

# On the relationship between the fundamental right to life and assisted death

Gonzalo Arruego\*

ON THE RELATIONSHIP BETWEEN THE FUNDAMENTAL RIGHT TO LIFE AND ASSISTED DEATH

**ABSTRACT:** This paper tackles one of the classic queries surrounding the analysis of the right to life: what is the relationship, if any, between the fundamental right to life and the capacity to end one's own life, especially with the help of others? To answer this question the study explores the meaning of the fundamental right to life paying special attention, on the one hand, to the language used to proclaim it and, on the other, the doctrines of the ECtHR, the Spanish Constitutional Court, the Colombian Constitutional Court, the Supreme Court of Canada, the Italian Constitutional Court and the German Constitutional Court.

**KEYWORDS:** Right to life; assisted death; right to die; ECHR; ECtHR

**SUMMARY:** 1. Introduction – 2. The fundamental right to life – 2.1. The problem of the object of the right – 2.2. The nature of the fundamental right to life: the right to life as a guarantee – 2.3. The positive dimension of the right to life: a slippery slope? – 3. The relationship between the right to life and assisted death – 4. Final remarks.

## 1. Introduction

**D**espite the transcendence it is usually granted, it can be considered that the express protection of human life in human rights and constitutional documents is a «late comer». In this sense, and contrary to other fundamental rights strongly rooted in our constitutional history and tradition, the consecration of what we can call in general terms the «right to life» occurred after WWII<sup>1</sup>. This fact has probably conditioned its interpretation and possibly explains some

---

\* PhD in Law; LIM in Comparative, European and International Law; Public Law Department; University of Zaragoza. Mail: [garruego@unizar.es](mailto:garruego@unizar.es). This study is part of the National Research Project DERFUNDAT (PGC2018-093737-B-I00), funded by the Spanish Government. I would like to thank the anonymous reviewers for their insightful and helpful comments and suggestions. And I would like to express my deepest gratitude to Professor Wayne McIntosh for his careful reading of the original and his invaluable help. The article was subject to a double-blind peer review process.

<sup>1</sup> We find no mention in the *Magna Carta* (1215), the *Bill of Rights* (1869) or the *Declaration of the Rights of Man and of the Citizen* (1789). However, according to the 5th Amendment to the US Constitution (*US Bill of Rights* of 1791), «[n]o person shall be [...] deprived of life, liberty, or property, without due process of law». The first part of the second paragraph of the *Declaration of Independence* (1776) already affirmed that «[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness»; a wording which differs from that of Jefferson's «rough draft», which referred to the inherent right to «the preservation of life».

Reviews

of the internal tensions the right had already germinated<sup>2</sup>. Today, and after 70 years of its formal proclamation, those difficulties have progressively increased, probably as a result of the inherent peculiarities of its object: human life.

Dilemmas such as the protection that must be afforded to human life from the moment of conception, the legal definition of death and whether the right to life protects bare existence regardless of quality, are just a few examples of the many recurrent questions surrounding the analysis of the right to life.

The following pages tackle one of those classic queries: what is the relationship, if any, between the fundamental right to life and the capacity to end one's own life, especially with the help of others?

In order to answer this question, this study mainly focuses on the delimitation of the object of the fundamental right to life, as well as its content, as the key to provide a reply. Such an exploration pays special attention, on the one hand, to the language used to proclaim the right both in the main international human rights documents and the European Union member States' Constitutions. And, on the other hand, it analyses the interpretation of the right in the evolving doctrine of the European Court of Human Rights (ECtHR), in the jurisprudence of the Spanish Constitutional Court and in the case-law of those constitutional/supreme courts which have recognized, albeit with different scope, the constitutional legitimacy of assisted death: the Colombian Constitutional Court, the Supreme Court of Canada, the Italian Constitutional Court and the German Constitutional Court. In the light of the conclusions reached, the study closes by addressing the existing relationship between the right to life and assisted death.

As the title of the study suggests, in the following pages I will use the generic term assisted death to encompass two well-established terms, euthanasia and (physician) assisted suicide. This decision is based mainly on three different considerations. On the one hand, it is consistent with the nature of the question addressed by the study and the perspective adopted to answer it. On the other, and as the following pages illustrate, today the real debate does not turn so much around carrying out in private and alone the decision to end one's own life, but rather around the recognition of a right to be assisted/helped in dying, normally by public authorities and within a public health system. Finally, this decision is meant to avoid the at times artificial complexity of a debate that has become over populated with a myriad categories which have only obscured the central issue<sup>3</sup>.

<sup>2</sup> For example, and with regard to the object of this study, an analysis of pro-euthanasia movements since the 70's in H. INDABAS et al., *Declarations on euthanasia and assisted dying*, in *Death Studies*, 41, 9, 2017.

<sup>3</sup> This is the perspective adopted by the Spanish legislature. In this sense, the *Preamble of the Law 2/2010 of the Autonomous Community of Andalucía on the rights of the person and the protection of her dignity in the process of dying* asserts that: «[f]rom and etymological point of view euthanasia means good death. However, different adjectives such as "active", "passive", "direct", "indirect", "voluntary", "involuntary", have resulted in an increasing confusion among the citizens, the healthcare professionals, the media, the bioethicists and the lawyers». Actually, the bill to legalise assisted death being currently discussed by the Spanish Parliament avoids the use of any of those terms. Its object is the regulation «of the right to demand and to receive assistance to die», a right that encompasses «the direct administration by a healthcare professional of a substance to cause the death of the person» and «the prescription by a healthcare professional of a substance so that the person can cause her death herself».

## 2. The fundamental right to life

### 2.1. The problem of the object of the right

The first problem that any analysis of the fundamental right to life faces is definitional.

Obviously, no legal document clarifies what «human life» means<sup>4</sup>. This provides no help in resolving the dilemma of whether one should adopt a purely biological conception of what the right to life guarantees or should also integrate subjective and qualitative elements. In either case the questions about what human life is and when it begins and ends remain unsettled.

Dependence on the scientific and technological state of affairs and their increasing impact on juridical processes<sup>5</sup> boost those difficulties despite the fact that the law obviously provides juridical and not scientific answers<sup>6</sup>. And we cannot forget either the relevance of the socio-economic and cultural background, where changes are many times provoked by shifts in the scientific paradigm and/or by technological advances. Think, for example, about the following three examples in the context of end of life decisions.

First, practices that only a few years ago were studied under the umbrella of «euthanasia» have today become *lex artis* standardized medical procedures and, in some cases, even the expression of fundamental rights such as personal integrity<sup>7</sup>. Second, the role of health care professionals is being transformed due to their participation in processes whose nature is neither therapeutic nor palliative as well as the weight attributed to their decisions by the law. Actually, in jurisdictions that have legal-

<sup>4</sup> This has sometimes forced judges to establish the boundaries of the concept «human life» but, as Korff explains with regard to the doctrine of the ECtHR, only for the purposes of their resolutions and therefore exclusively in relation to the concrete facts under their scrutiny (D. KORFF, *The right to life. A guide to the implementation of Article 2 of the European Convention on Human Rights*, Strasbourg, 2006). The Spanish Constitutional Court considers that «human life» is an indefinite concept «whose definitions are plural depending on the perspective adopted (biological, ethical, theological...)» (Spanish Constitutional Court decision 53/1985/5).

<sup>5</sup> For example, with regard to the protection of the unborn, technical advances in neonatology are fundamental to fetal viability. Or, concerning the end of human life, the Law confronts the definition of death from scientific uncertainty but with the certitude that dying is a process; in this sense, from a legal point of view a human being can be considered simultaneously death and/or alive depending on the criterion adopted to certify death; as Skegg expressively depicted it, «a beating heart cadaver» (P. SKEGG, *F W Guest Memorial Lecture: The Edges of Life*, in *Otago Law Review*, 6, 4, 1988, 518). Significant changes in the life sciences and technologies are even conceived by Jasanoff as «bio-constitutional» (S. JASANOFF, *Introduction: rewriting life, reframing rights*, in S. JASANOFF, *Reframing Rights: Bioconstitutionalism in the Genetic Age*, Oxford, 2011, 3).

<sup>6</sup> As Glover already warned in the 70's, «[c]onventional lines for social or legal purposes could always be drawn, but we would be mistaken if we took the shadows cast by these lines for boundaries in biological reality» (J. GLOVER, *Causing Death and Saving Lives*, London, 1977, 127).

<sup>7</sup> This is the case of life saving or sustaining treatment refusal; in the Canadian Supreme Court doctrine see *Ciarlariello v. Schacter* [1993] 2 S.C.R. 119; in the case of the Spanish Constitutional Court see, among others, the decisions 154/2002 and 37/2011; with regard to the ECtHR, and despite the fact that the same conclusion could be inferred for example from *Pretty*, the Court has asserted that «no consensus exists among the Council of Europe member States in favor of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appear to allow it» (*Lambert and others v. France* (2015) § 147 and *Gard and others v. United Kingdom* (2017) § 83).

ized assisted death, doctors have even be depicted as «gatekeepers»<sup>8</sup>. Third, the debate on assisted death is historically recent and typical of advanced societies where death has increasingly become a medicalized process<sup>9</sup>.

## 2.2. The nature of the fundamental right to life: the right to life as a guarantee

Beyond the complexity of the concept of «human life», the truth is that human life is a natural fact. As a consequence, the right can only be understood as a guarantee that protects its bearer from the deprivation of his/her existence and that imposes on the State the duty to protect it. This conclusion is consistent with the historical moment in which the right was generally recognised, as a reaction against the atrocities of WWII, and with the language usually used to do so.

In contrast to less detailed consecrations such as the ones contained in article 3 of the *Universal Declaration of Human Rights* (1948)<sup>10</sup> or article 2 of the *Charter of Fundamental Rights of the European Union* (2000)<sup>11</sup>, let us examine the wording of article 6 of the *International Covenant on Civil and Political Rights* (1966)<sup>12</sup>, article 4 of the *American Convention on Human Rights* (1969)<sup>13</sup> and article 2 of the *European Convention on Human Rights* (1950)<sup>14</sup>. In the three cases, the explicit content of the

<sup>8</sup> S. MCLEAN, *Assisted dying: reflections on the need for Law reform*, Oxon, 2007, 198.

<sup>9</sup> «[The debate on assisted death] is new, occupying academic and public attention primarily in the late twentieth century and the early twenty first [...]. Consider just three of the many profound changes that affect matters of how we die. First there has been a shift, beginning in the middle of the nineteenth century, in the ways in which human beings characteristically die. Termed the “epidemiological transition”, this change involves a shift away from death due to parasitic and infectious disease [...] to death in later life of degenerative disease [...]. This means dramatically extended lifespans and also deaths from diseases with characteristically extended downhill terminal courses. Second, there have been changes in religious attitudes about death [...]. Third, among the major shifts in cultural attitudes that affect the way we die is the increasing emphasis on the notion of individual rights of self-determination [...] rights previously eclipsed by the paternalistic practices of medicine». This, in addition to other cultural changes has led to a situation where «dying is no longer *something that happens to you* but *something you do*. [Though] dying in the poorer countries continues to be different from dying in the richer countries» (M. PABST BATTIN, *Ending Life: Ethics and the Way We Die*, Oxford, 2005, 18, 325 and 86).

<sup>10</sup> «Everyone has the right to life, liberty and security of person».

<sup>11</sup> «1.-Everyone has the right to life. 2.- No one shall be condemned to the death penalty, or executed».

<sup>12</sup> Article 6.1: «Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life».

<sup>13</sup> Similarly to the *International Covenant*, its article 4.1 states that «[e]very person has the right to have his life respected» and that «[n]o one shall be arbitrarily deprived of his life». It is true that it has a peculiar addition: that the right to life shall be protected, «in general, from the moment of conception». Contrary to what it might seem at first reading, the intention of this wording was to exclude the possibility of considering the unborn entitled with the right to life, an interpretation incompatible with the legal diversity on abortion (see Inter-American Commission of Human Rights Resolution n. 23/81, Case 2141 (1981), especially § 19, and Inter-American Court of Human Rights *Artavia Murillo et al. v. Costa Rica (In vitro fertilization)* (2012), particularly § 264).

<sup>14</sup> Article 2.1: «Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law». Its second paragraph establishes a series of circumstances under which «deprivation of life shall not be regarded as inflicted in contravention» of the Convention, as death is the unintentional result from the legitimate and no more than absolutely necessary use of force (see ECtHR *McCann and others v. United Kingdom* (1995) § 148).

right to life is the prohibition of depriving a person of her life outside the circumstances defined by the law. The State's obligation to protect the lives of those subject to its jurisdiction is added to that prohibition.

The same conclusion results from the analysis of the European Union member States' Constitutions. In this sense, and leaving aside the peculiarities of the United Kingdom, we can distinguish between three situations within the EU<sup>15</sup>.

First, Constitutions which make no explicit reference to the protection of human life<sup>16</sup> or, at most, have abolished capital punishment. By chance or not, this is the case of the three EU countries where assisted death is fully legalised, the Netherlands, Belgium and Luxembourg<sup>17</sup>. Austria, Italy or Sweden are, constitutionally speaking, in a similar situation<sup>18</sup>.

Second, Constitutions which expressly protect human life and do so in the form of a guarantee or imposition on public authorities to protect human life. The Constitutions of Slovenia, Greece, Ireland or Poland are examples<sup>19</sup>. Also the Portuguese Constitution falls into this category: even though article 24 is titled «The right to life», its content is the «inviolability» of human life<sup>20</sup>.

Finally, some Constitutions proclaim the protection of human life using the term «right»; that is to say, they consecrate a «right to life». This is the case of the Constitutions of Germany, Spain, Cyprus, Bulgaria, Slovakia, Estonia, Finland, Latvia, Lithuania, Malta or Romania as well as the Charter of Fundamental Rights and Freedoms of the Czech Republic<sup>21</sup>. However, we should highlight that in many cases the meaning of the «right to life» is similar to that laid out in the previous group, that is, a guarantee or a duty to protect human life<sup>22</sup>.

Therefore, the prevailing conception concerning the protection of human life is what, in the words of the Supreme Court of Canada, we could call «the existential conception» of the right to life: the right is a guarantee of human existence<sup>23</sup>.

Whether the right simply protects «bare existence» or it also encompasses the guarantee of «living under certain conditions», varies from one jurisdiction to another and lies at the heart of the distinc-

<sup>15</sup> «The history of the UK's top judges' engagement with the right to life is therefore a short one [...]. The prevailing impression which emerges is that the top judges have been reluctant to re-frame English common law around the concept of the right to life. They have preferred to work with traditional legal categories and to allow the European Court of Human Rights to take the lead on the right to life per se» (B. DICKSON, *Human Rights and the United Kingdom Supreme Court*, Oxford, 2013, 101).

<sup>16</sup> For example, the Constitution of Denmark.

<sup>17</sup> Respectively, arts. 114, 14 a) and 18. It is true that the Belgian Constitution also guarantees in its article 23 the «right to lead a life according to human dignity». However, its content unfolds in different «economic, social and cultural» rights relating to employment, health protection, social security, housing, environment or culture, and whose exercise conditions have to be defined by the law.

<sup>18</sup> Arts. 85, 27 and 4, respectively.

<sup>19</sup> Arts. 17, 5.2, 40.3.2 and 38, respectively.

<sup>20</sup> Art. 24: «Right to life. 1.-Human life is inviolable; 2.-There will be no capital punishment under any circumstances».

<sup>21</sup> Arts. 2.2, 15, 28, 93, 19 and 22.1 of the German, Spanish, Bulgarian, Latvian, Lithuanian and Romanian Constitutions.

<sup>22</sup> For example, reading the Charter of fundamental rights and freedoms of the Czech Republic or the Constitutions of Cyprus, Eslovakia, Estonia, Finland or Malta, we infer that the «right to life» is really a guarantee which protects against the arbitrary deprivation of life; arts. 6, 7, 15, 16, 7 and 33, respectively.

<sup>23</sup> *Carter v. Canada (Attorney General)* 2015 SCC 5.

tion between the two different trends in which the existential understanding of the right as a guarantee unfolds: what we could call the *strict* and the *enriched* understandings of the existential conception of the right to life.

If, according to the strict existential conception, the right merely preserves the physical or biological existence of the individual, its enriched understanding problematically guarantees also that life ought to be lived in certain conditions which qualify as dignified. As we shall see *infra*, this distinction is especially important with regard to the duties the right to life imposes on public authorities and, consequently, to the legitimate demands of its bearer.

The *strict* conception appears to be the prevailing one, is more consistent with the way the right is proclaimed and is the consequence of understanding human life purely in biological terms. As the Spanish Constitutional Court explains, human life is a «process» which begins with conception and ends with death and whose constitutional protection is «gradual in nature»<sup>24</sup>. Therefore, if the object of the right is the physical or biological existence and as the ECtHR explains, the right «is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection [...] they may be reflected in the rights guaranteed by other Articles of the Convention», but not in the right to life<sup>25</sup>. A similar conclusion has been reached by the Canadian Supreme Court<sup>26</sup>.

The content of the right is hence focused on protecting the physical existence of its holder against serious aggressions or threats<sup>27</sup>. As explained above, existence is a biological fact and, therefore, the right is only intelligible as a duty to protect life and as the guarantee that its deprivation will not occur outside the strict circumstances established by law. In other words, the core meaning of the right is the prohibition of causing death but not absolutely: only outside the legally established limited conditions, the prohibition of the *arbitrary* deprivation of life.

This is the reason why the ECtHR categorically asserts that article 2 ECHR «is first and foremost a prohibition»<sup>28</sup>, why the right to life is described as «reactional», «defensive» or «negative»<sup>29</sup> and it also explains why there is nothing contradictory about proclaiming the right to life including provisions on capital punishment: the law is determining when the State can legitimately kill a citizen and

<sup>24</sup> Spanish Constitutional Court decision 53/1985/5.

<sup>25</sup> *Pretty v. United Kingdom* (2002) § 39.

<sup>26</sup> «In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights. We see no reason to alter that approach in this case [...] the existential formulation of the right to life» (*Carter v. Canada (Attorney General)* 2015 SCC 5 §§ 62 and 63).

<sup>27</sup> With regard to the Spanish Constitutional Court case law see Spanish Constitutional Court Edict 241/1985/2 or Spanish Constitutional Court decision 181/2000/8.

<sup>28</sup> «Article 2 of the Convention is first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being and does not confer any right on an individual to require a State to permit or facilitate his or her death» (*Pretty v. United Kingdom* (2002) § 54).

<sup>29</sup> Respectively, G. ARRUEGO, *Asistencia sanitaria coactiva y derechos fundamentales en la Ley 6/2002*, in J. PEMÁN (coord.), *Derecho sanitario aragonés*, Zaragoza, 2004; F. REY, *Eutanasia y derechos fundamentales*, Madrid, 2008; and L. ZUCCA, *Constitutional dilemmas*, Oxford, 2009.



therefore is simply establishing the boundaries of the right<sup>30</sup>. This also allows us to understand (partially) why decisions concerning the end of one's own life have traditionally been understood as an (impossible) conflict among the person's own rights. This is due to the fact that the use of the term «right» with regard to the right to life is equivocal: it is not strictly a right but a guarantee to the individual and a source of obligations for public authorities<sup>31</sup>. Yet this makes it barely intelligible: there is no conflict because what is at stake is determining the extent of the public authorities' duty to protect the lives of those under their jurisdiction.

In addition, we should underline one of the most peculiar characteristics of the right to life: it is basically a prohibition whose violation usually results in the death of the individual. This fact leads to a paradox: if it had not been interpreted that death is not necessary to infringe the right<sup>32</sup> and if the duty to protect life had not been expanded, the fundamental right to life would *de facto* be void from its bearer's point of view. Notice that, as a guarantee, it strictly has a reactionary content requiring protection when violated<sup>33</sup>. Its violation, however, usually means that the individual is already dead. This scenario is partially altered when we adopt the «enriched» interpretation of the existential conception of the right. Why does it alter it? And, why do we use the adjective «enriched» to describe it? The reason is that it problematically transcends the strict conception by adding to the mere preservation of physical existence the guarantee that life will be lived in a set of circumstances which qualify as «dignified». But, why is it only a partial alteration? Because the reactionary nature of the right to life as a guarantee of human existence is not transformed: it is the State's duty to protect the right, and therefore the scope of the possible demands by its bearer, which are transformed and expanded.

### 2.3. The positive dimension of the right to life: a slippery slope?

As argued above, the main feature of the fundamental right to life is that, as a guarantee, its content basically consists of imposing duties upon the public authorities: the obligation to preserve physical existence and, in the case of the enriched conception, to do so also ensuring certain *living* conditions. The relevant question is that the scope of the State's duty to protect life seems irresistibly to expand. The point of departure of this expansive dynamic is the recurring assertion that the prohibition to deprive from existence does not exhaust the content of the right to life. On the contrary, it also imposes on the authorities a set of positive duties whose goal is to protect human life. Traditionally, the

<sup>30</sup> «Here the message is simple: we have a right to life except when the state legitimately plans to execute us. It is a message long since forgotten in Europe due to the later enactments of Protocols 6 and 13 [...] It is significant, however, that the additional Protocols are not reflections of the right to life but distinct from it. They represent a limitation of (state) sovereignty for ratifying parties in respect of the death penalty, but this does not stem from an individual's right not to be deprived of his or her life. The death penalty has been practically eradicated from Europe but in a movement that is independent from the region's protection for the right to life» (E. WICKS, *The right to life and conflicting interests*, Oxford, 2010, 105).

<sup>31</sup> For example, the ECtHR has argued that «[w]hen [...] a detained person maintains a hunger strike this may inevitably lead to a conflict between an individual's right to physical integrity and the High Contracting Party's positive obligation under Article 2 of the Convention» (*Nevmerzhitsky v. Ukraine* (2005) § 93, among others).

<sup>32</sup> The ECtHR has reiterated that it is not necessary to cause death to appreciate that the right has been violated and that the right protects not only against effective aggressions but also against situations of risk.

<sup>33</sup> For example, Spanish Constitutional Court decision 120/1990/7.

way these obligations have been understood was coherent with the core content of the right. Typically, the law transposes the prohibition of causing death to private relations especially through Criminal Law provisions<sup>34</sup>; puts into force and implements norms; or even adopts preventive measures with the aim of ordering potentially life-threatening or hazardous activities and protecting the lives of those in danger<sup>35</sup>. The dilemma is how to define accurately the scope of the State's positive duty to «protect the lives of those under its jurisdiction», an obligation that is clearly exposed to a problematic *slippery slope*.

First, difficulties arise with regard to how the positive duties linked to the strict conception of the right have evolved. Consider, for example, the progressive recognition of a «procedural» dimension or their gradual extension. Although it is true that we can identify causal connections in each argumentative step, it is equally true that sometimes the connection disappears as soon as we examine the starting point and the conclusion. For example, are the positive duties arising from the right to life really so detailed as to require that an investigation into a violation of the right «should include an autopsy of the victim's body, whenever possible, in the presence of a representative of the victim's relatives»?<sup>36</sup> Or, what is the scope of the obligations imposed on public authorities with regard to potentially dangerous activities or the protection of the environment?<sup>37</sup>

Secondly, and more importantly, we witness the alteration of the object of the fundamental right to life. As noted above, this happens when the right does not only protect biological existence but also a «dignified» existence. In the case of the United Nations, this shift can be observed in the different *General Comments* on article 6 of the *International Covenant on Civil and Political Rights* (1966). While numbers 6 (1982) and 14 (1984) focused on the core meaning of the right as the prohibition against «arbitrary» killing, the more detailed number 36 (2019) expressly proclaims that the scope of the right to life goes beyond the mere preservation of life and also encompasses the right to «enjoy a life with dignity» (§ 3)<sup>38</sup>.

<sup>34</sup> With regard to the protection of human life *via* the Criminal Law in the ECtHR's case law see, among others, *Calvelli and Ciglio v. Italy* (2002) and *Vo v. France* (2004). A critical exam of this doctrine, concluding that it carries the potential of both coercive overreach and dilution of the right in N. MAVRONICOLA, *Taking Life and Liberty Seriously: Reconsidering Criminal Liability Under Article 2 of the ECHR*, in *The Modern Law Review*, 80, 6, 2017.

<sup>35</sup> On the protection against the violent acts of third parties it is usual to quote ECtHR *Osman v. United Kingdom* (1998), especially §§ 115 and 116; concerning the positive duties with regard to the suicidal impulses of a person in custody *vid.* ECtHR *Keenan v. United Kingdom* (2001); with regard to the risk generated by industrial dangerous activities see ECtHR *Guerra and others v. Italy* (1998) and, particularly, ECtHR *Öneryıldız v. Turkey* (2004).

<sup>36</sup> CCPR, United Nations, *General comment n. 36* (2019) § 28. Its draft (2017) was even more detailed as it demanded a «thorough» autopsy in the presence of a «pathologist» representing the family of the deceased.

<sup>37</sup> *Vid.*, among others, ECtHR *Öneryıldız c. Turquía* (2004) or IACtHR *Opinión consultiva OC-23/17 de 15 de noviembre de 2017, solicitada por la República de Colombia: Medioambiente y derechos humanos (Obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal –Interpretación y alcance de los artículos 4.1 y 5.1, en relación con los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos)*, especially §§ 212 y ss.

<sup>38</sup> Without judging the realizability of such right, it is striking that barely one of its 70 paragraphs expressly refers to it and using a vague language.



One can certainly perceive an uncontrolled expansion of the understanding of the protective dimension of the right. This carries the risk of confusing fundamental right to life demands with requests that, despite their legitimacy, can be traced back, where appropriate, to other different principles and values. There is an increasing danger of distorting and trivializing the right to life as a consequence of over-involving it and even making it unrealizable.

We might partially explain this dynamic as a consequence of some of the excesses that are usually incurred in interpreting the right to life and the connection that usually, and not by chance, is established between it and human dignity.

In this sense, the obvious fact that without existence there can be no bearer of rights, is usually used to improperly grant the right to life a unique position which is immediately reflected in its interpretation. For example, departing from the «sanctity of life principle» and from the aforementioned fact that, without the right to life, «enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory», the ECtHR awards «preeminence» to it «as one of the most fundamental provisions of the Convention»<sup>39</sup>. The same line of reasoning has been used by the Inter-American Court of Human Rights to conclude that «no restrictive approach is admissible with regard to the right to life»<sup>40</sup>. Moreover, the Spanish Constitutional Court has reiterated that the fundamental right to life «constitutes the essential and principal fundamental right» as, along with human dignity, they are the «logical and ontological *prius*» of every fundamental right<sup>41</sup>. In the Court's view, the right therefore has «a singular expansive nature»<sup>42</sup> which makes it «absolute and not subject to restrictions»<sup>43</sup>.

As we can see, and unsurprisingly, the fundamental right to life is immediately connected with the notion of human dignity<sup>44</sup>. As explained above, the right to life-human dignity linkage enriches the strict understanding of the fundamental right to life: from mere preservation of physical existence to a guarantee of living under certain conditions (e.g. related to environment, health, food, shelter, etc.), eventually even including the person's perception of those conditions. This is a subtle shift, but one that inevitably transforms the scope of the right and that can turn it into something unrecognizable. It is true, however, that many of those conditions are connected to other constitutional values and principles. The problem is how to insert them correctly into the system of fundamental rights.

Note that, taken to the extreme, it is relatively easy to establish a link between almost any imaginable matter and the material and spiritual conditions surrounding human life. A small step forward and we risk trivializing the right by making it absolutely dependent on the will and resources of the

<sup>39</sup> *Pretty v. United Kingdom* (2002) §§ 37 and 65.

<sup>40</sup> *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala* (1999) § 144.

<sup>41</sup> Spanish Constitutional Court decision 53/1985/3, among others.

<sup>42</sup> Spanish Constitutional Court edict 304/1996/3.

<sup>43</sup> Spanish Constitutional Court decision 48/1996/2.

<sup>44</sup> On the connection right to life-human dignity *vid.*, among others, E. WICKS, *The Meaning of «Life»: Dignity and the Right to Life in International Human Rights Treaties*, in *Human Rights Law Review*, 12, 2, 2012; on the use of human dignity in the assisted death debate see K. LOVELAND, *Death and its dignities*, in *New York University Law Review*, 91, 2016 and S. MUDERS (ed.), *Human dignity and assisted death*, Oxford, 2017.

public authorities. Without negating the transcendence of the underlying questions, we seem to witness an uncontrolled «ballooning of the content» of the right<sup>45</sup>.

For example, does the right to life entail access to potentially life-saving medicines?<sup>46</sup> To enjoy a «dignified existence»?<sup>47</sup> And which conditions make an existence dignified: food, clothes, shelter, education...?<sup>48</sup>

And what about environmental matters? Where are the limits of the duties arising from the right to life? Does the right to life really directly impose the exhaustive «regulation, licensing, control or supervision» of «potentially dangerous activities to life and health» due to their negative impact on the environment? Or the access to quality water not only for drinking but also for «personal hygiene and domestic cleaning»?<sup>49</sup>

<sup>45</sup> As Griffin explains, as soon as we start to reflect «on the grounds for a right to life [...] the scope of the right seems irresistibly to expand. The grounds tend to a generality that justifies more than just a prohibition of murder. If living at liberty is of great value (to take an indisputable human right), then living, as well as living in that way, is valuable, and that seems to justify a claim to some broader preservation of life. It would seem to justify a wider negative right than just the prohibition of murder – say, a prohibition of gratuitously endangering other people’s lives or of destroying their rationality. What is more, it would seem to justify some positive rights. If you are drowning, and all that I have to do to save you is to toss you the life-belt next to me, and I disregard your plight, do I not violate your right to life? Does the right not include a positive right to rescue, at least if the cost to the rescuer is not great? And if it includes a right to be tossed a life-belt if one were drowning, would it not include a right to food if one were starving, or to medicine if one were dangerously ill? And if it includes those, does it also include a right to conditions, such as clean water and female literacy, the absence of which drastically shortens a child’s life? This ballooning of the content of the right to life is not just a theoretical possibility; it is just what has happened» (J. GRIFFIN, *On Human Rights*, Oxford, 2008, 212 and 213).

<sup>46</sup> For example, granting access to generic antiretrovirals to fight AIDS in Kenya, *vid.* J. HARRINGTON, *Access to essential medicines in Kenya: intellectual property, anti-Counterfeiting and the right to health*, in *Law and Global Health. Current Legal Issues*, 16, 2012; with regard to ECtHR’s doctrine on the right to access experimental medical treatments see *Hristozov and others v. Bulgaria* (2012) and *Gard and others v. United Kingdom* (2017). In August 2006, *England’s National Institute for Clinical Excellence (NICE)* ruled against the inclusion in the National Health Service (NHS) of two treatments for late stage bowel cancer because their cost was considered excessive to extend the lives of those with terminal bowel cancer by five months, *vid.* N. ROSE, *The Value of Life: Somatic Ethics & the Spirit of Biocapital*, in *Daedalus*, 137, 1, 2008.

<sup>47</sup> Inter-American Court of Human Rights *Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala* (1999) § 144.

<sup>48</sup> For example, the Supreme Court of India has asserted that «[w]e think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self» (*Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981) 1 SCC 529). In Yorke’s opinion, among the positive obligations arising from the fundamental right («to promote the right to life») are «reducing infant mortality» or «increasing life expectancy, which will involve having an adequate healthcare service to tend to the population’s health needs» (J. YORKE, *Introduction*, in J. YORKE (ed.), *The Right to Life and the Value of Life: Orientations in Law, Politics and Ethics*, Farnham, 2010, 4).

<sup>49</sup> Inter-American Court of Human Rights *Opinión consultiva OC-23/17 de 15 de noviembre de 2017, solicitada por la República de Colombia: Medioambiente y derechos humanos (Obligaciones estatales en relación con el*

### 3. The relationship between the right to life and assisted death

As described above, the right to life is a guarantee. It is a negative or reactional right which imposes on the public authorities a prohibition (not to cause death) as well as a set of positive duties (to protect the lives of those under their jurisdiction). Therefore, a hypothetical right to end one's own life, whether or not with the help of others, is simply alien to it. From this point of view, the right to life shows an inelasticity which is consistent with the way it is repeatedly proclaimed and interpreted.

This brings us to an extremely illuminating fact: even those jurisdictions that recognize the constitutional legitimacy of assisted death do not accommodate it in the right to life. Neither the Colombian Constitutional Court, nor the Canadian Supreme Court, the Italian Constitutional Court or the German Constitutional Court, which have all recognized, though with different scope, the constitutionality of assisted death, have altered the «existential» understanding of the fundamental right to life.

In this sense, the Colombian Constitutional Court has inferred from the Constitution a fundamental right to a dignified death which entitles the individual to manage the final moments of his life in a medicalised context<sup>50</sup>. And the Canadian Constitutional Court<sup>51</sup>, the Italian Constitutional Court<sup>52</sup> and the German Constitutional Court<sup>53</sup> have found the criminal legal framework on assisted death to be unconstitutional on two separate but related grounds. On the one hand, the existence of a constitutional context of rights and principles which empowers individuals with a capacity of self-determination with regard to one's own death whose scope varies and, on the other hand, the fact that current laws governing end of life decisions are flawed because of inconsistencies.

Furthermore, the doctrine of those four courts and of the European Court of Human Rights show that the right to life neither precludes the recognition of assisted death<sup>54</sup> nor that they are totally unrelated. On the contrary, the positive duties arising from the right to life have important implications for the eventual regulation of assisted death.

Thus, while the nature of the fundamental right has not changed, the interpretation of the positive duties arising from it has: in the light of the constitutional rights and principles involved, the free and

---

*medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal – Interpretación y alcance de los artículos 4.1 y 5.1, en relación con los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos) §§ 111 y 121.*

<sup>50</sup> See, mainly, Decisions C-239/97 and T-970/14.

<sup>51</sup> *Carter v. Canada (Attorney General)* 2015 SCC 5.

<sup>52</sup> Decisions 207/2018 and 242/2019 (*Cappato*).

<sup>53</sup> Judgement of February 26<sup>th</sup> 2020, which enshrines the «right to a self-determined death».

<sup>54</sup> As the Canadian Supreme Court explains in *Carter*, «[...] we do not agree that the existential formulation of the right to life *requires* an absolute prohibition on assistance in dying, or that individuals cannot “waive” their right to life. This would create a “duty to live”, rather than a “right to life”, and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment. The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life. But s. 7 also encompasses life, liberty and security of the person during the passage to death. It is for this reason that the sanctity of life “is no longer seen to require that all human life be preserved at all costs” (*Rodriguez*, at p. 595, per Sopinka J.). And it is for this reason that the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect» (*Carter v. Canada (Attorney General)* 2015 SCC 5 § 63).

responsible will of a person to end her life and to do so with the assistance of others does not yield, at least under certain well defined circumstances, to the State's obligation to protect life.

The doctrine of the European Court of Human Rights, which the German Constitutional Court has somehow taken to its last consequences, is the perfect example of how the traditional scenario regarding assisted death has subtly and progressively changed. Indeed, the Courts' understanding of the positive duty to protect human life (article 2 ECHR) has evolved through a gradual recognition of the principle of personal autonomy and the belief that end of life decisions are reflected in the right to private life (article 8 ECHR)<sup>55</sup>.

Initially, the Court clearly excluded any assistance in the death of others from the concept of privacy «by virtue of [its] trespass on the public interest of protecting life»<sup>56</sup>. It was even possible to infer from its doctrine that the individual's will yielded to the public authorities' positive duty to protect life<sup>57</sup>. In the end, the Court has recognized that article 2 ECHR cannot prevail over a free and responsible person's resolution to end her life, but rather obliges the State to adopt preventive measures precisely to ensure that her will is free and responsible and to protect vulnerable persons<sup>58</sup>. Furthermore, the Court has concluded that the decision to end one's own life is protected by article 8 ECHR. In this sense, the Court's doctrine has evolved from the assertion that it was «not prepared to exclude» that preventing the applicant «by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life» constitutes «an interference with her right to respect for private life»<sup>59</sup>, to expressly affirm that «an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life»<sup>60</sup>. This has transformed the discussion: the debate *is no longer* whether a right to end one's own life and to do so with the help of others exists, but rather how and with which requirements and restrictions it can be recognized and regulated<sup>61</sup>.

<sup>55</sup> The Court's case-law ranges from the examination of the justification of the blanket prohibition on assisted death (*Pretty*) to the State's positive duties and the requirements to access assisted death in those jurisdictions which have adopted «a liberal approach» on the matter (*Haas, Koch and Gross*). And it has done so in relation to the will to die of those who are not capable of taking their own lives due to their clinical condition (*Pretty and Koch*), to those who suffer from a mental illness (*Haas*) and to those who are simply tired of living (*Gross*).

<sup>56</sup> EComHR *R v. United Kingdom* (1983) § 13.

<sup>57</sup> ECtHR *Keenan v. United Kingdom* (2001); *vid.*, in this sense, Lord Bingham in *The Queen on the Application of Mrs Dianne Pretty (Appellant) v. Director of Public Prosecutions (Respondent) and Secretary of State for the Home Department (Interested Party)* [2001] UKHL 61 § 8.

<sup>58</sup> ECtHR *Haas v. Switzerland* (2011) §§ 54 and 57.

<sup>59</sup> ECtHR *Pretty v. United Kingdom* (2002) § 67.

<sup>60</sup> ECtHR *Haas v. Switzerland* (2011) § 51; ECtHR *Koch v. Germany* (2012) § 52; and ECtHR *Gross v. Switzerland* (2013) § 59, where the Court expressly appeals to the applicant's «right to end her life» (§ 66).

<sup>61</sup> J. DORSCHIEDT, *Euthanasia and physician-assisted suicide from a human rights perspective*, in B. TOEBES et al. (eds.), *Health and Human Rights in Europe*, Antwerp, 2012, 188. It is true that the vast majority of the Council of Europe member States have translated the positive duties imposed by article 2 ECHR into the blanket prohibition on assisted death probably after evaluating their (in)capacity to neutralize its inherent risks; see ECtHR *Haas v. Switzerland* (2011) § 55.

And this is, precisely, where the crux of problem lies: how can we guarantee the freedom and responsibility of an irreversible decision while complying with the duty to protect human life imposed by the fundamental right to life?

This perspective explains the procedural safeguards usually adopted by those legal orders that have legalised assisted death in order to verify that the decision to die is reached freely and responsibly (for example, the need to reiterate the decision or the process of informing patients about alternative therapeutic choices, such as availability of palliative care). Moreover, some jurisdictions seem to share the belief that the model most consistent with the obligations arising from the right to life is a «medicalised» one<sup>62</sup>, because it provides more certainty and safety to the patient (to die without pain and suffering) and more effective implementation of the aforementioned safeguards.

But, as the German Constitutional Court doctrine shows, those precautions usually transcend the obligation to preserve life and force us to face some apparent inconsistencies. The principal question is how to justify that a faculty apparently innate to every person regardless of circumstances (to decide how and when her life will end) is nonetheless legalised taking into account her clinical condition as a substantive requirement<sup>63</sup>. To put it from a different perspective: if the goal is to guarantee freedom and responsibility and to protect the vulnerable (*Carter, Pretty, Haas, Cappato*)<sup>64</sup>, how can we justify the clinical restrictions usually adopted when legalising assisted death?

The traditional conception of the obligation to protect life as being independent of the person's will overcame these apparent inconsistencies: under the extreme circumstances that usually entitle an individual to seek assisted death where it has been regulated, the duty to protect life would simply yield. Otherwise, the imposition of the obligation to preserve life would be disproportionate. We can still trace this rhetoric in the references to the suffering of those who request assistance to die and the extremely dramatic situations they face, which are very often acknowledged in the reasoning of those courts that have legalised it. The problem, however, is that this conception of the obligation to preserve life is probably no longer compatible with the constitutional framework of principles, values and rights and with how its interpretation has evolved. This explains why courts do no longer conceive the preservation of life *per se* as the justification to prohibit assisted death, but the difficulties to ensure freedom and responsibility and the protection of those who are vulnerable. In this sense, we have progressively shifted from an absolute to a contingent justification of the «blanket prohibition»<sup>65</sup>.

<sup>62</sup> See, for example, the Italian Constitutional Court doctrine.

<sup>63</sup> As the Court explains in its 26<sup>th</sup> February 2020 decision, the «right to a self-determined death» cannot be circumscribed to a clinical condition or to any other substantive circumstances alien to the individual's will. On the contrary, the right belongs to every person at every stage of her life and there is no need for her to explain or to justify her free decision to die: State and society must respect it as an expression of self-determination.

<sup>64</sup> This is of course a contingent argument, because if the risks could be neutralized there would be no reasons against the legalisation of assisted death.

<sup>65</sup> But we cannot forget either the apparent contradiction present in the fact that those usually entitled with the faculty to end their lives with the assistance of others are, at the same time, usually considered to be vulnerable. Maybe it's time to boldly acknowledge that «the real question [...] is how much risk to the vulnerable we are prepared to accept [...] in order to facilitate suicide by the invulnerable» (Lord Sumption in UK Supreme Court, *R (on the application of Nicklinson and another) (Appellants) v. Ministry of Justice (Respondent); R (on*

#### 4. Final remarks

This paper opened with the following question: what is the relationship, if any, between the right to life and a hypothetical capacity to end one's own life, especially with the help of others?

The preceding pages have explored the nature and the content of the right to life to conclude that it cannot accommodate a right to end one's own existence, with or without the help of others. But, as it has been shown, that conclusion does not mean they are unrelated; nor does it mean that the right to life precludes a recognition of that capacity. Indeed, the two are inevitably linked. A connection arises from the positive duty of the State to protect human life imposed by the right to life: it can no longer nullify the free and responsible decision to die, but obliges to adopt safeguards to ensure freedom, responsibility and the protection of the most vulnerable.

It is true that after evaluating its inherent risks, most legal orders have translated that obligation into the blanket prohibition of assisted death. But this prohibition coexists with the legitimacy of decisions that *de facto* allow individuals to choose death over life, even with the necessary assistance of others. As the doctrines of the Canadian Supreme Court and the Italian Constitutional Court show, this normative situation seems increasingly difficult to explain. Are we approaching an *impasse*? Have we entered a «no man's land» between, on the one hand, a blanket prohibition on assisted death whose constitutionality is increasingly difficult to uphold and, on the other, the lack of express constitutional support, but not rejection, to a right to assisted death? Such uncertainty will only increase if legislators do not face it, thus leaving decisions to the judges<sup>66</sup>.

In fact, some courts have acknowledged that it is the responsibility of parliamentary lawmakers to debate and enact appropriate regulations in this domain. For example, and in order to allow the Parliament to exercise appropriate legislative power to establish comprehensive regulations and to avoid the problems deriving from a legal void, the Canadian Supreme Court suspended in *Carter* the declaration of invalidity of the current legal framework on assisted death and, in *Cappato*, the Italian Constitutional Court adjourned the case until a new hearing one year later in the spirit of a «loyal institutional collaboration» with the Parliament. The UK Supreme Court expressly refused rule on the blanket ban on assisted death reasoning that the Parliament, as the democratic representative body, is much better situated to deal with such thorny issues (*Nicklison and Conway*)<sup>67</sup>. And the Irish Su-

---

*the application of AM) (AP) (Respondent) v. The Director of Public Prosecutions (Appellant); R (on the application of AM) (AP) (Respondent) v. The Director of Public Prosecutions (Appellant) [2014] UKSC 38 (2014) § 229.*

<sup>66</sup> «[...G]overnments are normally reluctant to stir up opposition and risk a backlash on the part of influential interest groups. The politically astute strategy is to avoid dealing with these issues unless compelled to do so» (L.W. SUMMER, *Assisted Death: A Study in Ethics and Law*, Oxford, 2011, 210).

<sup>67</sup> UK Supreme Court *R (Nicklison and other) v. Ministry of Justice; R (AM) v. General Prosecutor [2014] UKSC 38 (2014)*. More recently, the Court has asserted that «[u]nder the United Kingdom's constitutional arrangements, only Parliament could change this law. But the Supreme Court could, if it thought right, make a declaration that the law was incompatible with the Convention rights, leaving it to Parliament to decide what, if anything, to do about it [...]. These are questions upon which the considered opinions of conscientious judges may legitimately differ [...]. Ultimately, the question for the panel is whether the prospects of Mr Conway's succeeding in his claim before this court are sufficient to justify our giving him permission to pursue it [...]. [I]t has been concluded that in this case those prospects are not sufficient to justify giving permission to appeal» (*R (Conway) v. Ministry of Justice* (November 27th 2018) §§ 7 and 8). Lord Steyn had already argued in *Pretty* that «[i]f s 2 of the 1961 Act is held to be incompatible with the convention [...] such a fundamental change cannot be



preme Court, after upholding the constitutionality of the absolute ban on assisted death, hinted at the possibility of reconsidering the current criminal framework within the Constitution when extreme and dramatic circumstances occur<sup>68</sup>.

Are the Parliaments of those jurisdictions where the *blanket prohibition* still stands running out of time? Is the clock ticking? Just imagine: what would happen if the ECtHR, in an «à la Carter» change of doctrine, were to conclude that the blanket prohibition on assisted death can no longer be justified under the ECHR?

Reviews

---

brought about by judicial creativity. If it is to be considered at all, it requires a detailed and effective regulatory proposal. In these circumstances it is difficult to see how a process of interpretation of convention rights can yield a result with all the necessary in-built protections. Essentially, it must be a matter for democratic debate and decision-making by legislatures» (House of Lords *R (Pretty) v. General Prosecutor and Secretary of State for the Home Department* [2001] UKHL 61 (2001) § 57).

<sup>68</sup> «The Court accepts [...] that the legislation in question called for a careful assessment of competing and complex social and moral considerations [...] which legislative branches of government are uniquely well placed to undertake [...]. There can be no doubt but that Article 40.3.2 imposes a positive obligation on the State to protect life [...]. The precise extent of the State's obligation in any given circumstance is, however, a matter which may require careful analysis and, at least in some cases, require a careful balancing of other constitutional considerations [...]. It may well be, therefore, that as part of its obligation to vindicate the right to life, the State is required to seek to discourage suicide generally and to adopt measures designed to that end. It does not, however, necessarily follow that the State has an obligation to use all of the means at its disposal to seek to prevent a person in a position such as that of the appellant from bringing her own life to an end [...]. Nothing in this judgment should be taken as necessarily implying that it would not be open to the State, in the event that the Oireachtas were satisfied that measures with appropriate safeguards could be introduced, to legislate to deal with a case such as that of the appellant. If such legislation was introduced it would be for the courts to determine whether the balancing by the Oireachtas of any legitimate concerns was within the boundaries of what was constitutionally permissible» (Irish Supreme Court *Fleming v. Ireland and others* [2013] IESC 19 (2013) §§ 106, 107 and 108).

