Not Yet but Soon

Teresa Violante 2021-03-22T18:24:27

On 29 January 2021, the Portuguese Parliament approved the decriminalization of active euthanasia and assisted suicide for adults in a situation of intolerable suffering, with a definitive injury of extreme gravity according to scientific consensus, or incurable and fatal disease. A ruling delivered on 15 March by the Constitutional Court halted this legal innovation and cut short on introducing the right to a self-determined death in the Portuguese legal order (press release here). The Court distanced itself from the standards developed by European sister courts to uphold an objective dimension of the right to life, which entails a strong duty of protecting life and its quality until the very end. Yet, it has kept the door open to an amendment to the bill that can render it constitutionally valid. The ball is rolling. It is now up to the parliament to follow the detailed guidelines provided by the ruling and devise an alternative formulation that avoids legal indeterminability and can find shelter in the judges' narrow lines.

Medically assisted death in Portugal

On 15 March, the Portuguese Constitutional Court halted a significant parliamentary bill aimed at legalizing medically assisted death in Portugal. It would render acceptable active euthanasia and assisted suicide for adults in a situation of intolerable suffering, with a definitive injury of extreme gravity according to scientific consensus, or incurable and fatal disease. This bill results from a legislative process whose roots go back to a civic movement for the right to die with dignity launched in November 2015. After a first unsuccessful legislative initiative in 2018, the new parliamentary majority elected in October 2019 passed the bill that would give Portugal a pioneering role in regulating the right to a dignified death.

Following an *a priori* review triggered by the President of the Republic, the Constitutional Court found that the concept "definitive injury of extreme gravity according to scientific consensus" lacks normative density and is therefore in breach of the principle of determinability of the laws as a corollary of the rule of law and the requirement for a parliamentary law. This conclusion prompted a presidential veto of the legislative act, which has now returned to parliament. A two-thirds majority could still confirm the act. However, parliamentarians have already announced that a new draft will be developed to address the Constitutional Court's concerns and thus expunge the unconstitutional aspects of the bill.

Medically assisted death is not in breach of the right to life

The President's request for prior review by the Constitutional Court raised controversy because it refrained from questioning the compatibility of euthanasia

with the Constitution, recognizing that “it is up to the legislature to allow or forbid euthanasia in each particular moment, following the social consensus.” The fact that the President decided to draft the review request in such narrow terms and implicitly recognize the legislature’s legitimacy to regulate euthanasia and medically assisted death was surprising.

According to Art. 2(1) of the bill, the anticipation of medically assisted death is considered not punishable when it occurs by the decision of a person, of legal age, whose will is current and reiterated, serious, free, and informed, in a situation of intolerable suffering, with a definitive injury of extreme gravity according to scientific consensus or an incurable and fatal disease, when practiced or assisted by health professionals. The President challenged two conditions of the procedure – the concepts of “intolerable suffering” and “definitive injury of extreme gravity according to scientific consensus” for breach of the principle of determinability of the laws as a corollary of the rule of law and the requirement for a parliamentary law.

Movements that oppose euthanasia and medically assisted death expressed disappointment with the review request’s modesty as they feared the Court would refrain from measuring medically assisted death against the right to life. However, the Court decided that it should first address the constitutionality of medically assisted death in light of the right to life *per se* before analyzing the concrete conditions challenged by the President. According to the judges, it was an inevitable and preliminary question to the President’s interrogations.

The judges found that the right to life, which is formulated in extensive terms in the Constitution (“human life is inviolable”), includes an objective dimension that consecrates the state’s duty to protect life, including those who want to die. The right to life entails an objective dimension comprising a duty to protect and promote life and its quality. In discharging this duty of protection, the legislature must adopt “a life-oriented legal protection system.”

In the face of the inherent tension between the duty to protect life and the respect for private autonomy, the Court added that in a democratic, secular, and plural society, “the *right to live* cannot become a *duty to live under any circumstances*.” A *duty to live* in situations of suffering would be incompatible with the self-determination of those in pain and breach of their human dignity. Therefore, this condition of human vulnerability can create tension with an unconditional protection of human life by sacrificing the individual autonomy of people who experience suffering by converting their right to live into a duty of painful fulfillment.

Remarkably, however, the Court did not articulate this reasoning in light of a right to a self-determined death nor of the fundamental right to the free development of personality. It instead limited its reasoning to recognizing that under these limited circumstances, the democratic legislature is not prevented from regulating medically assisted death, subject to the adoption of safeguards to ensure freedom, responsibility, and the protection of the most vulnerable.

There is no fundamental right to a self-determined death

By framing medically assisted death in light of an objective dimension of the right to life and rejecting an autonomous normative relevance to individual self-determination, the Portuguese Court decisively moves away from recent comparative examples. Despite being traditionally open towards comparative and international law, the Constitutional Court did not draw inspiration from the European Court of Human Rights doctrine or the German and Austrian Constitutional Courts to recognize the existence of a fundamental right to a self-determined death. Although it acknowledged said *acquis* and extensively cited the relevant case law (*Bundesverfassungsgericht's decision of 26 February 2020* and *Verfassungsgerichtshof*'s decision of 11 December 2020), it refused to join the consensus reached by those courts on recognizing a fundamental right to a self-determined death, based on the right to life or the individual autonomy and free will of the individual. The relevance attributed to personal autonomy is thus not carried to its further consequences by the Court.

Nevertheless, it still ascribed constitutional relevance to situations where the duty to protect life yields to private autonomy in concrete (and extreme) circumstances. Although this is formulated in somewhat opaque terms, it seems that the Court may be willing to accept a right to a self-determined death if it is drawn narrowly. These would be cases concerning a choice between a slow, painful, and agonizing death and a calm and quick death. In the Court's words, these cases concern a choice between different dying ways and not a choice between life and death.

In this sense, as the Court finds that medically assisted death is not *per se* in breach of the right to life, it draws heavily on the criteria developed by the Italian *Corte costituzionale* in the Capatto case. This case, however, concerned a situation where the *Corte* was confronted with the blanket criminalization of assisted suicide and decided, at first , to call on parliament to pass legislation legalizing assistance to suicide in extreme and dramatic cases and, secondly , in the face of the legislature's inaction, to enact the regulation covering those very same situations. In the Portuguese case, by contrast, the Court is confronted with the opposite scenario where the legislature has materialized its democratic decision to exempt from punishment situations of euthanasia and assistance to suicide.

As the Court draws these narrow lines while it assesses medically assisted death's compatibility with the Constitution, it was not asked to review but found preliminary to the conditions effectively challenged by the President – the judges grant clearance, albeit restrictedly, to the procedure. Suppose euthanasia and assistance to suicide have indeed been measured against the right to life in their full extent. In that case, their constitutional admissibility is limited to circumstances where, as the ruling mentions, the individual finds herself "at a time near the end". This restriction would then have the effect of actively reducing the legislative act's scope to those extreme situations where people were facing imminent death situations.

Dialogical concerns

The Court found that the concept “definitive injury of extreme gravity according to scientific consensus” lacks normative density and is therefore in breach of the principle of determinability of the laws as a corollary of the rule of law and the requirement for a parliamentary law. The Court puts forward alternative formulations signaling different options that the legislature can follow to render future amendments constitutionally valid. One such alternative includes a reference to the Spanish proposal of *Ley orgánica de regulación de la eutanásia*, which was approved in parliament only a few days after the ruling was delivered.

This assistance by the Court to the legislature must be welcomed with caution. Indeed, it is in line with previous case law where the judges expressed similar concerns to engage with the legislature in providing guidance and clarifications. However, a unified reading of the ruling shows that the majority of the judges are reluctant to accept medically assisted death in situations that fall outside the dramatic cases where only a choice between a long and agonizing death and a quick and peaceful death is at stake. But if that is the case, then the concept of “definitive injury of extreme gravity according to scientific consensus” would suffer from other constitutional liabilities, namely that it is not necessarily related to a fatal condition. Eloquently, one of the dissenting opinions claims that the legislature will now face a challenge of comparable difficulty to putting a camel through the eye of a needle.

Since there is no doctrine of *stare decisis* and a significant change in the Court’s composition will take place in the following months (five of its thirteen judges will be replaced), the main consequence of this ruling is that it kept the dialogue with the legislature open for the future introduction of medically assisted death in Portugal.
