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PROBING KEY CONCEPTS OF MEDICALLY ASSISTED DEATH. ANALYZING THE PORTUGUESE CONSTITUTIONAL COURT'S RULINGS

Luís Cordeiro-Rodrigues[1], Christopher Simon Wareham[2], João Cruz Ribeiro[3]

Abstract: From 2021, the Portuguese parliament tried to get four versions of a law on medically assisted death approved. Two were rejected by the Portuguese Constitutional Court (PCC) because they were unconstitutional, and the President politically vetoed another. Finally, the parliament passed the law in 2023, even though the President and the PCC seem to oppose it. In this article, we analyze the PCC's rulings on the medically assisted death law and contend that, broadly speaking, the PCC's decisions to reject the law were justified. We focus on two core questions that have been critical in this debate: the meaning of 'suffering' and of 'permanent injury of extreme gravity'. Further, we point to possible directions whereby the legislators may revise the law and thus solve the problems raised by the PCC.

Keywords: medically assisted death, portuguese constitutional court, unbearable suffering, vagueness and the law, permanent injury

Conceptos clave de la muerte médicamente asistida. Análisis de las sentencias del Tribunal Constitucional portugués

Resumen: Desde 2021, el parlamento portugués ha intentado que se aprueben cuatro versiones de una ley acerca de muerte médicamente asistida. Dos de ellas fueron rechazadas por el Tribunal Constitucional Portugués (TCP), por ser inconstitucionales, y otra fue vetada políticamente por el presidente. Finalmente, el parlamento aprobó la ley en 2023, a pesar de que el presidente y el TCP parecen oponerse a ella. En este artículo analizamos las decisiones del TCP sobre la ley de muerte médicamente asistida y sostenemos que, en términos generales, las decisiones del TCP de rechazar la ley estaban justificadas. Nos centramos en dos cuestiones fundamentales que han sido fundamentales en este debate: el significado de "sufrimiento" y de "lesión permanente de extrema gravedad". Además, señalamos posibles direcciones por las que los legisladores pueden revisar la ley y así resolver los problemas planteados por el TCP.

Palabras clave: muerte médicamente asistida, Tribunal Constitucional Portugués, sufrimiento insoportable, vaguedad y ley, lesión permanente

Uma análise das decisões do Tribunal Constitucional português sobre a morte medicamente assistida

Resumo: Desde 2021, o parlamento português tem tentado aprovar quatro versões da lei da morte assistida. Duas das versões foram rejeitadas pelo Tribunal Constitucional (TC), devido a inconstitucionalidades e o Presidente da República vetou outra versão. O parlamento passou uma lei em 2023, ainda que o presidente e o TC se tenham oposto. Neste artigo, analisamos as decisões do TC sobre esta lei e defendemos que o TC tomou decisões acertadas na maioria das vezes.

Palavras-chave: morte medicamente assistida, Tribunal Constitucional Português, sofrimento insuportável, indefinição e a lei, lesão permanente

[1] Department of Philosophy, Yuelu Academy, Hunan University, China, https://orcid.org/0000-0001-9571-2120
Corresponding author: lccmrodrigues@gmail.com

[2] Ethics Institute, Department of Philosophy and Religion, Utrecht University, Utrecht, Netherlands; Steve Biko Centre for Bioethics, School of Clinical Medicine, University of the Witwatersrand, Johannesburg, South Africa, https://orcid.org/0000-0003-1631-8868

[3] CEPS - Centre for Ethics, Politics and Society, University of Minho, Portugal, https://orcid.org/0009-0009-6517-235X

Introduction

Only six European countries have legalized medically assisted death: Luxembourg, the Netherlands, Belgium, Germany, Spain and Austria*(1)*. The Portuguese parliament has been trying since 2021 to pass a law to decriminalize medically assisted death but all failed to pass: the Portuguese Constitutional Court (PCC) due to the unconstitutionality of the draft has rejected two, and the President vetoed another for the same reason. Despite these rejections, the law ended up being approved because the problem was the formulation of the law rather than an intrinsic incompatibility between medically assisted death and the Portuguese Constitution. This article provides an ethical analysis of the Portuguese case, which may also be instructive about potential shortcomings in other nations. In particular, our goal is to evaluate the PCC's decision and point toward directions that may help address it. We do this by exploring the meanings of the concepts of 'suffering' and permanent injury of extreme gravity, which were critical for the PCC's rulings against the constitutionality of the draft law. Especially because of the first judgment, we consider that the judges of the PCC were right in their assessment that these concepts were not concrete enough. We, in fact, go beyond the PCC's ruling and add some suggestions for further clarification. This research is different from previous work in at least two ways. Firstly, most research on medically assisted death has focused on the cases of the US, Canada, the Netherlands, and Belgium and, therefore, neglecting the specificities of the Portuguese case*(2-5)*This is particularly significant because of factors such as the context of a Portuguese Catholic culture (rather than a Protestant or laic one), and the use of slightly different concepts from other legislations (such as, in later versions, 'intense suffering' instead of 'unbearable suffering') make the discussion of the Portuguese case quite distinctive. Secondly, this article differs from the few approaches that address the Portuguese context in adopting a more conciliatory aim. On the one hand, those who oppose medically assisted death write about it being difficult to implement in practice*(6)*; on the other, those who support it look at the decision of the PCC with skepticism and dismiss it as a political veto*(7)*. This paper, in contrast, accepts the need for the legal regulation of medically assisted death but recognizes the legitimacy of the PCC's concerns and tries to build an approach that makes the law more coherent.

In section 1, we contextualise the status quo in Portuguese law, leading up to the rejection of the law by the PCC and later to the approval of the law by the parliament (without the PCC's approval). In section 2, we discuss the proposed vagueness or indeterminacy of the concepts identified by the PCC, providing examples that indicate how this indeterminacy has been dealt with in other contexts. We suggest some principles and analogies with different cases that can be helpful guidance for redrafting the law. In section 3, we consider objections to our arguments and provide possible responses. We conclude by considering the prospects for a revised law.

As a preliminary point, it is important to mention an explicit limitation of the article: while there are vast expanses of literature on the ethics of medically assisted death generally, it would be beyond our scope to delve deeply into general justifications of, or arguments against, the practice. Instead, we will focus more narrowly on some specific criticisms of a particular proposed law raised by judges in the PCC. Thus our aim is not to reach a firm conclusion about the ethics and legality of medically assisted death but instead to clarify and respond to some particular claims in the context of the Portuguese and the European debate.

1. Medically assisted death in Portugal

Before the entering into force of the law under analysis in this article, medically assisted death was a crime in Portugal. The Criminal Code addressed the issue in three different instances. First, article 134 prohibited the homicide resulting from a request by the victim. Second, article 135 did not allow inciting or assisting suicide. Finally, article 139 forbids suicide propaganda. As a result of the recently approved legislation, these three types of crime do not apply when medically assisted death is executed according to the conditions established in the new Law.

The admissibility of medically assisted death has been debated in legal scholarship, with particu-

lar relevance for the field of Constitutional Law, oversimplifying a complex debate, the details of which are not the main objective of this article. We can roughly say that the debate is framed by two opposing views: on the one hand, the fundamental right to life, as established in article 24 of the Constitution, is seen as beyond the power of disposition of its holder; therefore, the individual's autonomy, self-determination or freedom do not constitute legal ground to accept any kind of medically assisted death whatsoever. In this regard, the state must to protect human life which cannot give way in light of any of the mentioned arguments, By contrast, some authors argue that the free development of the personality, as established in article 26 of the Constitution, constitutes a legal ground to accept medically assisted death; in this regard, the argument goes, the individual should be recognized to have general freedom of action and a capacity of self-determination that are broad enough to include the decision to be submitted to medically assisted death*(8–10).*

From a different perspective, medically assisted death in Portugal has been opposed mostly by Catholic sectors of society and the Portuguese Communist Party*(11).* While Catholics oppose it for religious reasons, the Portuguese Communist Party has opposed it because medically assisted death would likely negatively impact the worst off and entail providing less quality healthcare to the least economically powerful classes*(12,13).* Although traditionally, Christian Democrats and Communists held a significant number of parliamentary seats, thus impeding the passing of a law on medically assisted death, this has changed significantly in the last few years*(14,15).* Indeed, recently, the Portuguese parliament has established a different distribution, including members of the new left and liberals, who are more willing to approve medically assisted death on the grounds of honoring individuals' autonomy. Thus, on 29th January 2021, to decriminalize medically assisted death, the parliament approved a draft law for medically assisted death with 136 votes in favor and 78 against*(11)*.

Version 1

The first version of the proposed law (hereafter version 1) stated that medically assisted death could be allowed if the decision by the patient is informed and a health professional aids the procedure. The *situation must be one of unbearable suffering* and *permanent injury of extreme gravity, with an agreement with what the scientific consensus states* or an incurable and lethal disease when aided by a health professional*(16).* Maria do Céu Patrão Neves and Cíntia Águas summarise the key features of the draft law very clearly. The draft law allows medically assisted death only 'by decision of the patient, whose will must be current and reiterated, serious, free and informed; in a situation of intolerable suffering, with permanent injury of extreme gravity or incurable, fatal illness, when carried out or assisted by health professionals. Procedural legitimacy limited the applicants to competent adult citizens, of Portuguese nationality or with legal residence in Portugal*(6).*

The proposed law demanded that a request for medically assisted death covered four steps before gaining approval; firstly, a medical doctor chosen by the patient would approve the request from the patient; then, a specialist doctor would need to corroborate with the first doctor's opinion; following this, a psychiatrist and a clinical psychologist would determine whether the person requesting suicide had made the decision freely; finally, a commission comprising various kinds of professionals (including two health professionals and a specialist in bioethics) would assess the process and approve it if all was found to be in order*(16)*. Hence, the whole process would pass through the evaluation of various professionals to confirm whether the case meets the conditions set in the law.

Although version 1 of the draft law was approved by parliament, making a law in Portugal also requires the promulgation of the President. The President has the choice to promulgate it, veto it, or, in cases where the President is unsure about the proposed law's constitutionality, send it to the PCC to decide whether the law violates the Constitution. In this case, the Portuguese President, Marcelo Rebelo de Sousa, decided to send the proposed medically assisted death law to the PCC for evaluation. In his letter to the PCC, Rebelo de Sousa requested that the constitutionality of two aspects of the law be evaluated. In particular, the President doubted whether the expressions 'situation

of unbearable suffering' and 'permanent injury of extreme gravity with an agreement with what the scientific consensus states' are sufficiently specific to protect individuals against haphazard decisions for carrying out medically assisted death*(17)*. The terms, the President contended, were too vague and needed to be more determined so that rights to life and human dignity were not violated. More precisely, according to de Sousa, the law would allow too much personal decision-making power by the health professionals involved in the process of deciding on each specific case. As it stands, the President thought the law did not provide a clear measure of suffering, providing, instead, subjective standards that were open to interpretation by the doctors and commissions evaluating. Moreover, it appears unclear whether the relevant measurement in the law refers to the individuals' suffering or the doctors' assessment of the suffering. According to the President, then, the procedural conditions set out by the law were insufficient to avoid indeterminacy because the terms above were too vague and allowed too much personal opinion from the professionals involved*(17)*.

The PCC's ruling agreed at the core with the President's opinion that the proposed law violated the principle of determinability of law (non-vagueness) and that the law had insufficient normative guidance. The judges disagreed with the President regarding the first point and considered that 'unbearable suffering' can be known "by the rules of the medical profession"*(18)*. Nonetheless, they agreed regarding the second definition concerning the nature of the injury and its determination, which they considered was indeed undeterminable to an extent that rendered it unconstitutional*(18)*. The PCC added, however, that the judges did not consider that medically assisted death is incompatible with the constitution in itself because the right to life is compatible with the autonomous decision to cease one's life. Notably, they contended that the right to life guaranteed by the Portuguese Constitution does not entail the duty to live in every kind of circumstance. Nevertheless, the situations where medically assisted death occurs need to be clear, precise, controlled and anticipable. In short, the problem is not whether medically assisted death is constitutional in itself or violates the right to life, but whether the *means whereby it is practiced* are in keeping with the Constitution*(18)*.

Version 2

After a few months, a second version of the law was sent to the Portuguese president. However, on November 29, 2021, the president immediately vetoed it (without sending it to the PCC) because in his view it had several indeterminacies and a lack of precision. To justify his veto, the president required that the concepts of 'lethal disease', 'incurable disease' and 'serious disease' be further clarified. More precisely, the political veto was taken on two grounds*(19)*. Firstly, the new draft law was self-contradictory: at one point, to be applicable it required a "lethal and incurable disease", while, at other points, it merely required a "serious and incurable disease"*(20)*. Secondly, the President was concerned that widening the scope to include "serious and incurable disease" constituted a significant change in *scope*. The President accordingly asked the parliament to reconsider its deliberation.

Version 3

On 9th December 2022, the Portuguese parliament approved a revised version of the draft law. This draft law responded to the ambiguities noticed by the President, but contrary to the President's opinion, did not circumscribe the scope to cases of "lethal disease". The parliament opted, therefore, for a broader scope. In any event, and despite the mentioned clarifications, the President remained unconvinced about the content of the draft law and asked the PCC to intervene. The President's request for the PCC's inspection was like the previous one, with a concern regarding a violation of the principle of determinability of law. More precisely, although the parliament revised the concepts considered vague before, the President wanted more than the modifications made. Now the parliament defined the disputed concepts as follows:

> 'The concept of 'serious and incurable disease' ought to be understood to refer to a disease that threatens life in an advanced and progressive stage; it is incurable and irreversible, which causes suffering of great intensity (our translation)*(21)*.

> 'The concept of 'extremely serious permanent injury' refers to a serious, permanent and significantly disabling injury that places the person in a situation of dependence on a third party or on the need of technological support to carry out basic activities of their daily life, with a certainty or at least a very high likelihood that such dependency or need will persist over time without the possibility of cure or significant improvement.' (our translation)*(21).*

> 'The concept of 'suffering of great intensity' means physical, psychological and spiritual suffering, resulting from a serious and incurable illness or permanent injury of extreme gravity, with great intensity, persistent, continuous or permanent and considered intolerable by the subject (our translation)*(21).*

As is clear from the quotes above, contrasting with before, the new draft law submitted did not include the concept of 'lethal disease' and only requires that there is an "extremely serious permanent injury" or "serious and incurable illness". In this new version, there is also a more detailed attempt to clearly define the concepts of "serious and incurable illness", "extremely serious definitive injury", and "great suffering". The proposed new law also sets a minimum period of two months from the beginning of the procedure before medically assisted death is carried out. Finally, it requires the patient to undergo psychological counseling, except if the patient explicitly rejects it. In addition, there is a change from the expression 'unbearable suffering' to 'suffering of great intensity'.

The concerns raised by Rebelo de Sousa were similar to the previous ones that he had sent to the PCC. The President was not sure that changing from 'lethal illness' to 'serious and incurable illnesses was constitutional. Another doubts the President had was whether adding the expression 'great intensity' satisfied the constitutional requirements for a proper definition of suffering. Also, he questioned whether the great intensity criterion for suffering referred only to the serious and uncurable illness or also to the permanent injury of serious gravity.

The PCC ruled again that the draft law was unconstitutional, despite disagreeing with most issues that the President raised. Instead, the PCC ruling of the law to be unconstitutional was due to an imprecision regarding categories of suffering in the draft law being "cumulative" or "alternative". That is, the PCC found it unclear whether someone must suffer physical, psychological and spiritual suffering *together* or whether it is sufficient to suffer *one alone* to be eligible for medically assisted death. The court gave the following clarifying example. If someone suffers from Amyotrophic lateral sclerosis (ALS), but does not experience physical suffering, will this person be eligible for medically assisted death? Consequently, the articles in the draft law that refer to suffering were considered unconstitutional: the ambiguity regarding what kind of suffering is required means that decisions regarding medically-assisted death lack "clarity", and are not "anticipable" or "controllable"*(21).*

Version 4

The parliament approved a fourth draft of the law on the 31st of March 2023. Pragmatically, it accepted the criticism developed by the Court concerning the definition of "unbearable suffering" and opted for eliminating the reference to the different types of suffering. Indeed, the PCC had already accepted in its first decision that the concept of "unbearable suffering" could be used without violating the Constitution. Nevertheless, the legislator, to densify and improve the determinability of the norm, had adopted the revised notion of "suffering of great intensity." In this regard, the parliament may have thought, if the three types of suffering – physical, psychological, spiritual – are simply set aside, the remainder of the norm does not result as less determinable than the one previously established in the first draft, which the PCC accepted as constitutional.

Additionally, the determinacy of the norm is maintained by the fact that three conditions must be satisfied for the law to be applied in a particular case: a) the person should suffer from a 'serious and incurable disease', or from an 'extremely serious permanent injury'; b) the person should be in a situation of "suffering of great intensity"; c) a causal link between a) and b) should occur. Given these conditions, it will not be the case that anything goes concerning medically assisted death.

So, for example, someone who simply feels tired of life but has no medical condition would not be eligible for receiving medically assisted death.[4]

However, the Parliament introduced another amendment that proved to be problematic.

Indeed, in this fourth version, and contrary to all previous versions, the modalities of medically assisted death – assisted suicide and euthanasia – appear in a relationship of priority. According to article 3º*(5)*, medically assisted death can only consist in euthanasia when the patient is physically incapacitated to perform medically assisted suicide. That is, if the patient has the physical capacity to self-administering the lethal substance, the patient cannot choose to be euthanised.

This led the President to veto the draft law because it was not clear which doctor should determine the patient's incapacity for that purpose. As explained before, two doctors intervene in this procedure: a medical doctor chosen by the patient and a specialist doctor in the pathology from which the patient suffers. The President noted that nowhere in the draft law was this competence attributed. Furthermore, the President also observed that the draft law did not identify which doctors should supervise the administration of the lethal substances*(22)*.

The draft law was, thus, sent back to Parliament without promulgation. In such circumstances, the Parliament has the possibility of confirming the draft law by a super majority of half plus one member of the Parliament (normally, by a supermajority of 116 out of 230 members of Parliament). On the 12th of May 2023, the Parliament confirmed the draft law by a majority of 129 votes. After being confirmed, the draft law should be obligatory promulgated by the President, which occurred on the 16th of May 2023*(23)*.

After publication in the Official Journal, the Government should approve a regulation within 90 days, and the law enters into force 30 days after the publication in the Official Journal of the Government's regulation.

[4] We do not discuss whether this broader scope may be justified in some cases, but see Sumner 2011 and 2022.

2. Vagueness, Suffering, and Grave injury

The Portuguese case raises several issues that are of general ethical interest in other contexts. In this section, we discuss debates surrounding some of the disputed concepts in different versions of the law. In particular, there are significant concerns about what is meant by a) "unbearable suffering" and b) "permanent injury with extreme gravity." In each case, there are issues with the *content* of the term (what is to be determined) and *the process* of determination: who is to make the determination, and what procedure should be followed. In the following sections, we describe these issues, drawing on ethical theory and the experiences of other nations to suggest possible resolutions. In discussing these particular issues, we do not assume these are the only issues of significance. Indeed, there are significant debates about whether these criteria are appropriate in the first place. For instance, it might be questioned why my suffering should become unbearable before I am entitled to assistance in dying. However, the purpose of this article is to provide an ethical critique of the PCC's judgment of the proposed law and point the way for the Portuguese legislator on how to address this judgment, so these broader questions sit outside our current scope.

Vagueness

Before focusing on alleged shortfalls in clarity in the proposed Portuguese law, it is important to say something about the extent to which such clarity is required or desirable. While vagueness is generally undesirable, there are two reasons to resist excessively demanding and constraining legal criteria. First, given that medically assisted death is a topic that reflects the key mores of a society, there must be some room for elected representatives to exert an influence, particularly where reasonable, value-based disagreement about rights exists. For instance, internationally, there is no accepted definition of unbearable suffering*(2)*. Hence, the requirement of the PCC cannot reasonably be to offer such a widely accepted definition, which should be supplied about to the mores of a specific society. Taking this on board, where this kind of reasonable disagreement exists, constitutional procedures must provide some leeway allowing elected representatives to legislate*(24)*. Here,

the legislator should engage and insist on a wide and inclusive public debate to ensure that she or rightly represents those who elected her or him. Second, in addition to being important from an ethical perspective, concerning the legitimacy of the laws that bind citizens, a degree of flexibility is desirable from a *practical* standpoint since other decision bodies may be better-placed than courts to anticipate and respond to procedural and contextual problems. These responses may be hindered by overly specific prescriptions. With that said, it is important that all parties must be able to know whether they are working within the confines of the law, and we suggest that the PCC's findings point to genuine senses which is unclear in the proposed Portuguese law.

Definition and Typology of Suffering

From the very first version, clauses about suffering raised an initial question about what sorts of pain and suffering should be included in the definition of suffering. In a psychiatric context, Verhofstadt and colleagues identify five different types of suffering: medically related, intrapersonal, interpersonal, societal, and existential*(25).* Different understandings of what suffering involves raise sensitive ethical questions. Should, for instance, existential pain, such as being 'tired of life' fall within the definition of suffering? Is the dimming of medical pain through palliative care sufficient to reduce the unbearableness of a terminal condition? Should 'spiritual' suffering be included as a distinct category?

A similar lack of clarity accompanies the term 'unbearable.' Such a subjective criterion rests heavily on the evaluations of the person seeking assistance in dying. The proposed Portuguese law allows for several steps of independent evaluation for patients who have requested assistance in dying based on unbearable suffering – including by bioethicists, medical professionals, and psychiatric personnel. This should provide some safeguarding against fleeting evaluations of unbearable suffering. However, the first draft law did not guide the circumstances in which independent authorities may override a person's declared evaluations that their suffering is unbearable. This is important since there is little agreement about what constitutes unbearable suffering from a subjective or objective perspective. For instance, in a qualitative study of patients and practitioners, a participant suggested that having to wear a stoma would constitute unbearable suffering. Another suggested that unbearable suffering is being "alive, but not living." By contrast, a practitioner suggested that unbearable suffering might be a situation in which one must "lie in bed moaning." At the same time, another implied that unbearable suffering may not be somatic at all but associated with "powerlessness"*(26).* Given the subjectivity of unbearable suffering, there is potential for tremendous conflict between patients' judgements and those of independent evaluators. Under what circumstances, other than lack of capacity, might an assessor legitimately declare a patient's assertion of unbearable suffering to be incorrect or insufficient?

The legislator must give the details of such an answer. In practice, it seems that there would be very few cases where the patient's decision can be undisputedly overruled. Take the example of the Netherlands where various factors, including physical, psychological, social and emotional determinants, have been shown to influence the determination that suffering is unbearable*(27,28).* Bos and colleagues conclude that:

> Unbearable suffering cannot be measured. It should be regarded as a result of the sum of physical symptoms and existential problems. While the components may not be unbearable, the resulting suffering may be unbearable for the patient*(2).*

This lack of objective criteria suggests that, provided that the person in question is rationally capable and has repeatedly expressed a desire to die, in practice, there is limited scope for practitioners to overrule a judgement of unbearable suffering. If so, it would be important for Portuguese regulations to clarify and acknowledge this. To the extent that the patient is psychologically competent and not silenced, threatened, inflicted by physical harm, prevented from speaking, or coerced, then there is no reason to overrule her evaluation*(29).*

The latest draft law version seems not to solve all these problems, albeit it is an improved version of the draft. Significantly, the new draft law gives primacy to the person's subjective perception of their

suffering to the extent that it states that the level is to be_determined by *the person who suffers it*. It prolongs the process of evaluation so that there is repeated evidence that there is a clear expression to die, reinforcing the point regarding the subjective nature of the assessment of the person's suffering. Also, by using the concept of 'suffering of great intensity' instead of 'unbearable suffering', the law arguably allows the suffering to be more measurable through physiological criteria*(30-32)*[5] To the extent that it is more measurable, the personal opinion of the professionals involved is more limited, as they are constrained by the data. It rightly adds mandatory psychological counselling and maintains several medical and bioethical specialists in the field to bring a more detailed evaluation. However, despite the changes, it remains somewhat unclear when (and if) the specialists' viewpoint on suffering can overrule the subjective experience of the person suffering and decide that the person's suffering is not very intense.

Additionally, the determinacy of the norm is maintained by the fact that three conditions must be satisfied for the law to be applied in a particular case: a) the person should suffer from a 'serious and incurable disease', or from an 'extremely serious permanent injury'; b) the person should be in a situation of "suffering of great intensity"; c) a causal link between a) and b) should occur. Given these conditions, it will not be the case that anything goes concerning medically assisted death. So, for example, someone who simply feels tired of life but has no medical condition would not be eligible for receiving medically assisted death.[6]

Permanent injury with extreme gravity

Like 'unbearable suffering,' the requirement that there should be a permanent injury with extreme gravity, or analogous clauses, is also widely accepted in other contexts that permit assisted death*(2).* Unlike unbearable suffering though, permanent injury and extreme gravity appear less susceptible to the charge of subjectivity, since these appear to be primarily a matter of objective medical judgement. Nonetheless, there are some concerns, first, about how the terms 'permanent' and 'extreme gravity' are to be understood.

First, cases of 'permanent' injury will be cases in which potential treatments might eventually be developed or for which better life-prolonging treatments may be found. The PCC expressed a concern that a permanent injury is not identical to an injury from which no recovery is possible. For instance, cancer therapies that aim to extend one's lifespan and alleviate the gravity of various conditions are constantly developing. An injury may be permanent given the existing state of knowledge, but there may still be experimental treatments that could provide a prospect of recovery. Should the presence of such experimental treatments affect judgments of permanence and gravity? This creates some difficulty in determining what counts as permanent and grave injury, which, while not compromising the objective determinability of the law, could become a site of controversy. This provision could be justified under a principle of revisability of the law, according to which those norms that significantly determine a given practice, can be revised and debated after they have been agreed upon. This principle gives leeway for correcting mistakes that may come to light with new evidence*(29)*. Particularly for the case in question, the legal term 'permanent injury' (and, indeed, unbearable suffering) should be scrutinized continuously and repeatedly to ensure that it is up to date in light of new scientific and technological evidence.

Second, the concept of 'consensus' is heavily disputed, as exposed by controversy about the degrees of the scientific consensus around climate change (Doran and Zimmerman 2011). How should consensus about the gravity and permanence of an injury be adequately measured? Does a single prominent dissenting voice undermine a consensus? Should the consensus be reached by Portuguese, European, or international scientists? And what procedures should be in place when there is doubt about whether a consensus exists? Given this lack of clarity about the term, it is important to note that the PCC's broad requirement for clarification is not addressable. Nonetheless, the legislator ought to define *what* is meant by consensus and explain *who* and *why* in terms of

[5] Although these sources provide slightly more objective standards, this evaluation remains subjective and self-report still remains the primary criterion.

[6] We do not discuss whether this broader scope may be justified in some cases, but see Sumner 2011 and 2022.

the relevant individuals that need to agree on this.

Questions regarding the permanence of an injury and the nature of the consensus required are, again, important to answer, given that the lack of clarity may impede an individual's self-determined choice for assisted death. Again though, it is beyond our scope to attempt a resolution to these difficult issues here. Bos and colleagues note that in a Dutch context, distinct criteria are provided:

> The patient's suffering is considered to be without prospect of improvement if the disease or disorder causing the suffering is incurable, and there is no means of alleviating the symptoms so that the suffering is no longer unbearable… Whether treatments are a realistic option depends on two things: the improvement that can be achieved and the burden such treatment would place on the patient*(2).*

While this does not resolve all the issues above, providing relatively clear criteria for permanent injury with extreme gravity would go some way towards redrafting the law to satisfy the PCC's concern regarding this criterion. The latest draft law is much clearer. It dropped the scientific consensus requirement which was problematic. Additionally, it defines the concept of permanent injury with extreme gravity slightly better because it links it to dependence on daily tasks, which is a clearer and more precise criterion. Although it does not make a direct reference to the development of technology, it is implied that the criterion is dependent on technological advancements that can change this. Even though the PCC has not contested this, we consider that conditions of revisability mentioned above are important to include and these are still lacking in the latest version of the draft law.

3. Practical Difficulties and Dependency

In this section, we wish to address two important objections to this specific law that can be raised in the Portuguese context. One form of criticism is that this policy has difficulties in implementation in Portuguese society*(6).* To start, there seems to exist little interest from civil society on this matter, and health policies should correspond to the will of the people. That is, we have not seen, according to this criticism, the general population of Portugal interested in addressing this issue; it is a minority concern. Neves and Aguas, who raised this criticism, are more concerned about the question of legitimacy. While the democratic legitimacy of the PCC to make legally binding decisions is beyond our scope, there is a practical aspect of this criticism that bears on the practicability of the law. Namely, health policies work better if they have the support of the affected population*(33).* Another practical concern they raise is that there may not be enough trained health professionals who will want to be involved in the process, which would make medically assisted death materially impossible. This concern is especially acute in the Portuguese context because the Portuguese Medical Association is reluctant to support the medically assisted death law*(34).* On top of this, there may be insufficient infrastructure and resources, and consequently, the Portuguese health system will end up offering low-quality service. Neves and Aguas do not argue that this is necessarily the case, but as there are no studies on this, there is a high degree of uncertainty*(6).*

Certainly, the cooperation of the population is critical for the successful implementation of health policies. Nonetheless, this seems more important in cases of infectious diseases where people's behaviour can significantly contribute to the success or failure of the policy*(35).* In the case of medically assisted death, active cooperation seems less pivotal, except when it refers to specific groups within the population, like health professionals. However, it is likely that health professionals (as well as other professionals) will respond to incentives, especially economic ones. It is, therefore, not a fatal problem to have less cooperation of health professionals at the beginning of the implementation of this law and this may indeed change. This leads us to another issue with the objection: it is beyond the scope of the draft law to assure that the required means for implementation will exist in the future. This is rather a matter of policy, which ought not to stop the enactment of a law, and any confusion in this regard would ultimately infringe on the democratic separation of powers. For instance, just because human rights may be difficult to implement, that does not mean that there should be no human rights law as a basis for protecting individuals. Surely, as Immanuel

Kant pointed out, ought implies can*(36)*. But this is not a question of the ability to implement the law but of the number of people who can be aided: this law, even if it cannot reach everyone, can aid some. If this is not sufficient, the critics would have to endorse the levelling-down objection. Derek Parfit argued that the view that it is in itself bad if some people are worse off than others is wrong. To prove this, one prime example he gives is that this theory would imply blinding everyone to make everyone equal. As this is absurd, it cannot be the case that inequality is intrinsically bad*(37)*. The critics of medically assisted death contend that there are not enough resources for everyone and therefore it is better not to have it fall into the same problem. Namely, their argument would imply that it is better to have more people suffering than address some people's suffering just because there are not enough resources for everyone.

The stronger objection relevant in the Portuguese context against the law is that it looks at the concept of dependency acritically. It accepts dependency as a bad thing when there is nothing normatively wrong with it: there is nothing morally wrong with being dependent on another; neither is there anything wrong in providing care to a dependent person. Dependency is a fact of life and comes in degrees. The binary of dependent-independent has a weak foundation on concepts of masculinity which easily disappears when confronted with the facts of life, which demonstrate that everyone is, to a certain degree, dependent on others. There is no indignity in being dependent because it is a normal thing. Nonetheless, there is some indignity in responding to dependency in a negative way, by, for example, perceiving it as inferiority and contending that some dependencies make a life not worth living*(38)*[7]. The Catholic sector of Portuguese society is the one that has raised more or less this concern when they contend that it is normal for people to have relationships of dependency and for some people to take the role of a carer. They contend that relationships of dependency can be a good opportunity to show care and love.

We agree with the underlying theory of this argument that there is nothing intrinsically wrong with dependency – a dependent person is not inferior to others. However, we do not need to deny this to contest the argument. A moral theory can point out what is wrong with a certain idea and, at the same time, recognize that as a matter of law, it needs to be flexible in terms of implementation*(39)*. In the present case, this becomes more evident by looking at the limits of the plasticity of individuals' preferences and values. Although we think that a new perspective on dependency is important, it is also the case that autonomy has gained significant importance in the values of the West, making it core for individuals' self-perception of worth. This tendency needs to be changed, but it is likely unchangeable for people who have been socialized all their lives in this way. Hence, although the reason why they suffer may not be justified by a moral theory, their suffering is very real and possibly irreversible. If the psychological counselling they receive cannot help them look at their condition in a different way, then this ought to be considered an irreversible or nearly irreversible emotional state, which justifies medically assisted death. So if someone cannot stand being dependent, this ought to be respected – independently of our understanding of whether dependency is a good, bad, or indifferent value. Notwithstanding this, society must work towards understanding that dependency is not intrinsically unworthy*(38)*. It is, however, dangerous too probe to much into individuals' personal opinions as it resembles some kind of thought police. It is advisable that any change is carried out indirectly through nudges rather than forcing individuals to change*(40)*.

Conclusion

In this article, we have surveyed ethical aspects of the PCC's judgements that versions of a proposed law decriminalising medically assisted death are unconstitutional. In so doing, we have in many cases agreed with the PCC that there are points at which the proposed law requires clarification, in particular by identifying limitations on health practitioners' capabilities to over-rule subjective suffering. Our paper suggests several ways for the legislator to solve these problems, including problems concerning categories of suffering, which arguably originated at the PCC. In response to this,

[7] Donaldson and Kymlicka are here referring to the dependency in a different context.

we suggested that removing reference to categories of suffering would improve the determinability of the law. Whilst we have suggested ways to remove some indeterminacy, it is also important to stress that some indeterminacy is inevitable, perhaps desirable, to accommodate resolutions to unforeseen practical problems in implementation. However, vagueness at the outset mustn't threaten fundamental rights to life, dignity, and self-determination. In this respect, there is scope for optimism that the PCC judgement may be a significant step towards an ethically and constitutionally justified assisted death law rather than an implacable obstacle in the path of one.

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