the umbrella of the provision on commercial facilitation of medically assisted suicide.

4. The centre of gravity: ascertaining a free and conscious decision to request assistance to suicide

This irremediable 'original defect' that characterises the positions of the Italian and German Constitutional Courts prevents a well-structured and convincing examination, within the context of the different argumentative paths of the two rulings, of the one element they have in common. And indeed, in the *BVerfG*'s radical perspective, the only substantive requirement – unlike the four stipulated by the Italian Constitutional Court – to obtain assistance to suicide is the presence of a "genuine and definitive" will.

At this point I would like to go back to the issue that I have always considered central and that in my opinion is not dealt with in depth in the (bioethical and) legal debate – which should not be 'stuck' in the 'regulatory funnels' imposed on the Judges of the Constitutional Court and on the Karlsruhe Judges. That is, ascertaining a would-be suicide's free and conscious decision.

The right to self-determination of a person requesting assistance to suicide cannot be asserted without a prior in-depth examination of its ascertainment criteria[57].

This verification is therefore also essential for the debate – which would otherwise be 'governed' by axiological premises and apodictic assertions – on suicide as a phenomenon to be prevented or protected.

5. The wounds of the soul and the ambivalent, unfathomable scenarios of suicide. The reasons for a criminal prohibition on aiding suicide

This brings us back to the question that I consider crucial: the identification of criteria on the basis of which the suicidal choice and subsequent conduct can be considered truly autonomous and free.

In my opinion, the issue is decisive and its examination is inescapable if one wants to address the question of whether a 'right to suicide' even with the help of others exists or not. In a secular and liberal perspective – where my reasoning lies – it is not sufficient to state that ascertaining the voluntariness of choices must be an absolute priority, with the caveat that the more self-defeating and riskier the conduct, the higher the standard of voluntariness and the standard of ascertainment must be.

I consider it essential – within the framework of a 'genuinely' integrated criminal science – for the contemporary criminal law expert to take on the task of 'entering in a dialogue' with those disciplinary fields that most directly deal with suicide and from which one might expect guidance. The most rigorous scholars – psychiatrists, psychologists, sociologists, physicians, law experts, philosophers, theologians, bioethicists – start from the elaboration of a taxonomy, a classification of types of suicide. By way of example: pathological, anomic, unintentional/intentional/sub-intentional, altruistic, collective, selfish, passive, chronic, religious, political, liberating, expiatory, intellectual, humanitarian, emotional, rational, recreational, sentimental, symbolic suicide – and the list

could go on, just as some designations could be revised according to the perspective of the different authors.

An in-depth analysis of these investigations allows me, despite the variety of positions and the multiplicity of points of view, to formulate a few considerations.

From the perspectives of the different disciplines, suicide prevention is a central aim: the majority of studies have been carried out in order to gather useful information to prevent suicidal behaviour. Nevertheless, these investigations mostly remain 'on the outside' and their effectiveness is relative, as even the most sophisticated examinations fail to account for the involvement of the psyche in suicidal behaviour. It must be emphasised that, in the majority of cases, suicide occurs in common human situations and not – as it would be reassuring to think – in hospitalised psychotics: each suicide has its own particular, individual, dark side.

The knowledge we have of suicide is always incomplete, any clear definition is premature: 'understanding' suicide is indeed a problem, but it is and will remain above all a mystery.

This is also confirmed by the discipline that has the most resources to listen to the suffering of the would-be suicide's soul, i.e. psychoanalysis, or depth psychology: "An investigation carried out from the analytical perspective differs from other types of research in that it proposes neither to condemn nor to condone suicide; indeed, not even to pass judgment, but simply to understand it as an event in psychic reality"[58].

However, even when psychoanalysis has the effect of preventing suicide – as fortunately sometimes happens[59] – it cannot help to formulate a set of rules to establish whether a suicidal choice is truly free, because of the uniqueness and unrepeatability of the analytical relationship.

If suicide – literally 'killing oneself' – is an attack on the life of one's own body, the uniqueness of the tragedy cannot be subjected to testing. Even psychoanalysis cannot – nor does it intend to[60] – draw up rules to determine when suicide, or 'a certain suicide', is a 'call' of a free and autonomous Self[61].

In short, I consider it difficult not only to conceive of an ascertainment of a free and autonomous suicidal will, but even that there exists the figure of an 'assessor', an 'expert' who can assess the intensity and 'curability' of the wounds of our soul[62].

In the light of these observations, I consider the prevention of suicide to be an absolutely legitimate and entirely worthy aim. In this perspective, I wonder whether the criminal prohibition on aiding suicide – understood in the traditional sense – could be an effective instrument. The difficulty of even conceptualising a procedure aimed at assessing the 'abnormality' of a definitive gesture of self-annihilation, triggered by psychological pain, leads me to believe that no one – relatives, friends, acquaintances, business partners, 'bystanders' – has the faculty to facilitate suicidal conduct.

The impossibility of identifying adequate means of ascertaining in concrete terms whether the would-be suicide's decision is free, autonomous and responsible appears, in my view, evident in the face of the request – in itself 'ambivalent' – 'to be helped to commit suicide' in order to finally 'end' one's suffering of psychological or existential origin. These reflections lead me to agree with the decision of the Italian Constitutional Court where – in contrast to the *BVerfG*'s ruling – it expresses itself in favour of criminalising the aiding of suicide in its 'traditional' forms[63]. Incidentally, such a criminal prohibition can only survive within the framework of a general reform of the crimes against life provided for in the Rocco Code, which – I wish to emphasise clearly – *give rise to such intense punishing effects that their reasonableness-proportionality appears challengeable*[64].

The *BVerfG*'s judgment does not propose any empirical constants induced by scientific method capable of altering my conviction – supported by a 'dialogue' with depth psychology – that investigating and assessing the 'wounds of the soul' underlying a request to be 'helped to commit suicide' is impossible. Given the impossibility of basing a judgment on the legitimacy or non-legitimacy of the intervention of criminal law on reliable empirical evidence, it seems appropriate and reasonable to affirm that the criminal prohibition on aiding suicide may represent a useful tool to combat the risks of preventing a free suicidal

choice. It is immediately obvious that the dangers of 'manipulation' and abuse are manifold, taking into account the possible numerous 'conflicting interests' – from 'emotional' to economic – that could concretely determine the conduct of 'third parties' facilitating suicide.
With regard to the recipients of this protection, the reference to the category of especially 'vulnerable' persons (also reiterated in the aforementioned decision of the Constitutional Court) recurs. On the basis of the above considerations, I consider it preferable to be cautious in identifying the 'most at risk' contexts and categories. Since our knowledge of the suicidal choice is in any case very limited, any classification appears partial – the psyche of each of us may contain an eternal spring of growth and an endless winter of depression and despair[65].

6. The rights and pains of a captive body

Let me rephrase the question that I consider crucial – and preliminary to any further reflection – in the framework of the situations in which the Judges of the Constitutional Court consider that the criminal repression of aiding suicide conflicts with constitutional principles.
That is to say, is it possible to ascertain the capacity to make free and conscious decisions (to self-determine) in requesting the administration of a drug capable of rapidly provoking the death of patients (a) suffering from an irreversible illness, (b) which is the source of physical or psychological suffering that they find absolutely intolerable, who are (c) kept alive by means of life-support treatment?
I cannot even touch on the – deep and branched-out – question of the 'mutual relationship' between body and soul. However, we all know that there is a link between the 'sufferings of the soul' and the 'sufferings of the body': in actual experience, they never exclude one another completely. Moreover, in the conditions outlined by the Constitutional Court, unlike those that characterise the types of suicide examined above, the body undoubtedly assumes the role of *protagonist*, with its rights – the principle of the intangibility of the bodily sphere and the right to live all the

stages of one's existence without undergoing medical treatment against one's will – and its pains. This *centrality* of the sufferings and condition of the sick person's body leads me to make different considerations than those relating to the 'traditional' types of suicide induced by the 'sickness of the soul'. The existence of 'objective' prerequisites – the presence of an irreversible illness, which is the source of intolerable physical or mental suffering for the patient kept alive by means of life-support treatment – argues in favour of being able to verify the freedom of self-determination of a request for assistance in dying. We are in the presence of ascertainment criteria and a figure capable of carrying out the *verification* procedure, who can only be the physician, perhaps with the help of a clinical psychologist in the event of there being doubts as to the sick person's full possession of his or her mental faculties.

And indeed, in confirmation of this, the Judges of the Constitutional Court consider it fundamental to have a regulation on how to *medically* verify the existence of the conditions in the presence of which a person may request assistance in dying and a regulation of the related medicalised process[66]. Pending Parliament's intervention, the Court's decision has made non-punishability conditional on compliance with the modalities provided for in the regulations on informed consent, palliative care and continuous deep sedation (Articles 1 and 2 of Italian Law No. 219/2017) and on the verification of both the required conditions and the modalities of execution by a public facility of the National Health Service, after hearing the opinion of the territorially competent ethics committee.

I reiterate, in summary, my position. I do not find convincing the idea – frequent among Catholic scholars – that, in the context of very severe pathological or end-of-life situations, it is never possible to ascertain a 'current', 'certain', 'free' and 'conscious' will of the sick person requesting assistance to die[67]. On the contrary, I believe that it is possible for the physician to rigorously ascertain the will of the sick person precisely in cases where the request for aid in dying is made during and at the end of a course of treatment and in the context of a profound relationship between the physician and the sick person, as is the case when the patient is kept alive by means of life-sustaining treatment.

Where, on the other hand, doubt reigns and the verification of a 'lucid' and 'stable' request to avail oneself of assistance to suicide appears highly problematic – though certainly not entirely impossible – is the chequered universe of the sick person who can kill him or herself but plans a 'suicide by the hand of others'. In this galaxy ruled by anguish, where the person does not exercise the most extreme form of freedom – that of killing oneself – but asks others to take on that responsibility, one must reason with prudence, caution and fear.

The request 'help me commit suicide' for the pains caused by the wounds of the soul eludes by *its very nature* a process of ascertainment capable of 'identifying' the validity of the request, which in any case often comes from a person suffering from a psychopathological disorder. As to the complex and varied constellations of patients with a severe and irreversible illness but capable of ending their existence on their own I intend, on the other hand, to highlight the difficulties inherent in a process of typifying the ascertainment of a free and conscious decision to request aid in dying.

7. Medical verification of the request for assistance to die and the ambiguities of Constitutional Court Decision No. 242/2019

The requirement referred to in letter c) – that the request for assistance to die must come from a sick person "kept alive by means of life-support treatment" – allows the Italian Constitutional Court to 'resolve' (or, more correctly, 'not address') the more complex issues emerging from the global debate on the legalisation or decriminalisation of medically assisted suicide and euthanasia[68]. That is, requests for assistance to suicide from sick persons who find themselves in the identical subjective situations described by the Court, but who are by the nature of their illness in a position to autonomously refuse and/or forgo life-saving medical treatment.

The introduction of requirement c), therefore, enables the Court to exclude from the subject matter of the judgment those illnesses that lend themselves to an extremely difficult assessment in relation to the deci-

sion-making capacity of the sick person. Consequently, verification of the requirement referred to in letter d) – the 'facilitated' person must be "capable of making free and conscious decisions" – is less complex. Once again – from a twofold point of view. On the one hand, the choice to claim rights and to 'end' the 'pains of a captive body' must be assessed – never *only* the intensity of one's exhaustion due to the 'wounds of the soul'. On the other hand, since we are necessarily dealing with *medicalised patients*, it is easy to identify the *physician* as the person who must in any case be involved in the procedure of ascertaining the "capacity to make free and conscious decisions".

The presence of requirement c) also allows Decision No. 242/2019 to 'circumvent' the more tragic and controversial issues relating to the Court's requirements referred to in letters a) and b) for access to medical aid in dying.

With regard to requirement a) – the sick person must be "suffering from an irreversible illness" – the most debated issue concerns the definition of one's state as 'terminal'. The solutions adopted by the regulatory paradigms that have legalised or decriminalised medically assisted suicide or euthanasia are manifold: some States in the USA, for example, have referred to an 'objective model' by explicitly stipulating that the illness must be terminal.

Within the scope of the 'non-punishability' of medically assisted suicide outlined by the Court's ruling, through requirement c), a patient who enters into an end-of-life process as a result of giving up the use of instrumental techniques to support life functions and who is entitled to benefit from continuous deep palliative sedation is taken into consideration. That is, a sick person who necessarily enters a terminal phase after stopping life-sustaining treatment.

In relation to requirement b), the most controversial aspect entails the need to require that the clinical condition be characterised by a persistent state of physical 'and' or 'or' psychological suffering. On this issue, too, the choice of the Court's ruling – for the disjunctive 'or' instead of the conjunctive 'and' – is 'simplified' (and 'downplayed') by the simultaneous presence of requirement c). The fear that this choice would exces-

sively broaden the scope of non-punishability appears unjustified, since the dimension of 'physical suffering' must in any case be considered 'inherent' – to a certain extent – in the condition of a body dominated by biomedical technologies that were 'unimaginable'[69] at the time when the Rocco Code was drafted.

But there is more. The provision of requirement c) ends up introducing a further 'unwritten' condition for access to medical aid to suicide: as a rule, the sick person is unable to end his or her own existence by him or herself. Dealing with medicalised patients who find themselves in such a clinical condition, the Court manages – for ambiguous reasons – to add to the list of parameters Article 32, sec. 2 of the Italian Constitution and to give relevance to the provisions in Articles 1 and 2 of Law No. 219 of 2017 while avoiding, at the same time, to take an explicit position on the grounds for its decision[70].

8. The constellations of illnesses of a sick person who is neither dying nor in the final phase of his or her existence: the dilemmas of ascertaining a free, 'stable' and conscious request for assistance to suicide

The simultaneous existence of the four substantive requirements for availing oneself of medically assisted suicide – and the compliance with the procedural conditions and modalities stated by Decision No. 242 of 2019[71] – appear consistent in delimiting the scope of the non-punishability of assisted suicide in order to avoid any abuses.

The risks of futile medical care are 'neutralised' without incurring those of therapeutic – or, more correctly, 'medical' – neglect.

The requirements, conditions and limits indicated by the Court in a regulatory perspective are also affected – as we have already pointed out – by the fact that they avoid certain underlying issues, which are bound to 're-emerge' in the public debate. Decision No. 242/2019 is an unprecedented type of decision, modelled on the peculiarities of the concrete case and, precisely by virtue of the specificity of the case, it

risks generating further disorientation in the ethical and legal debate on end-of-life issues.

First of all, as we have repeatedly observed, it is not easy to categorise the existential condition of Fabiano Antoniani (a.k.a. Dj Fabo) as suicide at the time of his request for assistance to die – we are dealing with a sick person who has undergone years of medical treatments and experimental therapies and is motivated by a tenacious desire 'to live' rather than 'to die'. In these cases, thought should therefore be given to overcoming "the semantic and conceptual traps associated with a lazy repetition of the term suicide"[72].

Faced with the impossibility of a type-based differentiation, the uneasiness is 'doubled' by the fact that Article 580 of the Italian Criminal Code, formulated at a time when the irruption of technology in all aspects of our existence was still far away, is still in force.

Not only a suicide that was 'atypical' and unimaginable in 1930, but not a 'paradigmatic' one either, with respect to the global debate on the legalisation or decriminalisation of medically assisted suicide. The main hypotheses that come to the fore do not concern requests for assistance to suicide from sick persons who forgo the continuation of life-support treatment and, at the same time, refuse continuous deep palliative sedation in the imminence of death.

In this regard, it should be noted that continuous deep palliative sedation is a medical treatment that leads the sick person to a natural death and has the effect of completely nullifying consciousness and inducing a 'pain-free sleep' until death. Continuous deep sedation can be perceived as an anguished conclusion – in the words of Decision No. 242/2019: "[…] experienced by some as an unacceptable solution"[73] – but it can certainly not be considered an 'undignified' way to accompany the patient in the final phase of his or her existence[74].

The Italian Constitutional Court's approach to medically assisted suicide – 'modelled' on the Antoniani/Cappato case – is bound to raise terrible and complex issues. In particular, the question is posed by many as to whether it can be considered discriminatory to deny medically assisted suicide to sick persons who find themselves in the identical subjective

situations described by the Judges of the Constitutional Court without being, due to the contingent characteristics of their illness, in a position to forgo the continuation of life-support treatment.

Some legal literature maintains that on the basis of the principle of equality – in the forms of non-discrimination, reasonableness and proportionality – the non-punishability of medical assistance in dying cannot be limited to the case at issue in the Constitutional Court's ruling: dependence on life-supporting treatment cannot be considered an essential requirement. In this sense, having regard to the conditions for making a request for aid in dying, in line with the legislation of countries that have legalised medically assisted suicide, the simultaneous presence of three requirements is considered necessary: a) an ascertained, severe and irreversible pathological state; b) an intolerable state of physical and/or psychological suffering; c) a genuine will[75].

In the face of the multiplicity and diversity of clinical conditions that can be assessed from such a perspective, the contribution I can make consists mainly in pointing out and highlighting the very problematic nature of verifying a sick person's ability to make conscious decisions. That is to say: under what circumstances can the patient be considered truly autonomous, and thus his or her request for medical assistance to die free and responsible?

In the 'traditional' cases of suicide characterised by the *unintelligible* 'wounds of the soul', I have argued that it is not possible to establish or typify definite criteria, nor to identify subjects capable of ascertaining the 'genuineness' and 'stability' of a request to facilitate suicide. On the contrary, in the cases described by the Constitutional Court – modelled on the Antoniani/Cappato case – the physician certainly has the competence to verify the validity of the request of a patient whose sick and suffering body is kept alive by means of life-support treatment.

In the wide range of cases in which, on the other hand, the request for assistance to suicide comes from a patient who is severely sick with an illness that does not require life-sustaining medical treatment that can be interrupted – and therefore from a patient who is neither dying nor in the final phase of his or her existence – the issue is extremely complex.

The analysis of this matter would require in-depth observations and specialised expertise.

Certainly, the 'intensity' of a sick person's suffering cannot be assessed by taking the condition of dependence on life-support treatment as a 'decisive' reference point. What I would like to emphasise is the need *not to trivialise the difficulties of ascertaining* whether a request for medical aid in dying from a sick person who is not dependent on life-support treatment and can 'kill him or herself' is 'free', 'genuine' and 'stable'.

A patient kept alive "by means of life-support treatment" who requests medical assistance to die forgoes the continuation of medical treatment and, therefore, has already had access to support and assistance (although unfortunately not always adequate). On the other hand, when other pathological conditions are taken into consideration, the request for medical aid in dying may not infrequently originate from a lack of support and assistance, from a fearful and insidious 'medical neglect' in contexts in which sometimes not even a proper medical or psychiatric treatment is envisaged[76].

Moreover, the severe and irreversible pathological states of a suffering person who is not dependent on life-support treatment are numerous and pose delicate, complex and diverse ascertainment issues – one need only think of the various types of tumours, nervous system diseases, circulatory system diseases, etc. The importance of my *recurring reminder not to underestimate* the difficulties involved in verifying a 'conscious' and 'stable' decision to request medical aid in dying in this varied constellation of cases is also confirmed by the scientific debate in countries that have legalised euthanasia and assisted suicide. Recently, in the Belgian public debate, I would like to point out a contribution by three experts from Ghent University, of liberal orientation, who express justified and commendable concerns in relation to medical assistance in dying to people with cognitive or psychiatric disorders[77]. Furthermore, the study points out that among the main categories for which euthanasia is practised in Belgium is 'polypathology' (17.9%), a clinical condition that frequently does not make it easy to verify a 'conscious' and 'stable' request for medical aid in dying[78].

Let us read together a page by Eugenio Borgna, an authoritative psychiatrist who has explored the most painful fears and anxieties of the soul throughout his life. I find these words very beautiful and of great significance:

> It is not possible not to be aware of the complexity and multiplicity of the elements that come into play in the conception and then in the implementation of a suicide, and of an assisted suicide in particular – in which *another* person takes on the overwhelming and humanly terrible task of recognising the freedom and autonomy, the necessity and the meanings, with which death is requested – the conclusion of life – the conclusion of a life that would instead find its horizon of meaning when depression is alleviated and cured – when the anguish of death and dying is sedated, even pharmacologically – when the pain, which accompanies some illnesses, is calmed – when inner conflicts are deciphered and clarified in their genesis and phenomenology[79].

Here, I would simply reiterate emphatically that we should all agree with this underlying assumption: when comparing the different positions on medical assistance in dying, it is the validity of the request and not only the intensity of the suffering that constitute the absolutely essential prerequisite. In the discussion between scientific disciplines, between health professionals, in the confrontation between political forces, in the public debate, this element must be recognised as the centre of gravity.

9. (Aiding) suicide and medically assisted suicide are not conjoined twins, nor are they siblings. They are relatives rebelling against 'forced cohabitation'

Starting from this assumption, I again wonder whether it is permissible to consider the facilitation of death without the requirement of severe somatic pathologies, in the presence of psychological or existential suffering[80], as the *BVerfG* states.

In my opinion, aiding suicide following a request made for reasons of mere mental suffering – whether or not connected to physiological deterioration – must continue to be criminally relevant.
The Karlsruhe Judges' ruling does not propose any empirical constants induced by scientific method capable of demonstrating the possibility of 'assessing' the 'lacerations of the soul' – perhaps triggered by a bereavement, a professional collapse or the failure of a love affair – underlying a request to be 'helped to commit suicide'.
The decriminalisation of assistance to suicide as a mere manifestation of self-determination that is independent of existing pathological conditions is aimed at an *abstract affirmation* of the dignity of the suicidal choice as a way of affirming the person. It means understanding dignity in objective terms, conducive to absolutising its value in an abstract dimension. This depersonalisation of dignity ends up irreparably severing the bond between freedom of self-determination and its ascertainment process.
Being decontextualised, it not only prevents one from realising the verification issue at the procedural level, but also from acknowledging the central point: the difficulty *even of conceptualising* the process of ascertaining (and the implementation, if any, of its criteria) a stable, free and conscious decision to request support or assistance to kill oneself from a person who is not suffering from existing pathological conditions.
This leads me to clearly state that (aiding) suicide and medically assisted suicide are not conjoined twins, nor are they siblings – they are merely relatives rebelling against 'forced cohabitation'.

10. Aid in dying in the context of severe illnesses and the prerequisite of adequate health care. Involvement in pain therapy and palliative care: a basic human right

The discussion on the legalisation or decriminalisation of aid in dying should therefore only concern medical assistance to severely ill persons[81].

Hence, the different orientations should converge on an aspect that I consider to be of fundamental importance: to guarantee genuine freedom of choice in end-of-life decisions, the sick person must always be provided with the possibility of adequate health care, in particular all practicable palliative care as well as psychological and psychiatric diagnosis and treatment.

I therefore express my strong appreciation for the indications of the ruling of the Italian Constitutional Court where it clearly states that: "Involvement in palliative care must [in fact] constitute 'a pre-requisite of the patient's subsequent choice of any alternative pathway' (as already anticipated by Order No. 207 of 2018)"[82].

On this point, I would like to emphasise a (partial) misalignment in the rulings of the Italian and German Constitutional Courts, as the *BVerfG* limits itself to a decidedly more general observation, noting that medical treatment, even palliative treatment, constitutes only a 'possible' alternative[83] to assisted suicide. After all, such a 'mild' stance is consistent with the starting point of the German Constitutional Court's ruling that assistance to suicide cannot be reserved exclusively for pathological situations or certain phases of life and illness.

In the more commendable – I would venture to say 'more humane' – perspective adopted by the Italian Judges, the 'lapidary' reference in Decision No. 242/2019 to the opinion of the Italian Committee for Bioethics (ICB) – *Riflessioni bioetiche sul suicidio medicalmente assistito* – of 18 July 2019[84] is particularly relevant. The Constitutional Court points out that in this document the Committee unanimously argued that the necessary actual and concrete provision of palliative care and pain therapy should be a "top priority for healthcare policies"[85].

Otherwise, always according to our Constitutional Court's decision, we would have "the paradox of not punishing aiding suicide without first ensuring an effective right to palliative care"[86]. I consider this last statement to be of great significance – also for a 'responsible' discussion in Parliament – as it requires the patient's prior and effective involvement in pain therapy and palliative care.

This stance of the Judges of the Constitutional Court can be said to be fully in line with the opinion expressed by the present writer in the aforementioned document of the Italian Committee for Bioethics under position c)[87]. Reference is made in particular to the central part of this 'third guideline', the content of which it may be appropriate to quote here.

> Freedom of self-determination, which must be a prerequisite for speaking of a conscious request for assistance in dying, is only possible if patients concretely enjoy effective and adequate health care, have access to all practicable palliative care – including deep palliative sedation – and are supported by appropriate medical, psychological and psychiatric therapy. Access to care, adequate facilities and appropriate resources must be guaranteed irrespective of the legislative decision on the matter: the request for assistance to die must never be a forced choice as it would be if a state of suffering, which could objectively be changed and reduced, were made insurmountable by the lack of adequate support and assistance. In this regard then we intend to express, right here, great concern regarding the content of the *Rapporto sullo stato di attuazione della legge n. 38 del 15 marzo 2010 "Disposizioni per garantire l'accesso alle cure palliative e alla terapia del dolore"* (Report on the state of implementation of Law No. 38 of 15 March 2010 'Provisions to ensure access to palliative care and pain therapy'), which the Italian Ministry of Health sent to Parliament in January 2019[88]. As is clearly stated in the document, the quality and supply of palliative care in residential and home-based settings is highly inhomogeneous throughout the country, certainly not because of inadequate healthcare professionals but because of well-known and severe structural deficiencies. This translates into the fact that a fundamental human right is not guaranteed in some Italian regions today – that of the patient to receive, in the final phase of his or her existence, effective support aimed at controlling suffering while respecting his or her dignity. We are well aware that a greater diffusion and expansion of pain therapy and palliative care cannot completely eliminate requests for medical assistance to die, but they could significantly reduce them, by

> excluding those that arise from causes related to alleviable suffering. As a matter of priority, therefore, the need to make access to palliative care homogeneous throughout the country is strongly reiterated[89].

After pointing out that the concrete dangers of a 'slippery slope' appear to be accentuated in the Italian healthcare reality, the illustration of this guideline within the Committee's document ends with some thoughts relating to the relationship between the notions and institutions provided for in Law No. 219 of 2017 and the issue of medically assisted suicide. The reference, therefore, is not only to deep palliative sedation as provided for in Article 2 ('Pain therapy, prohibition on unreasonable obstinacy in treatment and dignity in the final phase of life'), but also to advance care planning dispositions (Article 4) and shared care planning (Article 5) with respect to the evolving consequences of a chronic and disabling illness or one characterised by unstoppable progression with an inauspicious prognosis.

> Unfortunately, Law No. 219/2017 has not yet been fully implemented and is not yet sufficiently known in the healthcare reality of our country. Now, then, those who support that position firmly believe that the indispensable application, enhancement and dissemination of the contents and institutions envisaged by such legislation can have a powerful preventive and dissuasive effect against suicidal conduct by patients in general, and against many, though not all, requests for medically assisted suicide (medical assistance in dying) in particular[90].

11. Summary. Concluding remarks on two levels for a thoughtful public debate

Aiding suicide in its 'traditional' forms and so-called medically assisted suicide are two radically distinct phenomena that must be regulated differently. Let us not 'reverse' the relationship between fact and law, intertwining different situations to achieve criminal policy objectives.

I. *Aiding suicide and the wounds of the soul*

IA. The different types of 'classic' or 'traditional' suicide – well known to the 1930 legislator (and to the constitutional legislator) – are triggered by 'psychological pain' that is unrelated to severe and irremediable pathological conditions. Suicide in its traditional forms – ranked by statistics as one of the top ten causes of death in the world – should not be treated as a crime, nor as a sin; it should not be 'automatically' classified as a symptom of a psychiatric disorder; it should be considered as a faculty or an exercise of a de facto freedom; it should not be considered a right protected and guaranteed by Article 2 of the Italian Constitution. This framing of the legal nature of suicide – understood in the traditional sense – allows for an appropriate balance between the solidaristic perspective that makes it legitimate and desirable for institutions to intervene in order to discourage suicide and the affirmation of suicide as an act of freedom[91].

The objective of suicide prevention is in line with the fundamental principles of our Constitution. The arguments that consider the objective of suicide prevention foreign to a liberal State are based on an abstract understanding of freedom of individual self-determination, which ignores the actual conditions in which the various types of "classic" suicidal behaviours are conceived. This statement is confirmed by the fact that there are no scientific disciplines that can formulate rules to establish whether suicidal conduct is truly free: suicide – literally 'killing oneself' – is an attack on the life of one's own body, and the uniqueness of the suicidal act cannot be subjected to testing[92]. Even psychoanalysis cannot – nor does it intend to – draw up rules to determine when suicide, or 'a certain suicide', is a 'call' of a free and autonomous Self[93].

With regard to the traditional types of suicide – caused by psychological or existential suffering – I consider it difficult not only to conceive of an ascertainment of a free and conscious suicidal will, but even that there exists the figure of an 'assessor', an 'expert' who can assess the intensity and 'curability' of the wounds of our soul. This difficulty of even 'conceiving' a procedure to ascertain in concrete terms whether the suicidal conduct is based on a free, autonomous and 'stable' decision leads me to

firmly reiterate that the prevention of suicide is an absolutely legitimate and entirely worthy aim. Here I would just like to recall – on a subject that should raise our awareness – an important document on suicide in prison by the Italian Committee for Bioethics, drawn up precisely with the aim of identifying recommendations to prevent and reduce this tragic phenomenon[94].

The opinion of a criminal law expert in a secular and liberal legal system must be voiced clearly and energetically also in order to set firm limits for preventive work. Even today, there are numerous cases where psychological and physical violence is used in medical and psychiatric institutions, as well as in residences for the elderly, when there is even a remote risk or a mere 'threat' of suicide, not infrequently practising forms of mechanical restraint[95] (bandaging, 'tying' to a bed or chair) that may constitute various offences.

IB. In a preventive perspective, I have wondered whether the criminal prohibition on aiding suicide – understood in the traditional sense – could be an effective instrument. The difficulty of even 'conceptualising' a procedure aimed at assessing the 'abnormality' of a definitive gesture of self-annihilation, triggered by psychological pain, leads me to believe that no one – relatives, friends, acquaintances, business partners, 'bystanders' – has the faculty to facilitate suicidal conduct.

The impossibility of identifying adequate means of ascertaining in concrete terms whether the would-be suicide's decision is free, conscious and 'stable' appears, in my view, evident in the face of the request – in itself 'ambivalent' – 'to be helped to commit suicide' in order to finally 'end' one's psychological suffering. These reflections – developed in more detail above[96] – lead me to agree with the decision of the Italian Constitutional Court where – in contrast to the *BVerfG*'s ruling – it expresses itself in favour of criminalising the aiding of suicide. Incidentally, such a criminal prohibition can only survive within the framework of a general reform of the crimes against life provided for in the Rocco Code, which – I wish to reiterate it clearly – give rise to such intense punishing effects that their reasonableness-proportionality appears challengeable.

The *BVerfG*'s judgment does not propose any empirical constants induced by scientific method capable of altering my conviction – supported by a 'dialogue' with depth psychology – that 'investigating' and 'assessing' the 'wounds of the soul' underlying a request to be 'helped to commit suicide' is impossible. Given the impossibility of basing a judgment on the legitimacy or non-legitimacy of the intervention of criminal law on reliable empirical evidence, it seems appropriate and reasonable to affirm that the criminal prohibition on aiding suicide may represent a useful tool to combat the risks of abuse and manipulation. It is immediately obvious that the dangers are manifold, taking into account the possible numerous 'conflicting interests' – from 'emotional' to economic to, for example, hereditary[97] – that could concretely determine the conduct of 'third parties' facilitating suicide.

II. *Medical aid in dying and the pains of the body*

IIA. Suicide and medically assisted suicide are not twins that can survive conjoined. They are not even siblings – they are 'distant relatives'. The term 'medically assisted suicide' could also be changed, for instance to 'medical assistance to die by one's own hand'.

But if the notion of medically assisted suicide is retained in the public debate – as is to be expected – one must be fully aware of its meaning. This notion serves to differentiate the various types of medical aid in dying, 'by one's own hand' or 'by the hand of the physician': medically assisted suicide and active euthanasia[98]. The concept of medically assisted suicide should not be used to change the 'legal nature' of 'classic suicide' and *reverse* the established and commendable preventive logic of an act of self-annihilation triggered by psychological pain.

In my opinion, the law expert must not make the mistake – which I would consider very serious – of 'reversing the perspective' by judging the conduct of 'supporting' or 'facilitating' the suicide of persons who are not suffering from existing pathological conditions. The discussion on the possible decriminalisation or legalisation of aid in dying should therefore only concern medical assistance to persons in severe pathological states.

IIB. Based on these considerations, I emphatically reiterate that the public debate on legalising or decriminalising medically assisted suicide and euthanasia must revolve around a central issue and fully consider its complexity. We must ask ourselves under what circumstances the patient – a sick person suffering from existing and ascertained severe pathological conditions – can be considered truly autonomous, and thus his or her request for medical assistance to die free and conscious. In my opinion, differentiated analyses are needed.

Firstly, I have taken into account cases in which the pathological nature is such that the patient is in a position where he or she *cannot autonomously forgo life-saving medical treatment*. In these cases, the body undoubtedly assumes the role of protagonist, with its rights – the principle of the intangibility of the bodily sphere and the right to live all the stages of one's existence without undergoing medical treatment against one's will (Article 32, sec. 2, Italian Constitution; Article 1, sec. 6, Italian Law No. 219/2017) – and its pains.

The existence of such 'objective' prerequisites argues in favour of being able to verify the freedom of self-determination of a request for assistance in dying. We are in the presence of ascertainment criteria and a figure capable of carrying out the verification procedure, who can only be the physician, perhaps with the help of a clinical psychologist in the event of there being doubts as to the sick person's full possession of his or her mental faculties.

I therefore do not find convincing the idea that, in the context of very severe pathological or end-of-life situations, it is never possible to ascertain a 'current', 'certain', 'free' and 'conscious' will of the patient requesting assistance to suicide. On the contrary, I believe that it is possible for the physician to rigorously ascertain the will of the sick person precisely in cases where the request for assistance to suicide is made during and at the end of a course of treatment and in the context of a profound relationship between the physician and the sick person, as is the case when the patient is kept alive by means of life-sustaining treatment[99].

In the wide range of cases in which, on the other hand, the request for assistance to suicide comes from a patient who is severely sick with an

illness that does not require life-sustaining medical treatment that can be interrupted – and therefore from a patient who is neither dying nor in the final phase of his or her existence – the issue is extremely complex. As to the varied constellations of patients with a severe and irreversible illness but capable of ending their existence on their own, I have merely highlighted the difficulties inherent in a process of typifying the ascertainment of a free and conscious decision to request assistance to suicide. The verification of a 'lucid' and 'stable' request to avail oneself of assistance to suicide, though certainly not entirely impossible, appears highly problematic.

An analysis of this matter requires in-depth considerations – no room should be given to 'trivialisations' or apodictic assertions. Hence:

a) in the discussion between scientific disciplines, in the public debate, in the confrontation (within and) between political forces, in the discussion in Parliament, specialised expertise must be valorised. On these sensitive and tragic issues, 'dictation' or 'dictatorship' by incompetents must not be tolerated;

b) the different orientations should converge on a fundamentally important aspect carved out by the constitutional principles of freedom and solidarity that protect all citizens: genuine freedom of choice in end-of-life decisions is only concretely guaranteed when sick persons can have access to all practicable palliative care – including continuous deep sedation – and are supported by appropriate medical, psychological and psychiatric therapy.

In particular, I firmly and truly believe that the indispensable application, enhancement and dissemination of the contents and institutions envisaged by Law No. 219 of 2017 can have a powerful preventive and dissuasive effect against suicidal conduct by patients in general, and against many, though not all, requests for medical assistance in dying in particular.

My reflection is painful and inescapably problematic. If regulations on medical assistance to die for severely ill and suffering patients are not passed in our country, the legislator will continue to be 'blind' to cases of sick people who make their own suicidal choice and find themselves

ending their lives in a tragic state of loneliness. If, on the other hand, legislation along the lines of that in force in some European States is passed, the dangers of a 'slippery slope' will be accentuated: given the healthcare reality of our country, the request for medical assistance to die could be a 'forced choice' for many sick people if a state of suffering, which could be changed and reduced, were made virtually insurmountable by the lack of adequate support and assistance.

Faced with this terrible dilemma, my contribution – as a criminal law expert who collaborated in the drafting of Law No. 219 of 2017 and celebrated its approval – is limited to a well-structured yet humble reflection, also with a view to a thoughtful debate in Parliament.

III. *Final remarks in the form of a dedication*

Let me conclude by returning to the central point of my contribution. My final remarks are expressed in the form of a dedication.

The cases of people who ask for help to be killed in the wake of a condition of anguish and despair, due to an existential crisis or painful events that do not stem from any illness, are bound to increase[100].

I dedicate this paper to psychiatrists, psychologists and psychoanalysts who are confronted with the 'lacerations of the soul', with the *taedium vitae*, with the desire to die triggered by traumatic experiences that generate intense mental suffering (death of loved ones, sentimental failures, economic difficulties, unemployment, etc.).

Faced with the mystery and ambivalence of requests for assistance to suicide in order to definitively 'end' a 'psychological pain', one cannot resort to 'generalisations', to the illusory temptation of elaborating 'guidelines' based on 'objective' interpretations. Resources must be invested to enhance the activity and role of mental health workers who, with dedication and persistence, believe in the most effective tool to heal the 'wounds of the soul' of those who ask for help to kill themselves – listening, and a tenacious willingness to dialogue, to talk, to communicate.

Notes

[1] See the considerations made in secs. 2 and 3.

[2] Cf. F. Faenza, *Profili penali del suicidio*, in *Trattato di biodiritto*, directed by S. Rodotà and P. Zatti, *Il governo del corpo*, volume II, edited by S. Canestrari, G. Ferrando, C.M. Mazzoni, S. Rodotà, P. Zatti, Milan, Giuffrè, 2011, p. 1801 ff. For many centuries, successful suicide was also punished by applying persecutory measures against the corpse or against property.

[3] Cf. C. Beccaria, *Dei delitti e delle pene*, 2nd ed. reprint 1950, edited by P. Calamandrei, Florence, Le Monnier, 1965, § XXXII.

[4] F. Carrara, *Programma del corso di diritto criminale. Parte speciale*, I, 4th ed., Lucca, Tipografia Giusti, 1878, § 1155, p. 216 ff.

[5] Cf. V. Manzini, *Trattato di diritto penale*, VIII, 5th ed., Turin, Utet, 1985, p. 111 ff.; in this sense, cf. also the reflections of P. Nuvolone, *Linee fondamentali di una problematica del suicidio*, in *Suicidio e tentato suicidio in Italia*, Rapporto della Commissione di studio del Centro nazionale di prevenzione e difesa sociale, vol. I, Milan, Giuffrè, 1967, p. 391. Now see T. Padovani, *Note in tema di suicidio e aiuto al suicidio*, in G.A. De Francesco, A. Gargani, D. Notaro, A. Vallini (ed.), *La tutela della persona umana. Dignità, salute, scelte di libertà (per Francesco Palazzo)*, Turin, Giappichelli, 2019, p. 140; Id., *Dovere di vivere e aiuto al suicidio: un sintagma*, in *www.biodiritto.org*, 27 August 2019, 6, according to which "the circumstance that suicide is not punishable is in itself irrelevant for the purposes of qualifying unlawfulness, because this qualification depends, more generally, on the possibility of referring to a fact *any sanction* aimed at preventing it" (emphasis added).

[6] Cf. the critical remarks of F. Giunta, *Diritto di morire e diritto penale. I termini di una relazione problematica*, in *Riv. it. dir. e proc. pen.*, 1997, p. 84 ff. On the subject, see also the considerations of F. Sclafani, O. Giraud, G. Balbi, *Istigazio-*

ne o aiuto al suicidio. Profili giuridici, criminologici, psicologici, Naples, E.S.I., 1997; M. Bertolino, *Suicidio (istigazione o aiuto al)*, in *Digesto Discipl. pen.*, vol. XIV, Turin, Utet, 1999, p. 113 ff.

[7] Cf. the Pastoral Constitution *Gaudium et Spes* (*Constitutio pastoralis de Ecclesia in mundo huius temporis Gaudium et Spes*, Bologna, Istituto per le scienze religiose, 1980).

[8] Cf. J. Finnis, *Moral Absolutes*: *Tradition, Revision and Truth*, Washington, D.C., Catholic University of America Press, 1991. For Kant's position affirming the inadmissibility of suicide as a violation of a "perfect duty to oneself", cf. I. Kant, *Grundlegung zur Metaphysik der Sitten*; Id., *Vom Selbstmord*, in *Eine Vorlesung Kants über Ethik*, edited by P. Menzer, Berlin, Heise, 1924.

[9] Cf. the critical remarks of L. Cornacchia, Euthanasia. *Il diritto penale di fronte alle scelte di fine vita*, in *Teoria dir. Stato*, 2002, p. 377 ff.

[10] Cf. L. Stortoni, *Riflessioni in tema di eutanasia*, in *Legislazione penale*, 2000, p. 481.

[11] With clarity, A. Vallini, *Morire è non essere visto: la Corte Costituzionale volge lo sguardo sulla realtà del suicidio assistito*, in *Dir. pen. e processo*, 2019, p. 805.

[12] See, for all, S. Seminara, *Riflessioni in tema di suicidio e di eutanasia*, in *Riv. it. dir. e proc. pen.*, 1995, p. 677 ff.; S. Canestrari, *Delitti contro la vita*, in VV.AA., *Diritto penale. Lineamenti di parte speciale*, 4th ed., Bologna, Monduzzi, 2006, p. 357.

[13] See, among others, S. Canestrari, *Principi di biodiritto penale*, Bologna, il Mulino, 2015, p. 66; Id., *I tormenti del corpo e le ferite dell'anima: la richiesta di assistenza a morire e l'aiuto al suicidio*, in F.S. Marini, C. Cupelli (ed.), *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Naples, E.S.I., 2019, p. 45 ff.; M.B. Magro, The last dance. *Riflessioni a margine del c.d. caso Cappato*, in *Diritto penale contemporaneo*, 12 June 2019, p. 27, fn. 58.

[14] S. Seminara, *La dimensione del corpo nel diritto penale*, in *Trattato di biodiritto*, directed by S. Rodotà and P. Zatti, *Il Governo del corpo*, vol. I, edited by S. Canestrari, G. Ferrando, C.M. Mazzoni, S. Rodotà, P. Zatti, Milan, Giuffrè 2011, p. 196.

[15] In the field of philosophy of law, V. Vitale, *L'antigiuridicità "strutturale" del suicidio*, in F. D'Agostino (ed.), *Diritto e corporeità. Prospettive filosofiche e profili giuridici della disponibilità del corpo umano*, Milan, Jaca Book, 1984, p. 121 ff. In the criminal law literature, see the original perspective of G. De Francesco, *Il suicidio assistito nel quadro sistematico della relazione con "l'altro"*, in *Legislazione penale*, 16 March 2020, p. 6. The Author considers it decisive to start from the

assumption that the choice of committing suicide deprives 'the other' of the possibility of cultivating and maintaining a 'relationship' over time. Consequently, the Author considers it preferable to reword the thesis of suicide as an unlawful act, "*albeit with the fundamental clarification that the consequence of such an attribute is concretely expressed in the mere possibility of preventing its commission*" (emphasis added). On the religious level, the Church has recently reaffirmed a definitive condemnation of the act of suicide in the letter of the Congregation for the Doctrine of the Faith, *Samaritanus bonus*. For some critical considerations on the letter *Samaritanus bonus*, see S. Semplici, *Il Samaritano è buono, ma non è questo il punto*, in *huffingtonpost.it*, 25 September 2020; in general, for a debate on end-of-life issues, see L. Manconi, V. Paglia, *Il senso della vita. Conversazioni tra un religioso e un poco credente*, Turin, Einaudi, 2021, p. 98 ff.

[16] Within the classification outlined by the present writer (S. Canestrari, *Principi di biodiritto penale*, cit., p. 7 ff.).

[17] Reference is made to the well-known theory of Ferrando Mantovani, *Diritto Penale. Parte Speciale. Delitti contro la persona*, vol. I, Padua, Cedam, 2013, p. 124, which defines suicide as a "legally tolerated fact", similarly to the exercise of prostitution, the use of drugs and the buying and selling of anatomical parts.
On this subject, Domenico Pulitanò's words are clear and commendable, where he emphasises that the interpreter of positive law – beyond his or her own ideological options – should "take the lack of an express assessment of the would-be suicide's behaviour seriously – neither an express judgment of the suicidal action's disvalue, nor the express recognition of a right to commit suicide" (D. Pulitanò, *Tutela della vita e dell'integrità fisica*, in Id. (ed.), *Diritto penale. Parte Speciale. Tutela della persona*, 2nd ed., vol. I, Turin, Giappichelli, 2014, p. 74).

[18] See S. Seminara, *Riflessioni in tema*, cit., p. 722; R. Romboli, *Atti di disposizione del proprio corpo (art. 5)*, in F. Galgano (ed.), *Commentario del codice civile Scialoja-Branca*, arts. 1-10, Bologna, Zanichelli, 1988, p. 245 ff.

[19] See M. Pompili, *La prevenzione del suicidio*, Bologna, il Mulino, 2013, p. 118, also for an in-depth analysis of the attempt to understand the psychological factors behind suicidal behaviour.

[20] E.S. Shneidman, *Suicide as psychache*, in *Journal of Nervous and Mental Disease*, 1993, p. 147 ff.; Id., *Anodyne therapy. Relieving the suicidal patient's psychache*, in H. Rosenthal (ed.), *Favorite counselling and therapy homework assignments*, Philadelphia, Pa., Taylor & Francis, 2001, p. 180 ff.

[21] S.C. Shea, *The practical art of suicide assessment*, New York, John Wiley & Son, 2002, p. 11: "The idea of suicide does not come from statistical protocols but from psychological pain. Every person is unique. Statistical power is at its best when

applied to large populations, while it plays a weaker role when applied to the individual. But it is the individual that must be assessed, whether in the silence of a doctor's office or in the din of the emergency room".

[22] See the reflections of M. Pompili, *La prevenzione del suicidio*, cit., p. 115 ff., esp. p. 120 ff. appropriately taken up by A. Vallini, *Morire è*, cit., p. 805 ff.

[23] In this sense M. Pompili, *La prevenzione del suicidio*, cit., p. 75, who states that would-be suicides want to live "on the condition that their extreme suffering is alleviated" (Ibid., p. 69).

[24] Ibid., p. 223.

[25] On this point, cf. the acute observations of R. Marra, *Suicidio* (entry), in *Enciclopedia delle scienze sociali*, 1998.

[26] As we shall see in more detail, the debate on suicide as a phenomenon to be prevented or protected cannot leave out an examination of the process of ascertaining a free and conscious decision by the would-be suicide. Cf. below, secs. 4 and 5.

[27] On this point, cf., for all, S. Seminara, *La dimensione del corpo nel diritto penale*, cit., p. 196 and further bibliographical references therein.

[28] In this sense, for example, A. Manna, *Omicidio del consenziente ed istigazione o aiuto al suicidio: l'eutanasia. Commento agli artt. 579-580*, in Id. (ed.), *Reati contro la persona. Reati contro la vita, l'incolumità individuale e l'onore*, vol. I, Turin, Giappichelli, 2007, p. 54.

[29] A case in point is the articulated and weighty volume by Giovanni Fornero, *Indisponibilità e disponibilità della vita. Una difesa filosofico giuridica del suicidio assistito e dell'eutanasia volontaria*, Turin, Utet, 2020. The work, reviewed by F. Giunta (*disCrimen*, 2, 2020, p. 625 ff.) and M. Botto (*SeF*, 2021), was widely debated in a discussion published in *Politeia*, 140, 2020, with commentary by G. Fiandaca, p. 126 ff., P. Borsellino, p. 133 ff., C. Tripodina, p. 140 ff. and closing intervention by G. Fornero, p. 146 ff.

[30] If this were the case, criminal law experts who embraced such an approach would accordingly have to envisage a (partial) decriminalisation of inciting suicide as well, perhaps along the lines of the Swiss Criminal Code (Article 115: "Whoever, for selfish reasons, incites someone to commit suicide shall be punished, if the suicide has been committed or attempted, by a term of imprisonment of up to five years or by a fine").
On this point, the reflections of D. Pulitanò, *Il diritto penale di fronte al suicidio*, in *Diritto penale contemporaneo*, 7, 2018, p. 69 (where he also takes up the thoughts of S. Seminara, *Riflessioni in tema di suicidio e di eutanasia*, cit., p. 722), are valuable: "Propaganda and incitement may be legitimately prohibited

only where it is legitimate to prevent certain choices to which the person being persuaded may be induced. It is in the name of this need that the prohibition on incitement to suicide and reinforcement of suicidal intent is justified – in fact, it is perceived as acceptable".

[31] On this subject, I recommend the volumes by F.S. Marini, C. Cupelli (ed.), *Il caso Cappato*, cit., and by G. Fornasari, L. Picotti, S. Vinciguerra (ed.), *Autodeterminazione e aiuto al suicidio*, Padua, Padova University Press, 2019. In addition to the essays published in the works just mentioned, see, in the criminal law literature, G. Cocco, *È lecito evitare l'agonia derivante dal rifiuto di cure salva vita*, in *Resp. civ. prev.*, 2, 2020, p. 382 ff.; F. Consulich, Stat sua cuique dies. *Libertà o pena di fronte all'aiuto al suicidio?*, in *Riv. it. dir. e proc. pen.*, 2019, p. 101 ff. See also M. Ronco (ed.), *Il diritto di essere uccisi: verso la morte del diritto?*, Turin, Giappichelli, 2019.

[32] Constitutional Court, Decision No. 242 of 24 September 2019 (filed on 22 November 2019) (President Lattanzi, Rapporteur Modugno) – available at *www.cortecostituzionale.it* – § 2.2. *Recitals in law*, referring to Order No. 207 of 2018.

[33] These arguments are also reinforced by reference to the case law of the European Court of Human Rights on the protection of the right to life and the right to respect for private and family life (Articles 2 and 8 ECHR, judgments *Pretty v. United Kingdom*, *Haas v. Switzerland*, *Koch v. Germany*).

[34] Constitutional Court, Decision No. 242 of 2019, § 2.3., referring to Order No. 207 of 2018.

[35] May we refer to S. Canestrari, *Una sentenza "inevitabilmente infelice": la "riforma" dell'art. 580 c.p. da parte della Corte costituzionale*, in *Riv. it. dir. e proc. penale*, 2019, p. 2159 ff., also published in G. D'Alessandro, O. Di Giovine (ed.), *La Corte Costituzionale e il fine vita. Un confronto interdisciplinare sul caso Cappato-Antoniani*, Turin, Giappichelli, 2020, p. 77 ff.

[36] Published at *www.penalecontemporaneo.it*, 16 February 2018.

[37] T. Padovani, *Dovere di vivere*, cit., p. 3 ff., who finds the order of the Milan Court of Assize well-structured, thorough and persuasive.

[38] Ibid., p. 9.

[39] Tullio Padovani's position seems now to be supported by A. Manna, *Esiste un diritto a morire? Riflessioni tra Corte costituzionale italiana e Corte costituzionale tedesca: l'influenza delle diverse concezioni del mondo*, in VV.AA., *Studi in onore di Lucio Monaco*, Urbino University Press, 2020, p. 712 ff., where he embraces the *BVerfG*'s approach that provides for an unlimited and unrestricted right to suicide and aiding suicide. Similarly, most recently, see A. Tigrino, *Il* Bundesverfassung-

sgericht *in tema di aiuto al suicidio prestato in forma commerciale. Verso un approccio realmente liberale al fine vita?*, in *Arch. pen.*, 2020, 3, esp. p. 7 ff.

[40] See as of now the summary document of the working group on medical aid in dying, which in any case does not rely on the assumption that a 'right to suicide' exists, coordinated by Professor Carlo Casonato at the University of Trento, *Aiuto medico a morire e diritto: per la costruzione di un dibattito pubblico plurale e consapevole*, in *Biolaw J. - Riv. BioDir.*, 11 September 2019, p. 1 ff.

[41] BVerfG, Urteil des Zweiten Senats von 26 Februar 2020 - 2BUR 2347/2015.

[42] K. Gaede, *Die Strafbarkeit der geschäftsmäßigen Förderung des Suizids - § 217 StGB*, in *JuS*, 2016, p. 385.

[43] Cf. M.T. Olakcioglu, in *Strafgesetzbuch Kommentar*, edited by B. von Heintschel-Heinneg, 2018, p. 1762 ff.

[44] See F. Lazzeri, *La Corte costituzionale tedesca dichiara illegittimo il divieto penale di aiuto al suicidio prestato in forma "commerciale"*, in *Sistema penale*, 28 February 2020, p. 2 ff.

[45] In German criminal law literature, cf., for all, L. Eidam, *Nun wird es also Realität: § 217 StGB n.F. und das Verbot geschäftsmäbigen Förderung der Selbsttötung*, in *medstra*, 2016, p. 19, where he speaks of "an established legal tradition in German criminal law"; S. Britzke, *§ 217 StGB im Lichte des strafrechtlichen Rechtsgutskonzeptes. Legitimität und Auslegung der Norm,* Zürich, Dike Verlag, 2019, p. 39 ff.; K. Gavela, *Ärztlich assistierter Suizid und organisierte Sterbehilfe*, Berlin, Heidelberg, Springer, 2013, p. 7 ff.

[46] On this point, cf. the considerations, from sometimes divergent viewpoints, of L. Eusebi, *Moriremo di autodeterminazione? Brevi note su BVerfG 26 febbraio 2020*, in *Corti supreme e salute*, 2020, p. 59 ff.; A. Manna, *Esiste un diritto a morire? Riflessioni tra Corte costituzionale italiana e Corte costituzionale tedesca*, cit., p. 712 ff.; A. Nappi, *A chi appartiene la propria vita? Diritto penale e autodeterminazione nel morire: dalla giurisprudenza della Consulta alla epocale svolta del* Bundesverfassungsgericht, in *Legislazione penale*, 2020, p. 14 ff.; L. Risicato, *La Consulta e il suicidio assistito: l'autodeterminazione "timida" fuga lo spettro delle chine scivolose*, in *Legislazione penale*, 2020, p. 10 ff.; V. Zagrebelsky, *Aiuto al suicidio, autonomia, libertà e dignità nel giudizio della Corte europea dei diritti umani, della Corte costituzionale italiana e di quella tedesca*, in *Legislazione penale*, 2020, p. 8 ff.; G. Fornasari, *Paternalismo* hard, *paternalismo* soft *e antipaternalismo nella disciplina penale dell'aiuto al suicidio. Corte costituzionale e* Bundesverfassungsgericht *a confronto*, in VV.AA., *Liber Amicorum Adelmo Manna*, Pisa, Pisa University Press, 2020, p. 315 ff.

[47] Very similar, as mentioned, is the approach taken by the Court of Assizes of Milan when it called for "making the facilitation of another person's suicide that did not affect the victim's decision criminally irrelevant, regardless of any reference to the victim's personal conditions and the reasons for his or her act" (Order 14 February 2018), endorsed by Tullio Padovani (*Dovere di vivere*, *loc. cit.*).

[48] See now, within German-language criminal law literature, among others, T. Hillenkamp, *Strafgesetz "entleert" Grundrecht - Zur Bedeutung des Urteils des Bundesverfassungsgerichts zu § 217 StGB für das Strafrecht*, in *JZ*, 12, 2020, p. 618 ff.; T. Hörnle, *Die niederländischen Hoge Raad und das BVerfG zu Fragen der Sterbehilfe: Die Abgrenzung von Selbstbestimmung und Fremdbestimmung im Einzelfall und als Leitlinie für die Rechtspolitik*, in *JZ*, 18, 2020, p. 872 ff.

[49] As well as by the experts consulted by the German Federal Constitutional Court: on the 'method' used by the Karlsruhe Judges, cf., in the Italian criminal law literature, the valuable reflections of M.B. Magro, *Il suicidio assistito tra inviolabili diritti di libertà e obblighi di protezione positiva nella decisione del Tribunale costituzionale tedesco sul § 217 StGB*, in *Dir. pen. XXI secolo*, 2020, p. 20 ff.; N. Recchia, *Il suicidio medicalmente assistito tra Corte costituzionale e* Bundesverfassungsgericht. *Spunti di riflessione in merito al controllo di costituzionalità sulle scelte di incriminazione*, in *Sistema penale*, 28 July 2020, published in *Diritto penale contemporaneo – Rivista trimestrale*, 2020, 2, p. 64 ff.

[50] For a review of some data, cf. S. Britze, *§ 217 StGB im Lichte des strafrechtlichen Rechtsgutskonzeptes*, cit., 2019, p. 39 ff.; M. Rudlof, *Das Gesetz zur Strafbarkeit der geschäftsmäßigen Förderung der Selbsttötung (§ 217 StGB n.F.). Untersuchung der (straf-)rechtlichen Grenzen, insbesondere von professionalisierter Suizidförderung bzw.-beihilfe*, Berlin, de Gruyter, 2018, p. 267 ff.

[51] It averages 11 deaths per 100,000 inhabitants.

[52] Together with, for example, the United Kingdom (7) and Spain (8). To consult Eurostat data, cf. *www.quotidianosanita.it*, 4 November 2020.

[53] In this regard, cf. also the considerations in the document of almost 150 German criminal law experts, who had limited themselves to expressing contrary opinions before the final approval of the reform: *Stellungnahme deutscher Strafrechtslehrerinnen und Strafrechtlehrer Ausweitung der Strafbarkeit der Sterbehilfe*, in *medstra*, 2015, p. 129 ff.

[54] Rn. 214.

[55] Rn. 242.

[56] M.B. Magro, *Autodeterminazione terapeutica e autodeterminazione alla morte dopo la sentenza della Corte costituzionale n. 242/2019*, in M. Catenacci, N. D'A-

scola, R. Rampioni (ed.), *Scritti in onore di Antonio Fiorella*, Rome TrE-Press, 2021 (forthcoming), sec. 6.

[57] This aspect – which I consider decisive – is not given particular attention even in the most articulate and analytical studies (see, e.g., the mentioned work by G. Fornero, *Indisponibilità e disponibilità*, cit.).

[58] J. Hillman, *Il suicidio e l'anima*, Milan, Adelphi, 2010, p. 121 ff. (the first edition is from 1965, the second with postscript from 1997). On the dilemmatic and in any case obscure scenarios of any choice of voluntary death, cf., in the wake of a phenomenological and anthropological psychiatry, the profound thoughts of E. Borgna, *L'attesa e la speranza*, 1st ed. Universale Economica, Milan, Feltrinelli, 2018, p. 119 ff.

[59] "When the impulse of physical death has been overcome and absorbed by its realisation within the psyche" (J. Hillman, *Il suicidio e l'anima*, cit., p. 137), psychoanalysts speak of a genuine 'rebirth' of the would-be suicide.

[60] Cf. G. Nardone, *Aiutare al suicidio o ad una buona morte?*, in *www.biodiritto.org*. 27 August 2019, p. 1 ff.
In this regard, I consider it significant that when psychoanalysts intervene in the public debate on 'end-of-life issues', they exclusively refer to medical aid in dying in the framework of severe and irreversible organic pathologies (see the considerations of M. Recalcati, *I tabù del mondo*, Turin, Einaudi, 2017, p. 150 ff.). In general, on the 'discipline of psychoanalysis' and on the 'identity of the psychoanalyst', I will limit myself to pointing out the valuable readings of S. Argentieri, S. Bolognini, A. Di Ciaccia, L. Zoja, *In difesa della psicoanalisi*, Turin, Einaudi, 2013; S. Bolognini, *Flussi vitali tra Sé e Non-Sé. L'interpsichico*, Milan, Raffaello Cortina, 2019.

[61] On this subject, cf. the profound thoughts of M.L. Caproni, in S. Canestrari, M.L. Caproni, *Suicidio e aiuto al suicidio: diritto e psicoanalisi in dialogo*, in *disCrimen*, 27 January 2021, p. 14 ff.

[62] Cf. the collected volume R. Tatarelli, M. Pompili (ed.), *Il suicidio e la sua prevenzione*, Rome, Giovanni Fioriti, 2008; M. Pompili, *La prevenzione del suicidio*, cit., esp. p. 55 ff.; M. Bioni, A. Iannitelli, S. Ferracuti, *Sull'imprevedibilità del suicidio*, in *Rivista di psichiatria*, 2016, p. 167 ff.; L. Pavan, *Esiste il suicidio razionale?*, Rome, Magi edizioni, 2009.

[63] Some of the arguments used in Decision No. 242/2019 lead the Judges of the Constitutional Court to justify criminalising aiding suicide on the basis of an 'indirect' paternalism that can be defined as 'weak' and compatible with a non-dogmatic but 'mature' and 'cautious' criminal liberalism (for a distinction between the different forms of paternalism, please refer to the classic work by J. Feinberg, *The Moral*

Limits of the Criminal Law, vol. 3, *Harm to Self*, Oxford, Oxford University Press, 1986, p. 14, clearly taken up by G. Fiandaca, *Il diritto di morire tra paternalismo e liberalismo*, in *Foro it*, 2009, V, p. 227 ff.). In another recent ruling of the Constitutional Court, No. 241 of 7 June 2019, the use of a 'hard' paternalism is instead pointed out, where moralistic motivations are put forward to deny the existence of a free choice to engage in paid sex (cf., for all, the in-depth critical remarks of A. Cadoppi, *La Consulta salva il reclutamento e il favoreggiamento della prostituzione: verso una legititimazione del moralismo penale*, in *Dir. pen. proc.*, 2019, p. 1653 ff.).

[64] The criminal code in force 'hangs' in between the matrix in which it was coined – the authoritarian matrix of the 1930 legislator – and the cultural horizon in which it currently operates: that democratic, liberal and personalistic project which, since the entry into force of the Italian Constitution, should underlie the interpretation of what exists and inspire future regulatory choices (may we refer to S. Canestrari, *Principi di biodiritto penale*, cit., esp. p. 11 ff.).
On the lack of reform of the criminal code, an Italian anomaly, we recommend, even for non-expert readers, the volume L. Stortoni, G. Insolera (ed.), *Gli ottant'anni del codice Rocco*, Bononia University Press, Bologna, 2012: see especially the valuable reflections of Francesco Palazzo (pp. 39-57), Domenico Pulitanò (pp. 157-178) and Giovanni Fiandaca (pp. 207-255).

[65] Here I would just like to recall a figure from the *WHO World Health Statistics 2018* report. In European countries, suicide is among the leading causes of death in young people aged 15 to 24: https://www.who.int/docs/default-source/gho-documents/world-health-statistic-reports/6-june-18108-world-health-statistics-2018.pdf.

[66] Constitutional Court, Decision No. 242 of 2019, § 2.4., referring to Order No. 207 of 2018.

[67] See, for all, F. D'Agostino, *Bioetica nella prospettiva della filosofia del diritto*, Giappichelli, Turin, 1996, p. 238.

[68] As I have repeatedly emphasised, Decision No. 242 of 2019 is 'modelled on the concrete case' and thus the notion of "life-support treatment" is conceived in relation to forms of dependence on machinery, on treatments without which death would be imminent. For an extensive interpretation (already put forward by M. Donini, Libera nos a malo. *I diritti di disporre della propria vita per la neutralizzazione del male*, in G. D'Alessandro, O. Di Giovine [ed.], *La Corte costituzionale e il fine vita*, cit., p. 223 ff.) or, alternatively, an interpretation in analogy with "dependence on life-support treatment", see now Court of Assizes of Massa, Decision of 27 July 2020 (filed on 2 September 2020), President Rapporteur De Mattia, accused Cappato and Schett, in *Sistema penale*, 14 September 2020, with

critical commentary by F. Lazzeri, *A che punto è la notte? La liceità dell'aiuto al suicidio oltre Dj Fabo: la nozione di "trattamenti di sostegno vitale" nella sentenza sul caso Trentini*.

On this point, cf., in the criminal law literature, the valuable reflections (with views that sometimes do not coincide in a *de iure condendo* perspective) of G. Fiandaca, *Fino a quale punto è condivisibile la soluzione costituzionale del caso Cappato?*, in G. D'Alessandro, O. Di Giovine (ed.), *La Corte costituzionale e il fine vita*, cit. p. 265 ff.; G.M. Flick, *Un passo avanti problematico nella dignità del morire*, in *Cass. pen.*, 2021, 2, p. 436 ff.; G. Gentile, *Il suicidio medicalmente assistito nello spazio libero dal diritto penale*, in *Dir. pen. e processo*, 2020, 3, p. 577 ff.; O. Di Giovine, *Spunti di riflessione sull'auspicata incipiente proceduralizzazione del fine vita (e sul ruolo di giudici ordinari e costituzionali nella definizione del area di rilevanza penale)*, in G. D'Alessandro, O. Di Giovine, *La Corte costituzionale*, cit., esp. p. 192 ff.; V. Manes, *Aiuto a morire, dignità del malato, limiti dell'intervento penale*, in *Pol. dir.*, 2020, no. 1, p. 41 ff.; A. Massaro, *Questioni di fine vita e diritto penale*, Turin, Giappichelli, 2020; F. Palazzo, *La sentenza Cappato può dirsi "storica"?*, in *Pol. dir.*, 2020, 1, p. 3 ff.; M. Romano, *Istigazione o aiuto al suicidio, omicidio del consenziente, eutanasia, dopo le pronunce della Corte costituzionale*, in *Riv. it. dir. e proc. pen.*, 2019, no. 4, p. 1793 ff.; S. Tordini Cagli, *Tutela dei soggetti vulnerabili e tutela dell'autodeterminazione: una sintesi possibile? (A margine del caso Cappato)*, in *www.archiviopenale.it*, 2, 2019.

[69] This is the term used in the Constitutional Court's 'double ruling' – which confirms that the Judges of the Constitutional Court were thinking of situations where the sick person is dependent on machinery.

[70] With regard to the absence of a necessary in-depth examination – by the Judges of the Constitutional Court – of the highly problematic dimension of an alleged 'connection' between a right to forgo the continuation of life-saving medical treatment and access to medically assisted suicide, may we refer to S. Canestrari, *Una sentenza*, cit., esp. p. 80 ff.

[71] On this point, may we refer again to S. Canestrari, *Una sentenza*, cit., p. 96 ff.

[72] See S. Rodotà, *La vita e le regole. Tra diritto e non diritto*, Milan, Feltrinelli, 2006, p. 255, as part of a general reflection on end-of-life issues.

[73] Constitutional Court, Decision No. 242/2019, *Recitals in law*, § 2.3.

[74] This aspect is clearly underlined by F. Giunta, *L'insostenibile sofferenza del vivere. Le motivazioni della Corte costituzionale in materia di suicidio medicalmente assistito (sent. 242/2019)*, in *disCrimen*, 25 November 2019, p. 2.

[75] See the already mentioned summary document of the working group on medical aid in dying, coordinated by Professor Carlo Casonato at the University of

Trento, *Aiuto medico a morire e diritto*, cit. p. 1 ff. Cf. also the observations of A. Vallini, *Morire è non essere visto*, cit., pp. 816 ff., where he calls for a regulatory solution that treats on an equal footing severely sick persons who can commit suicide by themselves, those who could not directly provide for initiating the lethal process, and those who, for the same purpose, require the intervention of third parties. A contrary position emerges from the reflections of Luciano Eusebi, according to whom a parliamentary intervention to extend the scope of admissibility of assistance to suicide would not be desirable, "nullifying all the caveats of the Constitutional Court" and "going all the way down the slope to authorising euthanasia" (L. Eusebi, *Il suicidio assistito dopo Corte Cost. n 242/2019. A prima lettura*, in *Corti supreme e Salute*, 2019, fasc. 2, p. 6 ff.). On the requirements of the bills under discussion in Parliament – sec. 2, Article 3; sec. 1586, Articles 1 and 2 – see C. Cupelli, *Il cammino parlamentare di riforma dell'aiuto al suicidio. Spunti e prospettive del caso Cappato, fra Corte costituzionale e ritrosia legislativa*, in *www.penalecontemporaneo.it*, 19 April 2019.

On 18 March 2021, in Spain, the Congress of Deputies definitively approved the *Ley orgánica de regulación de la eutanasia*, which will enter into force three months after its publication in the Official State Bulletin. Here, I merely emphasise that "the right of every person […] to request and obtain aid in dying" – enshrined in Article 4 – exists in the presence of two separate conditions described by the legislator. The first condition is provided for in Article 3, letter b), and concerns a "severe, chronic and disabling disease": this includes "limitations that directly affect physical autonomy and the activities of daily living", such "to prevent the person from looking after him or herself", as well as his or her "capacity for expression and relations"; in addition, it is required that such a condition be associated with "constant and intolerable physical or mental suffering for the sufferer" and that there is "certainty or great likelihood that such limitations are destined to persist over time without the possibility of a cure or significant improvement. Sometimes this can lead to full dependence on technological supports". The second condition is provided for in Article 3, letter c), and concerns a "severe and incurable illness", consisting of a pathological state – not specifically qualified – which "by its nature is a source of constant and unbearable physical or mental suffering with no possibility of tolerable relief for the person, with a limited life expectancy, in a context of progressive weakness". To read the text of the legislation in the original language, see *https://sistemapenale.it/pdf_contenuti/1616362777_legge-spagna-eutanasia-testo-con-emendamenti.pdf* with commentary by F. Lazzeri, Dum Romae (non) consulitur, *la Spagna approva una legge che disciplina l'eutanasia attiva*, in *Sistema penale*, 22 March 2021.

In Portugal, the *Tribunal Constitucional*, in Decision No. 123/2021, ruled on the preventive review of constitutionality submitted by the President of the Republic,

establishing the constitutional illegitimacy of Article 2, sec. 1 of the *Decreto da Assembleia da República n. 109/XIV* on medically assisted death. The Constitutional Court affirms the need for the conditions of eligibility for the medical assistance in dying procedure to be clear, precise, predictable and controllable. Having said that, the *Tribunal Constitucional* considers that one of the conditions set forth in the aforementioned article for access to medical aid in dying – *lesão definitiva de gravidade extrema de acordo com o consenso cientifico* – is vague and contrary to the constitutional principle of the clarity of the law (in this regard, see the summary by M. Fasan, *Portogallo - Tribunal Constitucional - Acórdão n. 123/2021: illegittimità costituzionale del Decreto da Assembleia da República n. 109/XIV in materia di morte medicalmente assistita*, in *www.biodiritto.org*, 15 March 2021).

[76] This aspect – which is not covered in the critical reflections of A. Manna (*Esiste un diritto a morire?*, cit., esp. p. 805 ff., fn. 6) – contributes to highlighting the different 'conditions of vulnerability' that can characterise sick people in all end-of-life decisions (in general, on the subject, cf. C. Casonato, *Fine vita: il diritto all'autodeterminazione*, in *il Mulino*, 2017, no. 4, p. 597 ff., esp. p. 601).

[77] K. Raus, B. Vanderhaegen, S. Sterckx, *Euthanasia in Belgium: Shortcomings of the Law and Its Application and of the Monitoring of Practice*, in *The Journal of Medicine and Philosophy*, 46, 2021, p. 80 ff., esp. p. 87, alarmingly reporting cases of patients being aided in dying due to psychological suffering caused by psychiatric conditions (e.g. schizophrenia, borderline disorder); cf. *Federal Control and Evaluation Commission for Euthanasia*, 2020.

[78] V. K. Raus, B. Vanderhaegen, S. Sterckx, *Euthanasia in Belgium*, cit., p. 88 ff. In Belgium, according to data from the *Federal Control and Evaluation Commission for Euthanasia* (2020), there were 2359 cases of medical aid in dying in 2018 and 2656 in 2019. The main categories for which euthanasia was practised were cancer (62%), polypathology (17.9%), nervous system diseases (8.5%), circulatory system diseases (3.6%), respiratory system diseases (2.8%), psychiatric disorders (1.1%), musculoskeletal and connective tissue diseases (1%), and cognitive disorders (1%). All other categories together account for 2.1% of disorders (see the website *https://overlegorganen.gezondheid.belgie.be/nl/documenten/euthanasie-cijfers-voor-de-jaren-2018-2019-9de-verslag-aan-de-wetgevende-kamers*).

[79] E. Borgna, *L'attesa e la speranza*, cit., p. 187.

[80] As mentioned earlier, however, we all know that there is a link between the 'sufferings of the soul' and the 'sufferings of the body': in actual experience, they never exclude one another completely. With regard to mood disorders, the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders) identifies two broad and distinct categories: depressive disorders and bipolar disorders. The causes of depres-

sive disorder and bipolar disorder are analysed from different perspectives: according to many current theories, depression is seen as a multifactorial disorder, where genetic, biological and psychosocial aspects interact.

[81] This view is clearly expressed in the beautiful book by H. Küng and W. Jens, *Della dignità del morire. Una difesa della libera scelta*, 1st ed. Rizzoli, Milan, 1996, 1st ed. updated Bur Saggi, Milan, 2010, p. 55 ff., esp. p. 58. This assumption appears to be endorsed by the very recent judgments of the Austrian Constitutional Court (11 December 2020), which thus does not align with the position of the *Bundesverfassungsgericht* based on the affirmation of a 'constitutional right to suicide', and by the Portuguese *Tribunal Constitucional* (see above, sec. 8, fn. 75 also for a concise illustration of Spanish law).
In a radically different vein is the bill tabled in the Netherlands again by the D66 party to allow assistance to suicide and euthanasia for people over 75 years of age who are not suffering from a specific disease, but feel a sense of "completed life" or "tiredness of living" (https://www.italiaoggi.it/news/in-olanda-a-75-arriva-l-eutanasia-per-vita-completa-2481388). As should be evident from the considerations made in the text, I consider such a perspective to be absolutely antithetical to our constitutional principles.

[82] Constitutional Court, Decision No. 242/2019, *Recitals in law*, § 2.4.

[83] Cf. *BVerfG* No. 242, Rn. 298 ff.

[84] The text was written by Professors Stefano Canestrari, Carlo Casonato, Antonio Da Re, Lorenzo d'Avack and Laura Palazzani. It is available at http://bioetica.governo.it/it/documenti/pareri-e-risposte/riflessioni-bioetiche-sul-suicidio-medicalmente-assistito/.

[85] Constitutional Court, Decision No. 242/2019, § 2.4. *Recitals in law*, where it takes up the cited ICB opinion, p. 20. In general, for an in-depth and valuable reflection on the 'words of care' ('medicine', 'therapy', 'drug', 'surgery'), which also goes back to the historical-conceptual origins of medicine, cf. the volume by U. Curi, *Le parole della cura. Medicina e filosofia*, Raffaello Cortina Editore, Milan, 2017.

[86] Constitutional Court, Decision No. 242/2019, § 2.4. *Recitals in law.*

[87] S. Canestrari, A. Da Re, § 5, *Opinioni etiche e giuridiche all'interno del CNB, Posizione c),* in ICB, *Riflessioni*, cit. p. 24 ff.

[88] http://www.salute.gov.it/portale/documentazione/p6_2_2_1.jsp?lingua=italiano&id=2814.

[89] S. Canestrari, A. Da Re, § 5, *Opinioni etiche e giuridiche all'interno del CNB, Posizione c)*, cit., p. 25.

[90] S. Canestrari, A. Da Re, § 5, *Opinioni etiche e giuridiche all'interno del CNB, Posizione c)*, cit., p. 26. For an authoritative endorsement of this position, cf. C. Viafora, *Fine vita: un'istruzione delle questioni etiche più dibattute*, in C. Viafora, E. Furlan, S. Tusino, *Questioni di fine vita. Un'introduzione alla bioetica*, Milan, Franco Angeli, 2019, p. 343 ff. fn. 52. On this subject, cf. the valuable statements, from different points of view, by M. Reichlin, *Questioni di fine vita. Intervista a Massimo Reichlin*, in *Diritto penale e uomo*, 3, 2020; M. Lalatta Costerbosa, *Questioni di fine vita. Intervista a Marina Lalatta Costerbosa*, in *Diritto penale e uomo*, 11, 2019; for an effective review, from the perspective of the palliative physician, of the arguments for and against medical aid in dying, cf. L. Orsi, *Aiuto medico a morire: una questione su cui riflettere a fondo*, in *Rivista italiana di cure palliative*, 2019, p. 205 ff.

[91] See bibliographical references in fn. 18.

[92] See above, sec. 5.

[93] Ibid.

[94] See the ICB opinion, *Il suicidio in carcere. Orientamenti bioetici* (25 June 2010), drawn up by the working group coordinated by Professor Grazia Zuffa, who prepared the working draft document, with written contributions by Professors Salvatore Amato, Stefano Canestrari, Francesco D'Agostino, Andrea Nicolussi. The text is available at http://bioetica.governo.it/it/pareri/pareri-e-risposte/il-suicidio-in-carcere-orientamenti-bioetici/.

[95] Cf. the document of the Italian Committee for Bioethics, *La contenzione: problemi bioetici* (23 April 2015), drawn up by Professor Grazia Zuffa and the present writer. The text is available at http://bioetica.governo.it/it/pareri/pareri-e-risposte/la-contenzione-problemi-bioetici/.

We must be fully aware that the increase in restraint practices, including pharmacological restraint, could of course be favoured by those orientations that tend to make mental health workers responsible for self-harming acts of psychiatric patients.

[96] See above, sec. 5 and bibliographical references therein.

[97] Here, in the conclusions, reference is made to the arguments put forward in sec. 5.

[98] The main distinguishing element between these two types of conduct – which, according to the typification of the Italian Criminal Code, constitute the crime of aiding and abetting suicide (Article 580, as 'reworded' by Constitutional Court Decision No. 242/2019) and that of consensual homicide (Article 579) – is the performance of the act by the person wishing to end his or her own life: as men-

tioned, medically assisted suicide is characterised by the 'preparation' of a lethal drug for the sick person who will take it personally. In some 'medicalised' end-of-life situations, the distinction between acting by one's own hand or by the hand of others, which is of great significance in terms of relationships and 'principles', tends to vanish: think of the cases in which a sick person suffering from irreversible illnesses and totally dependent on life-support treatments is able to express his or her own will (even through technology) but is unable to cooperate in the implementation of his or her own death (e.g. is in a locked-in state).

[99] See above, the considerations made in sec. 6.

[100] It can be assumed that the numbers will continue to grow in light of the current tragic economic and social situation resulting from the Covid-19 pandemic.