The Italian Constitutional Court and the Referendum on Euthanasia(?): a Declaration of Inadmissibility

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–Benedetta Vimercati, Assistant Professor of Constitutional Law, University of Milan

On 15 February the Italian Constitutional Court issued a press release to announce its ruling that the euthanasia referendum's question is inadmissible. The press release concisely states that the Constitutional judges turned down the request to hold a national referendum because it would not safeguard the "minimum constitutional protection of human life, particularly with reference to weak and vulnerable persons".

As we await the filing of the judgment in the next few days, which will allow us understand better the grounds for the judgment, we can sketch out some preliminary reflections here. To do this, we need to take a step backward.

In April 2021, a group of associations, movements, and parties collected more than 1.200.000 signatures in order to present a petition for a national referendum to partially revoke Art. 579 of the Italian Criminal Code. The provision, in paragraph 1, regulates murder by consent, establishing that whoever causes the death of a person, with his consent, is subject to imprisonment (from 6 to 15 years). Paragraph 3 states that the provisions relating to intentional murder apply if the act is committed against a person under the age of eighteen; against a person who is mentally ill, or who is mentally deficient due to another infirmity or for the abuse of alcohol or drugs; or against a person whose consent has been extorted with violence, threat or suggestion. In the event of a positive outcome of the referendum, paragraph 1 would have been repealed and, as a consequence, the murder of a consenting party would have been decriminalized without any conditions.

The Italian Constitution, at Art. 75, provides that a referendum may be held to repeal, in whole or in part, a law or a measure having the force of law, when so requested by five hundred thousand voters or five Regional Councils. According to Law No. 352/1970, a double-checking system on the referendum petition must be established before the referendum is called. The first check is assigned to an ad hoc Office of the Court of Cassation that reviews compliance with referendum procedures. The Constitutional Court is charged with carrying out the second check. One of the Court's functions, added with Constitutional Law 1/1953, is, indeed, to review the permissibility of requests for abrogative referenda.

But which kind of check is the Constitutional Court entitled to carry out?

The admissibility review primarily involves verifying whether the law or the provision subject to referendum

belongs to one of the categories of statutes not covered by Art. 75 Const. Indeed, the latter prescribes the so-call explicit limits on a referendum, stating that no referendum may be held on a law regulating taxes, the budget, amnesty or pardon, or a law ratifying an international treaty. In addition to these, particularly in the 1970s, the ICC ruled through its case law (a case law harshly criticized by some Italian scholars) that the above-mentioned explicit limits are supplemented by implicit limits that the Constitutional judges may infer from pivotal constitutional principles. The Constitutional Court has acknowledged that decisions of inadmissibility should represent a sort of last resort in order not to frustrate the exercise of the fundamental right of political participation of the electoral body. We can see evidence of this in the speech that recently appointed President of the Constitutional Court, Giuliano Amato, gave some days ago to the assistants of the constitutional judges, in which he said that, “referenda are a very serious matter and, therefore, we must avoid nitpicking and rejecting referenda”.

The President’s declaration seems to support a strict interpretation of the implicit limits derived from constitutional case law; limits with which, for better or for worse, constitutional judges are called to engage. The Court employs one of these implicit limits in this decision. According to its case law, the Court is entitled to evaluate the relationship between the subject of the referendum and constitutional provisions, in order to ascertain whether or not the potential absence of regulation brought about by the referendum would entail total prejudice to the application of a constitutional precept, causing direct and immediate harm to subjective situations or (but it is not the case here) to the constitutional organizational structure. And this evaluation becomes crucial when the provision to be repealed is expressive of “a plurality of relevant constitutional interests, which, as a whole, postulate at least a balance intended to ensure a minimum level of legislative protection” (Judgment No. 45/2005). Thus, both total and partial repealing that is capable of affecting the minimum level of legislative protection of constitutional interests must lead the Court to block the referendum.

Against this backdrop, and noting that there was at least another implicit limit that, according to some scholars, the ICC could have called upon in order to declare the referendum inadmissible (that is, the limit of the excessively manipulative referendum), it is likely that the constitutional judges faced the issue of whether the referendum question on Art. 579 CC, and the ablation that would have resulted, respected the minimum level of protection ensured by criminal provision, or if, on the other hand, the abrogative effect could have resulted in such an altered balance among constitutional interests that those constitutional interests were jeopardized.

Art. 579 CC not only protects the freedom of self-determination of the individual, but also their life, especially when it comes to fragile and vulnerable individuals. And it bears underscoring that these vulnerable subjects are not necessarily perfectly ascribable to one of the categories laid out by the third paragraph of Art. 579 CC, which would have survived the referendum. It is worth remembering here what the ICC held in deciding the well-known Cappato and DJ Fabo case, in which it ruled that Art. 580 CC (assisted suicide) violates the Italian Constitution insofar as it punishes whoever helps another person terminate their life under specific conditions, and specifically when the patient is (a) affected by an illness that is incurable, (b) the latter causes physical or psychological suffering, which they find absolutely intolerable, and (c) the patient is kept alive by means of life support treatments, but remains (d) capable of making free and informed decisions. Under these circumstances, and by adhering to a procedure summarily designed by the ICC, the criminalization of assisted suicide must be considered incompatible with the Constitution and, in particular, with articles 2, 13 e

32, paragraph 2 of the Constitution.

Despite the referring court's request for an ablative ruling, the ICC decided not to grant the request. Affirming the absoluteness of the self-determination principle and releasing a purely ablative ruling could have endangered other constitutionally protected values, especially concerning "weaker and more vulnerable people, whom the criminal law intends to protect from one extreme and irreparable choice, like that of suicide". According to the ICC, Art. 580 CC underpins the aim, "of continuing relevance, of protecting suffering people, also to avert the danger that those who decide to put in place the extreme and irreversible act of suicide could suffer interference" (Judgments No. 207/2018 and 242/2019).

Probably, in ascertaining the inadmissibility of the referendum, the ICC considered this ruling and the importance of life in balance with the right to self-determination, which can also include, in a sense, the choice of how to terminate it. Moreover, the ICC may have considered the conditions under which the ICC declared assisted suicide compatible with the Italian Constitution to not be automatically transposable to the provision deriving from the referendum. In the absence of an ad hoc intervention by the Parliament these conditions, and the procedure outlined by the ICC could not converge to regulate the murder of a consenting party, especially in accordance with some pivotal principles in criminal law (the prohibition of in malam partem analogy interpretation and the principle of express determination of crimes).

For a deeper look at the legal reasoning of the ICC, it is best to wait for the decision, which will offer food for thought and for parliamentary debate. Indeed, before the referendum petition, the Parliament undertook the debate on a draft statute aimed at implementing the ICC's ruling on the Cappato case.

But, importantly, the referendum petition turned the spotlight on civil society. By means of the referendum, the intent was to make civil society its own megaphone. The promoters of the referendum hoped for the voice of civil society to have been heard, directly leading to the legal recognition of active euthanasia and regulating an area in which Parliament has been accused of inaction. But the ICC's decision puts the euthanasia ball back in Parliament's court. It will have to decide whether to introduce active euthanasia in the bill under discussion, as required by some amendments filed last week, or whether to maintain the current hypothesis outside the Italian legal system.

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