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## Not intrinsically unconstitutional: the Portuguese constitutional court, the right to life, and assisted death

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### ABSTRACT

Recently, there have been debates in Portugal regarding the morality of assisted death. One of the leading opponents in Portuguese society against assisted death are Catholics. They argue that the right to life implies that assisted death is immoral and provide four key arguments they believe justify their position. In this article, we reply to these four articles and show that they all fail.

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### Introduction

The Portuguese Constitutional Court (PCC) has ruled the law the parliament drafted regarding assisted death as unconstitutional. Nonetheless, the PCC also affirmed that assisted death is not intrinsically unconstitutional and that, for that reason, it does not seem that it is legally impossible to pass an assisted death law. Notably, the PCC argued that the right to life is not incompatible with assisted death. Many Catholic sectors of Portuguese society have contested this idea and upheld that the right to life is inconsistent with assisted death. This short report evaluates arguments raised mostly by Portuguese Catholics against the compatibility of the right to life and assisted death. Although Portuguese Catholics are by no means the only group opposing this law, they have, historically, been one of the main opposers to the assisted death law in Portugal (Sanches 2020). To introduce a philosophical analysis of the Portuguese public sphere debate, we reconstruct the four main arguments that Portuguese Catholics have raised by combining the claims that they have made with academic literature and reply to each, showing that they all fail to show the incompatibility between the right to life and assisted death. While we engage with the academic literature on assisted death, our intention here is not to make a definitive case for permitting assisted death. Instead, the aim is to engage with the debates in the Portuguese public sphere and provide a philosophical defence of the PCC's claim that the right to life does not preclude

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assisted death in response to the main opposers to this idea in the Portuguese context (i.e., the Catholics). While others, notably Joel Feinberg (1978) and L. Wayne Sumner (2011), have addressed objections on this basis, we consider the extent to which these objections are allayed in the context of the PCC judgement. This question is important to answer in the Portuguese context (and indeed, the European context) due to the Catholic cultural groundwork embedded in the debate. In particular, for this case, some questions raised by the PCC can only be ultimately responded to by alluding to the mores of society. More specifically, things such as understanding what constitutes suffering can only be answered by looking at social norms and understandings regarding this matter. The following section will outline the debate on assisted death in Portugal. The following section will reconstruct four arguments made by Catholics and respond to them: (i) the right to life is not ours to waive, (ii) the right to life is foundational, (iii) assisted death causes harm to others, and (iv) all killing of innocents is murder.

### Assisted death in the Portuguese context

The public debate about assisted death in Portugal started in 1995. At the time, the National Council of Ethics for Life Sciences (Conselho Nacional de Ética para as Ciências da Vida/CNECV) issued an assessment which stated that assisted death was unacceptable because it would lead to the break of trust between the patient and the doctor leading therefore to the total liberalization of the licence to kill. Further, it was claimed that no ethical argument could morally justify health professionals intentionally killing a patient (Sanches 2020). Although the topic routinely came to public discussion, it was only in 2016 that it gained more relevance in Portuguese society when a civil movement called ‘The Right to Die with Dignity’ (Direito a Morrer com Dignidade) brought assisted death to the centre of the political debate by sending a petition to the Portuguese parliament to debate the issue (Neves and Águas 2022). The Portuguese Federation for Life (Federação Portuguesa pela Vida), a movement with the opposed view, sent, in 2017, another petition to parliament with the title ‘All Life has Dignity’. In this petition, it was requested that medically assisted suicide is not enacted into law. In this petition, The Portuguese Federation for Life evoked Article 24 of the Portuguese Constitution, which states there is a right to life: ‘human life is inviolable’.<sup>1</sup> In 2018, a law project of the Socialist Party for decriminalizing medically assisted death was rejected in parliament (Sanches 2020).

Nonetheless, since 2019, the outlook of the Portuguese parliament has changed significantly, with members of the new left and liberals having more parliamentary seats (Finn 2017). The different parliamentary distribution allowed new law proposals for assisted death to be approved. In 2021, the first proposal was approved by parliament. As the Portuguese law-making rule obliges, a draft law ought to be sent to the President, who can promulgate it, reject it or send it to the constitutional court. President Marcelo Rebelo de Sousa decided to send it to the Portuguese

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<sup>1</sup>The Portuguese Constitution refers to the principle that ‘Life is inviolable’ rather than making specific reference to the right to life. While there are potentially some conceptual differences, we will refer to the term ‘right to life,’ which is widely accepted internationally, and was also discussed by the PCC judges.

Constitutional Court, which, in turn, ruled that the law was unconstitutional, though not because it violated the right to life. The President of the Constitutional Court at the time, Judge João Pedro Caupers, explained that:

The right to life does not entail a duty to live under any circumstances [and that] the conditions under which medically assisted death is legally acceptable must be ‘clear, anticipated and controllable’. Therefore, it is the task of the legislator to define such conditions safely for all people involved in the process (Renascença 2023). (our translation)

According to this ruling, although the right to life in the Portuguese Constitution does not entail a duty to live, important practical safeguards must be in place. Hence, the parliament revised the law and redrafted it according to the Portuguese Constitution to undertake a new approval process. The parliament did so two more times, but they both failed for reasons not related to the question of the right to life (Francisco 2023).

### Assisted death and the right to life

Despite this ruling, the idea that the right to life implies that assisted death is immoral is still prevalent in conservative Catholic circles (Carmo 2020; Renascença 2016, 2017; SAPO 2023; Vatican News 2022). Key arguments against assisted death point to interrelated ways in which the right to life could have a bearing on assisted death: The party fulfilling the request could be said to violate the commonly recognized right to life, and, even more controversially, the person who requested assistance in dying could be said to violate a ‘duty to live.’ This section expands on the PCC decision regarding the right to life, before considering arguments that attempt to arrive at the impermissibility of assisted death based on the right to life.

#### The right to life in the PCC decision

Importantly, in their judgement, the PCC is explicit that the right to life does not, in principle, disqualify the law:

The right to live (and, therefore, not to be killed) is not opposed to the right to die or to be killed (by a third party or with the support of the public authority) (Acórdão do Tribunal Constitucional 2021)

This idea gains support from the claim that the right to life is *waivable* (Brock 1992; Tooley 1972). When one has a right to something, one can generally also waive that right. Brock suggests that, in consenting to be killed, a person has ‘waived his or her right not to be killed’ (Brock 1992, 53). Tooley similarly claims that we can permit others to destroy things to which we have a right and that our own life is not an exception to this rule (Tooley 1972, 207). In this way, the suggested link between the right to life and a purported ‘duty to live’ might, given appropriate background conditions, be severed. This seems to be the course the PCC took in arriving at their guidance.

However, opponents of assisted death may object that some rights are inalienable (Feinberg 1978).<sup>2</sup> They cannot be taken or given away, even by oneself. For instance, a common thought is that we do not have the right to sell ourselves into slavery

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<sup>2</sup>Albeit the term used is ‘inviolable’ it is meant to express the same as ‘inalienable’.

(Kuflik 1984). Several Catholic organizations in Portugal and elsewhere have insisted on this point in relation to the right to life (Carmo 2020; Vatican News 2022). They argue that this right is similarly inalienable, so we cannot choose to waive it. In what follows, we will outline the four main justifications that appeared in the Portuguese public sphere regarding the idea that the right to life *cannot* be waived, which would thereby provide additional reasons to reject the proposed assisted death law.

An important proviso is that, although we consider the Catholic basis for objections, in considering these arguments, we assume the need for the provision of *public reasons*. That is, although a significant number of Portuguese people identify as Roman Catholic, a separation between Church and State is also recognized. In this case, rules that bind everyone should be based on *reasons* that all reasonable citizens could endorse (Rawls 2005). If a justification derives its force from a belief in a metaphysical entity that not all reasonable people accept, the Constitution cannot legitimately appeal to it. In what follows, then, we will assume that objections should appeal to principles that do not have solely religious foundations.

### ***The right to life is not ours to waive***

An initial objection is that there is a duty to live because one's life does not belong to oneself. This argument is of religious inspiration: lives belong to God, and we have no right to take them, only He does. Samuel Adams (quoted in Feinberg's influential article *Voluntary Euthanasia and the Inalienable Right to Life*) expresses this idea as follows:

If men, through fear, fraud, or mistake, should in terms renounce and give up any essential natural right, the eternal law of reason would absolutely vacate such renunciation; the right to freedom being the gift of God Almighty, it is not in the power of Man to alienate this gift, and voluntarily become a slave. (Feinberg 1978)

Some Portuguese Catholics tend to use sources from the Vatican to fundament their view (Carmo 2020). Routinely, they cite the Second Vatican Ecumenical Council, which states that assisted death offends the dignity of the creator (Second Vatican Ecumenical Council 1965), and Pope John XXIII's *Mater et Magistra* and *Pacem in Terris* that affirm, respectively, that 'Human life is sacred – all men must recognize that fact. From its very inception it reveals the creating hand of God' (John 1961). In this case, Tooley's suggestion that we can permit others to destroy things to which we have a right does not apply: the right to life is not ours to waive.

An initial problem is that this contention raises the problematic possibility that the right to life must be regarded as a 'mandatory' right – one that 'confers no discretion on its possessor' (Feinberg 1978, 105). In addition to being paternalistic, a mandatory right to life risks imposing an implausible 'duty to live.' At its extreme, this duty undermines the right to refuse life-saving treatments, a fundamental tenet of medical ethics. The claim that the right to life is, in principle, waivable derives support from the fact that it is generally accepted, morally and legally, that there is a right to refuse life-sustaining treatments (Sumner 2011, 85), the exercise of which is usually seen to vindicate both the patient and the practitioner from moral and legal liability. The PCC explicitly makes this point:

The right to live (and, therefore, not to be killed) is not opposed to ... a right to choose whether or not to continue to live. (9)

This provides a solid reason to reject the conclusion that the right to life is, in principle, nonwaivable.

### **The right to life is foundational**

It could be argued that the right to life cannot be waived because it is basic: it is a priority right from which all other rights flow, including the right to self-determination that is typically seen as justifying assent to requests to die (Feinberg 1978). The suggestion is that, without life, there can be no self-determination, so the right to life must take priority and cannot logically be relinquished (Carmo 2020; Renascença 2016).

Two sorts of responses to this argument are possible. First, the right to self-determination is the basic source of any valuation, including the valuation of life. Moreover, our capacity for autonomy makes life valuable. It is unusual, for instance, to regard animals as having a right to life since they are not autonomous. If these arguments are accepted, the priority of rights appears to be inverted. At the very least, both rights – to self-determination and life – are mutually reliant, so the priority of life is not absolute. This appears to be the conclusion reached by the PCC:

The fact that a fundamental right, such as the right to life, constitutes a condition *sine qua non* of all other rights does not necessarily result in its permanent axiological superiority over other rights. (Acórdão do Tribunal Constitucional 2021)

A second, perhaps less controversial response is to point out that there is no suggestion that the right to life is being relinquished, since waiving is different from relinquishing. Relinquishing entails no longer possessing an individual right, while waiving does not have this implication. Feinberg explains that:

It does not follow from the inalienability of the right to life, that I may not decline to exercise it positively or that I cannot waive it (by releasing others from their duties not to kill me or let me die) if I choose. If I decline to exercise the right in a positive way or else waive it, then it is my life that I alienate, not my right to life. (Feinberg 1978, 115)

In seeking assisted death, one is not relinquishing the right to life but waiving a right that one retains.

### **Degradation of life**

A third way to oppose the waivability of the right to life in the case of assisted death invokes the idea that waiving the right through assisted death undermines the right to life by denigrating its value. In this case, the duty to live, and prohibitions on assisting one to die are derived from an obligation not to degrade the social value of life (Gray 1999, 25). It could be argued that permitting assisted death to happen degrades or devalues life, thereby indirectly harming the community (Carmo 2020; Renascença 2016; Vatican News 2022). In this case, suicide and assisted death are arguably not merely matters of self-determination and individual dignity but have effects that extend

into the social fabric. Assisted suicide is incompatible with the right to life since life, and the right thereto, lose value in society; namely, according to some Catholics, assisted death promotes a culture of death instead of a culture of love and care.

Part of a constitution's role is to limit the extent to which the good of a community may undermine an individual's entitlements. This means that a heavy burden of proof is generally required if the right to self-determination is to be restricted. The above claim that assisted death is incompatible with the right to life rests on an empirical claim that is (at best) hard to determine: whether assisted death degrades the value of life. Do societies with assisted death rules value life less and does this lead to broader negative consequences? The metric for valuing life is unclear, but certainly, there is no correlation between assisted death and murder. More convincing than relying on disputable empirical metrics is, perhaps, to point to the fact that it is precisely based on care for human life and the sensitivity to the sometimes intolerable conditions thereof that assisted death tends to be justified (Sumner 2011). Proposed and enacted laws require that strict rules are put in place to safeguard this.

### *Killing is always murder*

Another common argument raised by Catholics in Portugal is that killing always constitutes murder. There is no such thing as 'humane killing' because the inalienable right to life implies that the active act of killing is a violation of this right and, therefore, morally wrong (Carmo 2020; Renascença 2016). As stated in the *Samaritanus Bonus*, 'the Church is convinced of the necessity to reaffirm as definitive teaching that assisted death is a *crime against human life* because, in this act, one chooses directly to cause the death of another innocent human being' (Ladaria, Card, and Morandi 2020). There is, therefore, no distinction between acts of killing that kill *innocent* individuals. There is, in short, a violation of the right to life because there is no good justification for the killing of an innocent and, given that there is no justification, the killing constitutes a violation of the right to life.

Although it is morally wrong to kill innocents, the above statement is difficult to sustain as there may be cases where killing an innocent person may be the most humane thing to do. Note first that when we think about innocent non-human animals, we often do not oppose assisted death on the grounds of releasing them from pain. This may already be indicative of a species bias towards human lives. But it is also possible to imagine situations with human lives that indicate that sometimes we may be justified in killing innocents. Suppose that a rapist and sadistic serial killer kidnapped Mr Pink and his 3-year-old daughter.<sup>3</sup> The serial killer is known for torturing for days their underage victims before he kills them. Suppose further that there is no possible way Mr Pink can stop this, and he is certain of this. In such a case, if Mr Pink can provide a much less painful death to his daughter, he seems justified to do so to protect her. There may be more than one reason why this is a morally justified act; one of these is that the duty of care implies protecting one's child against greater evils, even if that means accepting lesser evils.

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<sup>3</sup>Mr Pink does not refer to a real person.

## Conclusion

Acceptance of the right to life is nearly universal, and it is a vital aspect of the judgement that the PCC did not find this right to be an obstacle to the proposed law. In this article, we have outlined and supplemented the PCC's justification for this idea, and defended the PCC judgement that the right to life is compatible with assisted death. While the Portuguese Catholic sector may provide other grounds for opposing assisted death in Portugal, attempts to do so on the basis of the right to life should be rejected.

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