UNIVERSITÀ DEGLI STUDI DI SALERNO

DIPARTIMENTO DI SCIENZE GIURIDICHE

(SCUOLA DI GIURISPRUDENZA)

DOTTORATO DI RICERCA IN SCIENZE GIURIDICHE

XXXIII CICLO

ABSTRACT

COSCIENZA RELIGIOSA E DICHIARAZIONI ANTICIPATE DI TRATTAMENTO. L'OMESSO RICONOSCIMENTO DELL'OBIEZIONE NELLA LEGGE N. 219/2017.

Coordinatore:
Ch.mo Prof. *Geminello Preterossi*

Tutor:
Ch.mo Prof. *Giuseppe D'Angelo*

Dottoranda:
Dott.ssa *Valeria Feo*

Anno Accademico 2019/2020

RELIGIOUS CONSCIOUSNESS AND ADVANCE DECLARATIONS OF TREATMENT. FAILURE TO ACKNOWLEDGE THE OBJECTION IN LAW No. 219/2017.

ABSTRACT

The main aim of the paper is to demonstrate the renewed role of the theme of conscientious objection for ethical-religious reasons as a direct consequence of today's multi-ethnic and multicultural context.
In the recent legislation on advance treatment provisions (Law 219/2017), the legislator has chosen to omit any reference to conscientious objection, thus leaving gaps for protection. This theme implies an immediate reference to the so-called “sensitive" choice which, by affecting purely human aspects (life and death) is linked with the religious, cultural and ethical convictions of the individual. This link is not so obvious because to understand its significance one must place one's mind not only at the moment in which the provisions are formulated but also at the moment in which they are received and applied. There is therefore the need for a reasonable understanding of the choices of the individual to ensure that they do not make an interpretation the content of which is different from the original. It is necessary to have a real and thorough interpretation in which the analysis of the religious - cultural background is essential, both of the patient and of the healthcare staff, in order to construct legal formulas of intercultural translation. The religious-cultural element becomes crucial for an adequate decoding of intentions within a meaningful context.
Any tentative attempts to offer an extensive interpretation of the law 219/2017 that allows us to give a positive meaning to the silence of the legislator through a general reference to the "conscience clause" of art. 22 of the Code of Ethics appear unreasonable. In this way, there is a risk of equating deontological rules with a rule of primary rank, distorting the hierarchy of sources. Based on these observations, the omitted recognition of conscientious objection within the law 219/2017 has led to the belief that it should be understood as a form of objection "contra legem", that is to say excluded by the legislator as a behavior deemed to be in conflict with the legislative precept and therefore illegal.
In the first instance, therefore, an attempt was made to trace possible forms of protection in front of the ordinary judge in favor of the objector doctor who - according to this - would find himself incurring criminal liability profiles in case of failure to execute the DAT. However, the attempt to enhance and protect the religious conscience through the work of the ordinary judge trying to recover the religious-cultural element in the form of a justification or other excuses/extenuating circumastances appears to be a scarcely feasible operation. In a balancing logic between freedom of conscience and self-determination of the patient - especially in light of important legal precedents - the first finds itself promptly to withdraw in favor of the second.
For this reason it became necessary to question the constitutionality of the Act 219/2017 insofar as it does not recognize conscientious objection of health personnel. Indeed, on this point, there are various profiles of inconsistency with those fundamental norms safeguarding religious freedom and conscience which does not exclude that in the future a question of constitutional legitimacy may arise.
Therefore, imagining a possible recovery through the intervention of the Constitutional Court, the recent ordinance no. 207/2018 and sentence no. 242/2019 - albeit on different topics - were an excellent starting point to be able to offer some answers.
From the court order no. 207, emerged the intention to preserve as much as possible the sphere of political discretion of the legislator, defining the intervention of the Chambers as indispensable when there are "delicate balances" at stake. However, if it is undeniable that legislative intervention is the preferable option, with sentence no. 242 of 2019, it was also explicitly stated that where the legislative discipline was constitutionally necessary - and the legislator had not done so - the judge of the laws would be required to take charge of exercising his supplementary power.
This supplementary role is to be limited to particularly relevant issues and exceptional events in which very delicate assets and rights are at stake. The circumstance in which a person's self-determination is aimed at interrupting - by means of third parties - one's life certainly falls into this case. Probably - faced with this - the Constitutional Court will not back down, assuming the heavy burden of drawing up the necessary discipline and using the same decision-making techn.