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# FROM THE LEGISLATURE'S MARGIN OF DISCRETION TO A FUNDAMENTAL RIGHT: THE LONG ROAD TO ASSISTED DYING IN PORTUGAL

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At the end of January 2023, the Portuguese Constitutional Court blocked, for the second time, a legislative bill to legalize euthanasia and assisted suicide under strict conditions. This ruling followed an *a priori* review requested by the President of the Republic and represented a problematic iteration from a legal point of view. However, it also means a development in judicial interpretation, which has evolved from framing assisted death in extreme conditions of injury and illness as a matter in the legislature's margin of discretion to a fundamental right.

1. The Legislative Process of Medically Assisted Death

On January 29, 2021, following a long legislative road that dates back to a civic movement for the right to die with dignity initiated in 2015, the Portuguese Parliament approved a bill legalizing medically assisted death in Portugal (Decreto 109/XIV). Both euthanasia and assisted suicide would be decriminalized and provided for at the request of adults in a situation of intolerable suffering, with a definitive injury of extreme gravity or incurable and fatal disease.

2. The First Ruling of the Court

A ruling of the Portuguese Constitutional Court delivered in an *a priori*

review triggered by the President of the Republic (Acórdão 123/2021, English translation) blocked the bill. The Court found that some of the concepts used breached the principle of legal determinacy as a corollary of the rule of law and the requirement for a parliamentary law.

This ruling was striking for the comparative observer. The number of countries implementing assisted death is increasing worldwide. In several countries, constitutional and supreme courts have recognized a fundamental right to assisted suicide that the legislator cannot ignore. Despite this emerging trend in comparative law and the traditional influence that foreign and comparative law has on its case law, the Court ruled conservatively. It rejected the existence of a right to a self-determining death and recognized that the topic falls in the legislature's margin of decision. Moreover, it provided guidelines that narrowed the legislature's margin in determining the conditions for legalizing assisted death, implying that the model should be limited to cases of imminent death.

While rejecting the existence of a fundamental right to a self-determined death, the Court accepted that there was room to ascertain a "positive constitutional interest" to third parties' aid to commit suicide in minimal cases. In these cases, death is imminent, and there is no choice between life and death but between a long and painful process or a quick and peaceful death. Moreover, the Court drew a clear line between the legal regimes requiring a terminal condition and the others, calling on the legislator to clarify the model effectively enshrined in the bill. The bill entailed the expressions "anticipation of death" and "fatal condition." Still, the legislative process, and the public debate around the topic of medically assisted death, showed the legislature's apparent intent to adopt the broad model, not limiting euthanasia and assisted suicide to cases where death was imminent. Anticipation of death and fatal condition had not been formulated as terminal conditions.

The Court's ruling, however, narrowed it down to said interpretation and aimed to reduce the scope of the legislature's initiative.

## 3. The Presidential Veto

The legislature welcomed the decision of the Court as it did not reject

assisted death *per se*, despite the evident limits drawn by the judges. It re-drafted the bill during a politically turbulent period because, in October 2022, the President of the Republic called for an early election.
On harmonizing the bill, the parties tried to delete the expression "anticipation of death" from the remaining text and replace it with "medically assisted death." Members of the CDS, a conservative party, successfully challenged these amendments.
Faced with the bill (Decreto 199/XIV), the President of the Republic delivered a political veto claiming inconsistencies and requesting clarification from the legislature. Notably, the President affirmed that the conceptual reform that had been undertaken broadened the assisted dying model to new cases that had not been covered before. Drawing on the Court's ruling, the President claimed that by dropping the requirement of "fatal condition" (which he, as the Court had done earlier, equated to "terminal condition"), the revised bill was aligning with a "more radical or drastic" vision and questioned whether that corresponded to the "prevailing social sentiment" of the Portuguese society.

4. The New Legislative Process

Following the January 2022 elections, the new parliamentary composition maintained the majority in favor of medically assisted death. A new bill (Decreto 23/XV) was adopted, including the duty to provide psychological counseling (Article 4(7)(8)(9)) and to introduce mandatory deadlines, such as a waiting period of two months and 15 days for the specialist doctors and the psychiatrist to deliver their opinions. To address the Constitutional Court's concerns, the legislature had already introduced a new clause with definitions to avoid breaching the principle of legal certainty. In doing so, it resorted to concepts from the Basic Law on Palliative Care (Law 52/2012, September 5), following an explicit judicial suggestion formulated in Decision 123/2021.
When the President of the Republic received the bill, he filed another *a priori* review, challenging the definition of "incurable and severe disease" as a condition of assisted dying. The presidential concerns addressed the fact that the concept now included the notion of "great intensity" but excluded the condition of "fatality" and the allusion to "anticipation of

death," the conditions that the Court had drawn in its first ruling.

5. The ruling: Acórdão 5/2023

The Court's composition was changed during the period that mediated the two rulings, and such change produced relevant consequences in the Court's recent decision. On the one hand, the narrow framing of Acórdão 123/2021 was not replicated by the majority of judges that concurred in the 2023 decision. In the sense that a judicial reading that envisages assisted dying as permissible only in cases where the death process is imminent, the outcome of the process can be read as a partial victory for the political forces that promote said reforms for that narrow reading was dropped. On the other hand, many constitutional judges now recognize the existence of a fundamental right to a self-determined death whose content comprises the right to be assisted to die with dignity in extreme conditions of injury and illness (six out of thirteen). The joint reading of the opinions of these six justices results in a significant consequence: as the Constitution guarantees this fundamental right, then the provisions of the Criminal Code that criminalize, in all their amplitude, assistance to suicide are unconstitutional.

This means that the democratic legislature when legislating on assisted suicide is no longer simply exercising its margin of discretion and is also constitutionally obliged to do so. As one of the opinions explains, it is a "state obligation to revise the criminal provisions on assisted suicide (...) to prevent the total anihilation of the possibilities of exercise ". As another vote mentions, if the request for help to die is free and serious, "the constitutional legitimacy for punishing those who assist suicide ceases."

However, despite this changed framing produced by the ruling, the outcome of the decision was not successful for the legislature. It represented a problematic decision from a legal point of view.

The Court did not find merit in any of the issues raised by the President. Instead, the judges found that "suffering of high intensity" raised insurmountable interpretative doubts regarding its scope. The legislative wording defined it as physical, psychological, and spiritual suffering. However, the Court questioned whether the three dimensions were cumulative or alternative in light of comparative law and the Basic

Palliative Care regime. According to the Court, the answer to that question would lead to very different models of assisted dying, ranging from more generous to more restrictive. Problematically, the Court equated physical suffering to physical pain or, at least, to suffering that derives from physical pain and hypothesized:

"By way of example, can a patient diagnosed with cancer with a very limited life expectancy prognosis or a patient with amyotrophic lateral sclerosis, who has no physical suffering resort to medically assisted death?"

The Court failed to realize a specific condition: even though physical suffering is usually caused by physical pain, it is not always so. There are physical conditions, including amyotrophic lateral sclerosis, which the Court mentions *ex officio*, that may not cause physical pain but will likely produce terrible physical suffering.

By confusing physical suffering with physical pain, the Court replaced its understanding of suffering with the legislature's view, ignoring the expert hearings conducted during the legislative proceedings and the explicit legislative intent.

Although the Court has epistemic superiority in constitutional interpretation, it is highly problematic that it imposes its interpretation on other matters, ignoring the mediating and rationalizing function that parliamentary legislation represents.

The bulk of concurring and dissenting opinions discloses another problematic aspect of the ruling. The Court could not produce a clarifying and dialogical decision that could guide the legislature on possible ways forward in the task of legislative development. The judgment merely represents the juxtaposition of several individual positions, each with specific criticisms of the legislature. There is no collective voice in it, so no possible ways of remedying the unconstitutionality are indicated. The dissenting votes contradict their views on their reading of the clause. While Justice Joana Costa claims that the conditions are inevitably cumulative, Justice José João Abrantes thinks they are alternative. On the other hand, Justices Mariana Canotilho, José Eduardo Figueiredo Dias, Assunção Raimundo, and Ascensão Ramos believe that this clarification is

an impossible condition for the legislature to fulfill. A majority of judges in favor or at least not opposing assisted death cannot agree on the concrete legal regime to implement it.

This is symptomatic of another, more serious, and damaging lack of consensus related to the renewal of the composition of the Court. Whereas ten of the judges are elected by Parliament, the remaining three are selected by the elected judges via a process called co-optation. These three, including the President and Vice-President, have their mandates now expired, but the Court has been unable to reach a consensus to replace these judges.

It seems increasingly clear that the fate of assisted death in Portugal is interlocked with the blockage in the renewal of the composition of the Court. This phenomenon resonates with other sister courts that have also seen their renewal paralyzed or dragged, which has also conditioned the fate of other politicized cases (such as abortion and euthanasia in Spain).

The new draft bill, which will be voted on March 31, addresses not only the constitutional defects identified in the majority ruling but also the issue of subsidiarity between assisted death and euthanasia that was raised in several dissenting opinions. According to these opinions, the law should not consider the two concepts as alternatives but in a subsidiary relationship, putting euthanasia on a subordinate level in relation to suicide, in which the patient could only resort to the help of a third party when she is unable to resort to medically assisted suicide.