Constitutional Court Judgment 19/2023, of 22 March 2023

The Plenary of the Constitutional Court, composed of Judge Cándido Conde-Pumpido Tourón, President, and Judges Inmaculada Montalbán Huertas, Ricardo Enríquez Sancho, María Luisa Balaguer Callejón, Ramón Sáez Valcárcel, Enrique Arnaldo Alcubilla, Concepción Espejel Jorquera, María Luisa Segoviano Astaburuaga, César Tolosa Tribiño, Juan Carlos Campo Moreno and Laura Díez Bueso, has handed down

IN THE KING'S NAME

the following

JUDGMENT

Action of unconstitutionality no. 4057-2021, brought by fifty-one deputies of the parliamentary group in Congress of Vox, goes against Organic Law 3/2021 of 24 March 2021 on the Regulation of Euthanasia, and alternatively, against the following provisions: Articles 1; 3(b), (c), (d), (e) and (h); 4(1); 5(1)(c) and (2); 6(4); 7(2); 8(4); 9; 12(a)(4º); 16; 17; 18(a) fourth paragraph; Additional Provisions 1 and 6; and Final Provision 3 [in conjunction with Art. 16(1) and Additional Provision 6]. The Spanish Government has made allegations. The rapporteur was Judge Ramón Sáez Valcárcel.

II. Legal Grounds

1. Subject-matter of the Action of Unconstitutionality

The fifty-one deputies of the Congress that filed this action of unconstitutionality, fully challenge Organic Law 3/2021 of 24 March 2021 on the Regulation of Euthanasia (OLRE), and alternatively, certain provisions of this Law: Articles 1; 3(b), (c), (d), (e) and (h); 4(1); 5(1)(c)

and 5(2); 6(4); 7(2); 8(4); 9; 12(a) fourth paragraph; 16; 17; 18(a) fourth paragraph; Additional Provisions 1 and 6; and Final Provision 3, in conjunction with Art. 16(1) and with Additional Provision 6.

In the previous section, the criticisms of unconstitutionality raised by the appellants have been sufficiently detailed, as well as the arguments put forward by the Government Legal Service in defence of the validity of the OLRE in the face of these criticisms. Both will be recalled in the corresponding sections of the legal grounds of this judgment, when examining each of the grounds of challenge. However, in order to facilitate the understanding of the discourse, it is pertinent to summarise the legal grounds of the complaint here.

The general challenge is based on two very different grounds, one formal and the other material:

(a) It is alleged, on the one hand, that the OLRE is affected by a formal defect in its drafting and parliamentary approval process. According to the appellants, despite the fact that the OLRE did not originate from a government bill, but from a proposal for organic law, during its parliamentary processing, the prior report of the General Council of the Judiciary should have been sought, as provided for certain bills in Article 561(1) of Organic Law 6/1985, of 1 July, on the Judiciary (OLJ), given the "functional identity" between the Government and the majority that supports it in the Chamber. Otherwise, the use of the legislative proposal is an "evasion of the law" by means of which the Government uses the parliamentary majority on which it relies to avoid the intervention of the General Council of the Judiciary and thus deprive minorities of relevant information regarding the legislative procedure, thus damaging the rights set out in Art. 23 SC. According to the complaint, the same damage would also derive from the accelerated processing of the legislative proposal during a state of alarm, which would have deprived citizens and parliamentarians of an essential debate on legislation that totally and radically alters the conception of human life and the core fundamental right.

(b) It is also claimed, on a substantive level, that the OLRE enshrines from its Articles 1, 4(1) and 13, a "right to demand that the State provoke one's own death", which would totally violate the fundamental right to life (Art. 15 SC), a right of an "absolute" nature, and in terms that would be projected onto "all Articles". In this regard, in addition to criticising some provisions of the OLRE, when developing this main claim, the appellants challenge certain

passages of its preamble in order to deny that euthanasia has a positive constitutional basis - contrary to what the lawmakers' statement would suggest. This is done by qualifying the preamble itself as "unconstitutional", even though the appellants immediately recognise that this text without normative value cannot "be the object of a declaration of unconstitutionality". Although -according to the claim- the absolute nature of the fundamental right to life determines the inadmissibility of any examination on the proportionality of the regulation established by the OLRE, it is alternatively claimed that it would not pass the assessment of proportionality either, as it would not satisfy the requirements of legality, suitability, necessity or proportionality in the strict sense, and would also infringe the duties of protection derived from Articles 43, 49 and 50 of the Spanish Constitution.

For their part, the challenges raised against individual provisions of the OLRE are, in summary, the following:

(a) Articles 7(2), 8(4), 17 and 18(a) fourth paragraph, as well as the first additional provision of the OLRE, would be contrary to the Constitution for not guaranteeing due control over the decisions that facilitate or recognise the "aid to die" regulated in the Law, for replacing the necessary judicial control with merely administrative controls and for infringing the duty of the State to investigate the causes of death of persons under its jurisdiction. Articles 15, 24, 53(2), 106 and 117 SC are invoked in this respect.

(b) Articles 3, points (d), (e) and (h); 5(1)(c); 5(2); 6(4); 9, and 12(a), fourth paragraph, OLRE, as well as its sixth additional provision, second paragraph, would be unconstitutional as far as the regulation of the so-called "de facto lack of capacity" is concerned. Articles 15, 24 and 53(2) SC are invoked.

(c) Articles 5(2) second paragraph, and 17(5) OLRE, as well as its sixth additional and third final provisions, would be unconstitutional insofar as they refer to administrative bodies to complement in one way or another certain aspects of the legal regulation. Art. 15 SC [in conjunction with Art. 9(3) SC] and Arts. 53(1) and 81(1) SC are invoked.

(d) Finally, and with regard to conscientious objection, Art. 16(2) OLRE and its third final provision [the latter in conjunction with Art. 16(1)] would be contrary to the fundamental

right to ideological and religious freedom and to the non-delegable legislation, in violation of Arts. 16(2) and 81(1) SC.

2. Scope and Order of Examination

Before examining the specific grounds of unconstitutionality raised in the appeal, it is necessary to make a series of preliminary considerations regarding (a) the scope of the constitutionality review that this Court is competent to carry out, (b) the delimitation of the specific object to be tried in the present proceedings and (c) the structure of the review that will be followed to decide on the appeal.

(a) Scope of Constitutionality Review

The intervention of lawmakers in an area as extremely delicate as that of the termination of a person's life with the help of third parties in situations of extreme suffering, an area in which, moreover, extra-legal assessments of various kinds intersect, requires a basic reminder of the role that this court must play in the context of these proceedings and of the limits of our jurisdiction vis-à-vis lawmakers.

From its earliest pronouncements, the Court has affirmed that the Constitution "provides room for political options" "of extremely different kinds", as long as they do not go against it" (CCJ 11/1981, PoL 7). Therefore, "the legislator does not execute the Constitution, but creates law freely within the framework that it offers" (inter alia, CCJ 209/1987, 22 December, PoL 3). In other words, the Constitution is not a fixed programme, but an open text. "It is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds", in line with what is expected from a constitutional system that enshrines political pluralism as one of its highest values [Art. 1(1) SC]. "The work of interpreting the Constitution does not necessarily consist of closing the door on options or variants imposing one of them in an authoritarian manner. This conclusion should only be reached when the unanimous nature of the interpretation is imposed by the play of interpretive criteria. We wish to state that the political and government options are not previously programmed once and for all, so that all that remains to be done in future is implement that previous programme" (CCJ 11/1981, PoL 7).

In this line, this Court has also declared that "when trying the law, this Court does not have to act as the legislator itself [...], restricting its freedom of disposition where the Constitution does not do so unequivocally" (CCJs 191/2016, 15 November, PoL 3, based on CCJ 19/1988, 16 February, PoL 8). As already stated in CCJ 4/1981, 2 February, PoL 3, the Court's function in examining the constitutionality of provisions consists of setting the limits within which the legislature can move freely and turn their political options into law, expressing their ideological preferences and their judgments of opportunity. This freedom of the legislator derives from his or her specific democratic legitimacy, from his or her nature as the representative at each historical moment of popular sovereignty. (Art. 66 SC). "The law, as an emanation of the will of the people, can only be repealed or amended, in principle, by the representatives of that will, and it is only in the case where the statutory provision infringes the Constitution that this Court has been given the power to annul it" (CCJ 17/1981, 1 June, PoL 4). It is not up to this court to assess the convenience, quality or perfectibility of a given legislative option, or its relationship with other possible alternatives, but simply to analyse, when required to do so, its "constitutional framework" (inter alia, CCJ 55/1996, 28 March, PoL 6).

In essence, it is not for this court to examine in these proceedings whether other legislative options would be possible within the constitutional framework, nor to carry out a quality or opportunity review on the lawmakers' choice, which it cannot replace in their task of political configuration. Our task is limited to analysing whether the lawmakers' specific regulatory choice embodied in the Law that is the subject of this appeal respects constitutional limits. An analysis that, as we recalled in CCJ 53/1985 of 11 April, PoL 1, "[must abstract from] any element or form of judgment other than the strictly legal, since otherwise it would be contradictory to the impartiality and objectivity of the reasoning inherent in the jurisdictional function, which cannot be based on any criteria or guidelines, including personal convictions, other than those of legal analysis".

(b) Delimitation of the Subject-matter of the Proceedings

As has been explained in detail in the Facts of this judgment, the appeal contains two blocks of challenges, one of a formal or procedural nature (relating to the OLRE as a whole) and the other of a material or substantive nature, containing a general challenge against the OLRE as a whole and, in the alternative, specific challenges against several of its provisions.

As regards the substantive complaints, it should first be noted that the main and alternative claims are not always distinguished with the necessary precision. On some occasions, in the general challenge - dedicated to proving the full unconstitutionality of the OLRE - individualised criticisms are introduced against the wording of certain provisions which, according to the heading and the pleading of the appeal, are also the subject of specific "subsidiary" challenges, but in respect of which no individualised criticism is then formulated that is distinguishable from that which would affect each and every one of the provisions of the OLRE. This is the case of Art. 1, which defines the subject matter of the Organic Law; Art. 4(1), which classifies the "provision of aid to die" as a subjective right; Art. 3(b), which defines the concept of "serious, chronic and incapacitating suffering"; and Art. 3(c), which defines the concept of "serious and incurable disease". Following the logic of the appeal, these challenges will be considered in connection with the examination of the general claim, without any individualised pronouncement being made in respect of them in addition to that required for their analysis. This is because the burden is always on the party seeking a declaration of unconstitutionality of a specific provision of law to provide the legal reasons that lead it to do so [inter alia, CCJ 68/2021, 18 March, PoL 2(B)], a singular justification which, in the case of subsidiary claims, must by definition be different from the common one on which the challenge, directed as a priority against the entire act in which the rule is integrated, could be based.

Secondly, and for a similar reason, we must exclude from our examination several paragraphs which the claim states as specifically and alternatively appealed. The appellants provide no specific grounds about their alleged unconstitutionality, not even in the context of the substantive challenge of general scope. These are Art. 3(e), which defines the concept of "Consultant physician"; the first paragraph of Art. 5(1)(c), which establishes as one of the requirements for the recognition of the right to receive the aid to die that the interested party must have made two applications voluntarily and in writing, or by another means to be recorded, leaving a separation of at least fifteen calendar days between them; and Art. 17(1) and (3), which regulate certain aspects relating to the creation and composition of the Guarantee and Evaluation Commissions.

Finally, the appellants' allegations regarding the unconstitutionality of certain passages of its preamble, set out in their overall challenge to the Organic Law on substantive grounds, will not be analysed either. As the appellants admit, the preamble has no normative value and cannot "be the subject of a declaration of unconstitutionality". This is so according to the constant case-

law of this court (related, inter alia, in CCO 95/2021, 7 October). The preamble to the OLRE cannot be the subject of an appeal or, therefore, of a declaration of unconstitutionality. And this is without prejudice to the fact that, in accordance with our case-law, the preamble of a given law may be taken into consideration, when appropriate, for the purpose of interpreting the meaning of one or other of its provisions (among many others, CCJ 81/2020, 15 July, PoL 12).

(c) Order of Examination

Once the subject matter of the appeal has been delimited, it is appropriate to follow the order of examination indicated below in order to solve it, bearing in mind that the Court can always structure the discourse of its judgment according to its best criterion (inter alia CCJ 183/2021, 27 October, PoL 2, by all). In the present case, given the scope and complexity of the appeal and in order to clarify our response, we will follow this systematic approach.

Firstly, we will examine the claim of unconstitutionality regarding the alleged existence of defects in the legislative procedure for the approval of the OLRE (PoL 3). Despite the fact that this claim has been posed in the last place of the grounds of unconstitutionality, its general nature - since it is directed against the Organic Law as a whole - and its obvious difference in perspective with respect to the other grounds of unconstitutionality makes it appropriate to anticipate its treatment in order to address, secondly, the objections of unconstitutionality of a material or substantive nature, which constitute the bulk of the appeal.

In view of the novel nature of the legal regulation at issue in our legal system and its technical complexity, the examination of the grounds of unconstitutionality based on substantive grounds will be preceded by a reflection on the normative and case-law context in which the OLRE is framed (PoL 4) and by an analysis of its subject matter and content (PoL 5). The examination of these substantive challenges will begin with the one directed against the OLRE as a whole (PoL 6) and will then consider the subsidiary claims, which target some of its specific provisions (PoLs 7 to 10), claims that will be addressed and decided - under a common heading, where appropriate - in accordance with the order set out in Point of Law 1 of this judgment.

3. Challenge of the whole Organic Law 3/2021 on Procedural Grounds

(A) Positions of the Parties

The complaint claims the unconstitutionality of the whole OLRE due to the defects in its parliamentary procedure, which would in turn lead to an infringement of the fundamental rights provided for in Article 23 SC.

According to the complaint, “the accelerated processing of the legislative proposal of OLRE during a state of alarm” would have deprived “citizens and parliamentarians of an essential debate on legislation that totally and radically alters the conception of human life and the core fundamental right, which is the backbone of the other fundamental rights”.

On the other hand, it is alleged that the request for certain reports during the legislative procedure was improperly omitted: (i) the report that should have been submitted to the Spanish Bioethics Committee (since, according to the complaint, although the legislation in force does not specify the mandatory nature of this report, it would be difficult to find any other matter with more relevant bioethical implications than the approval of the law being challenged), and (ii) the report of the General Council of the Judiciary. The appellants maintain that although the Council’s mandatory report refers to government draft bills, the same requirement would apply to parliamentary bills presented by the majority group or groups on which the Government relies, and that by not complying with it, an evasion of the law was committed, thus depriving the minority of information relevant to the exercise of its functions, and infringing the fundamental rights set out in Art. 23(1) and (2) SC (the right to exercise the representative functions of the deputies and, by extension, the right of citizens to participate through their representatives).

The Government Legal Service opposes this ground of challenge, arguing, first, that the OLRE was processed on the basis of a proposal for legislation, subject only to the provisions of Arts. 124 et seq. of the Regulations of the Congress of Deputies (RCD), and, secondly, that its parliamentary processing gave rise to a “large number of amendments tabled by the various political groups”, which were discussed “both in committee and in plenary”. In the Government Legal Service’s opinion, this nullifies any argument on the violation of Art. 23 SC.

(B) Prosecution

(a) The Court considers that the complaints regarding the "accelerated" processing of the OLRE during a state of alarm (initially declared by Royal Decree 463/2020 of 14 March 2020 and later, again, by Royal Decree 926/2020 of 25 October 2020) are inconsistent.

This claim lacks legal-constitutional significance. The proposal for legislation that is at the origin of the OLRE was not processed through the urgency procedure [Arts. 93 RCD and 133(2) of the Senate Regulations]. Besides, it is not possible to see, nor does the appeal suggest anything in this regard, how the state of alarm would have effectively undermined the rights of parliamentarians to participate in this specific legislative procedure. This is an absolutely indeterminate complaint that bears no relation to what was judged and resolved by this court in CCJ 168/2021, of 5 October.

(b) The protest that no report was requested in the course of the legislative procedure from the Spanish Bioethics Committee was equally irrelevant. This body's functions include that of "issuing reports, proposals and recommendations to public authorities at State and regional level on matters with relevant bioethical implications" [Art. 78(1)(a) of Law 14/2007, of 3 July, on biomedical research].

Parliamentary bills do not require, neither in their presentation nor in their subsequent processing, the issuing of prior reports of any kind [CCJ 215/2016, of 15 December, PoL 5(c)], whether or not the same were required for the Government before submitting a specific bill to Congress (Art. 88 SC). The lawmakers, who are obviously not "subject to the technical determinations or assessments that may be offered by experts or experts in the field on which they intend to legislate" (CCJ 112/2021, 13 May, PoL 5), are not even obliged, as far as is relevant here, to seek such assessments, even though they may be able to do so. To impose the opposite would mean giving rise to the mandatory participation of other bodies or instances, in an advisory capacity, in the exercise of the State's legislative power, which corresponds exclusively to the Parliament [Art. 66(2) SC].

However, on 6 October 2020 this independent body, the Spanish Bioethics Committee (Art. 77 of the aforementioned Law 14/2007) issued a report *ex officio* ("On the end of life and care in the process of dying, in the context of the debate on the regulation of euthanasia: proposals

for consideration and deliberation") while the legislative procedure that gave rise to the OLRE was still underway. The appellants attach this report to their application and transcribe certain passages from it. Many references were made to this report throughout the parliamentary debates on the proposal for legislation ("Record of proceedings from the Congress of Deputies"). Committees, XIV term, session of 10 December 2020, no. 249, pp. 12 and 13; "Record of proceedings from the Congress of Deputies". Plenary and Permanent Deputation, XIV term, session of 17 December 2020, No. 72, p. 8; "Record of proceedings. Senate", XIV term, Justice Committee, no. 146, session of 25 February 2021, p. 4 and 6, and the same "Record of proceedings", no. 43, Plenary, session of 10 March 2021, p. 95).

(c) We do not agree with the complaint that the report of the General Council of the Judiciary was not gathered at the parliamentary processing of the OLRE. This report is provided for in Art. 561(1) of the Organic Law on the Judiciary (OLJ), which establishes that draft bills will be submitted to a General Council of the Judiciary report when they are about the following matters: "[p]rocedural regulations or regulations that affect legal and constitutional aspects of legal protection before the ordinary Courts that relate to the exercise of fundamental rights" (point 6) and "[c]riminal laws [...]" (point 8), both of which are set out in this Organic Law, according to the complaint.

The OLRE did not originate from a government bill, but from a proposal for legislation of the Socialist Parliamentary Group in the Spanish Congress of Deputies ("Official Gazzette of the Parliament. Congress of Deputies", XIV term, no. 46-1, 21 January 2020). However, as far as we are concerned here, points 6 and 8 of Art. 561(1) OLJ refer strictly to reports on draft bills. The discussion on the possible constitutional significance of the omission of such consultation could only arise with respect to bills submitted by the Council of Ministers to the Congress of Deputies [see CCJs 108/1986, 29 July, PoL 5, albeit in relation to a different set of regulations to those in force, and 238/2012, 13 December, PoL 3(c)], but never on the proposals for legislation taken into consideration by one or other Chamber. The processing of these proposals is governed exclusively by the respective regulations [Art. 89(1) SC], which do not provide for any mandatory report by other bodies. This is without prejudice to the fact that the Spanish Parliament may deem it relevant to request a report from the General Council of the Judiciary on any question or matter within its institutional competence [Art. 561(1)(9) OLJ and CCJ 191/2016, 15 November, PoL 6]. In this case, this was not the view of the chambers, so there is nothing to object to in legal-constitutional terms. This means that the infringement - alleged in a related manner by the

appellants - of Arts. 88 and 89(1) SC in conjunction with Arts. 69 and 124 RCD cannot be assessed either. These regulatory provisions respectively establish that "[n]o debate may start without prior distribution to all members [...] of the report, opinion or documents which is to serve as the basis of such debate, unless otherwise resolved by the Bureau of the House or of the committee, with proper justification" and that "Private Members' proposals for legislation shall be submitted together with an Explanatory Memorandum and the necessary supporting information enabling a decision to be adopted thereon".

The "functional identity" claimed in the appeal -in language alien to the Constitution- between the Government and the majority in the Houses is the expression of a political and not a legal assessment, which is in no way in line with the very rationality of parliamentary democracy [CCJ 123/2017, 2 November, PoL 3(b)]. For the same reason, to describe the use of a proposal for legislation instead of a Government bill as an evasion of the law cannot be authorised. This proposal is set in order to initiate the legislative procedure or to claim, by comparing the incomparable, the imposition on the first of these channels of requirements that can only come to weigh on the second [for a similar controversy see CCJ 153/2016, 22 September, PoLs 3(a) and (b)].

(d) In view of the foregoing, it is clear that the parliamentary processing of the OLRE has not infringed Article 23 SC or any other of the provisions invoked by the appellants in formulating this ground of challenge, which must therefore be dismissed.

4. Regulatory and case-law context of Organic Law 3/2021

The "right to the provision of aid to die" set up by lawmakers for people who demand it in euthanasic contexts has to be considered taking into account the cultural, moral and legal evolution that has taken place in recent decades in our society and in those around us. This is an evolution that has affected the values associated with the person, their existence and their capacity to decide freely about their life, their health and the end of their existence, and which, based on certain strong ideas such as patient autonomy and informed consent, has led to an extension of the contents of the fundamental right to physical and moral integrity and of the principles of human dignity and the free development of the personality. In judging the constitutionality of a law such as the one now being challenged, it must be ascertained whether the Constitution, as a

framework for the meeting of legitimately heterogeneous political-legislative options, responds to and offers coverage for new rights.

Before briefly reviewing these developments, it is useful to make a few brief clarifications on the different types of situations involved and the terminology used.

With regard to the concept of assistance to die a third person, a distinction is usually made at the outset between assisted suicide by providing help or cooperation to someone who has decided to end his or her life and executes this decision by his or her own hand, and the behaviour of directly causing the death of that person. In the first case we speak of aid to commit suicide or assisted suicide, while in the second case we use expressions such as “death on request”, “homicide on request” or “executive assistance to suicide”, which are common in the criminal law field.

Both types of third-party intervention in the death of a person may occur in situations of intolerable suffering resulting from serious and incurable illness or disease. It is in this context that the specific term “euthanasia” is used, inserted in the broader reality of the so-called “dignified death” or “good death”, which in the strict sense includes the active or passive provocation by a third party of the death of another person. In turn, we speak here of “passive euthanasia”, relating to the limitation of therapeutic effort (omission of medical treatment or withdrawal of life-support devices), of “indirect active euthanasia”, identified with palliative measures aimed at alleviating the patient’s pain that accelerate the dying process, and of “direct active euthanasia”, understood as the direct causing of death at the request of the patient.

It should be noted that, despite its title and as its preamble makes clear, Organic Law 3/2021, on the regulation of euthanasia, refers to and considers “euthanasic conduct” both direct active euthanasia in the strict sense, that is, “the action by which a health professional deliberately puts an end to the life of a patient and at the patient’s request”, and medically assisted suicide, in which the person himself or herself performs the act of ending his or her life, albeit with the decisive “collaboration of a health professional who knowingly and intentionally provides the necessary means, including advice on the necessary substance and dosage of medication, its prescription or even its supply for the patient to administer it to himself or herself”.

Having established these minimal terminological conventions and conceptual nuances, the normative and jurisprudential context of the Organic Law in question can be addressed.

(a) Spanish law

As far as the Spanish legal system is concerned, three legislative milestones should be highlighted. The first of these came with the Criminal Code of 1995, which brought about a notable change in the treatment of the availability of one's own life, by exclusively punishing, as a mitigated statutory offence definition in Article 143(4), the conduct of anyone who causes or actively cooperates with acts necessary and direct to the death of another, at their express, serious and unequivocal request, in the event of them suffering a serious illness that would necessarily lead to their death or that would produce serious permanent suffering that would be difficult to bear. In addition, there was a less severe penalty, the execution of which could be suspended. The wrongful conduct was based on the factual requisite of cooperation and direct active euthanasia. This decriminalised other conducts, such as the interruption of life-sustaining treatment (e.g. withdrawal of life-sustaining measures) and the application of palliative treatments that accelerated the dying process (e.g. terminal sedation). This made it possible to begin to speak in our system of "dignified death" and of a space for the free decision of the person in the process of ending life.

A second milestone is to be found in Law 41/2002, on patient autonomy and on rights and obligations regarding clinical information and documentation, subsequent to the Convention of the Council of Europe for the protection of human rights and dignity of the human being with regard to the application of biology and medicine (Oviedo Convention of 4 April 1997, ratified by Spain on 23 July 1999). These rules established a new model between doctor and patient based on the autonomy of the individual and his or her power of self-determination, by declaring new rights to "decide freely, after receiving adequate information, between the available clinical options" and to "refuse treatment". The patient's capacity to decide on therapeutic measures and treatments was not conditioned by the risk it might represent for his or her integrity and health, even if it compromised his or her life and implied his or her death, which involved the legal recognition of a right to self-determination over health and body, anchored by our case-law in the fundamental right to physical and moral integrity of Art. 15 SC.

The third piece of information is provided by regional legislation. Several statutes of autonomy, starting with that of Catalonia in 2006, have included rights related to the dying process. Article 20 of the Statute of Catalonia sets out that "[e]ach individual has the right to receive appropriate treatment of pain and complete palliative attention and to undergo the process of death with dignity". The Balearic Islands, Andalusia, the Canary Islands and Castile and Leon can be cited in the same vein. In this line of regulation of the free decision of the individual on their health and on aspects linked to the end of life, different regional parliaments have passed laws on "dignified death". The first one was the Andalusian Parliament Act 2/2010 of 8 April 2010 on the rights and guarantees of the dignity of the person in the dying process; and subsequently, Aragon, Navarre, the Canary Islands, the Balearic Islands, Galicia, the Basque Country, Madrid and other autonomous communities have also established regulatory frameworks on this subject.

This legislative evolution has been accompanied by the development of the constitutional case-law on the fundamental right to physical and moral integrity, together with the right to life in Art. 15 SC, which characterises it as a right to self-determination that has as its object the body itself (CCJ 154/2002, of 18 July, PoL 9). Briefly said, our case-law places the absence of consent of the holder with respect to any intervention as a defining element of the interference with the right (inter alia, CCJs 120/1990, 27 June, PoL 8, and 207/1996, 16 December, PoL 2), even if it has a curative purpose (CCJs 48/1996, 25 March, PoL 3, and 154/2002, 18 July, PoL 9), to the point of protecting as an exercise of the patient's right to personal integrity the refusal of medical treatment that could lead to a fatal outcome (CCJ 37/2011, 28 March, PoL 5).

On the other hand, there are no judgments by this court on the core legal question at issue: the compatibility with the Constitution of a regulation on direct active euthanasia. We were confronted with a case relating to it when Ramón Sampedro Cameán filed an appeal for *amparo* in which he invoked the right to die with dignity through the non-punishable intervention of third parties. However, his death determined the termination of the constitutional proceedings, without the substitution of parties being admitted as it was a strictly personal claim (CCO 242/1998, 11 November).

(b) Case-law from the European Court of Human Rights

The European Court of Human Rights has ruled on several occasions on individual applications requesting that the Court, in the face of restrictive national regulations, recognise the individual's right to obtain assistance in dying [ECHR judgments of 29 April 2002, *Pretty v. United Kingdom*; 29 January 2011, *Haas v. Switzerland*; July 2012, *Koch v. Germany*; and 14 May 2013 (Second Chamber) and 30 September 2014 (Second Chamber) *Gross v. Switzerland]*; or the withdrawal of life-sustaining medical treatment (ECHR judgment of 5 June 2015 (Grand Chamber), *Lambert and Others v. France)*. On a more recent occasion, however, it has ruled on the conformity with the Convention of euthanasia carried out under a regulation of its exercise (ECHR judgment of 4 October 2022, *Mortier v. Belgium)*.

In all these decisions, the European Court of Human Rights has linked its pronouncement to the interpretation of Articles 2 and 8 of the Rome Convention, which enshrine, respectively, the right to life and the right to respect for private and family life, linking the State's duty to protect human life with the principle of personal autonomy and its potential for end-of-life decisions. The above-mentioned decisions produce a case-law that can be summarised in four axes: (i) the right to life does not include the right to die; (ii) the right to respect for private life includes the right to decide how and when to end one's own life, provided that the individual is able to decide freely and act accordingly; (iii) this right is not absolute and must be weighed against competing interests, in particular the State's positive obligations of protection arising from the right to life, which require the protection of vulnerable individuals from actions that may endanger their lives; and (iv) States have wide discretion on how to strike a balance between both rights. This discretion allows for criminal-political decisions to constrain the right to decide about one's own death (and to obtain assistance in doing so) based on the protection of life, but also the decriminalisation of euthanasia accompanied by adequate safeguards to prevent abuse by third parties.

5. Subject-matter and content of Organic Law 3/2021

In order to facilitate a better understanding of our judgment, it is appropriate to describe the main contents of the OLRE, without prejudice to the fact that in the following paragraphs we will go into more detail on certain aspects that the regulation establishes.

A) Subject-matter

(a) According to its Preamble, the OLRE limits its purpose to "active and direct" euthanasia, controlled by a doctor in an "euthanasic context", i.e. "the action that results in the death of a person directly and intentionally through a unique and immediate cause-and-effect relationship, at the request informed, express and repeated over time by that person, and which is carried out in a context of suffering due to an incurable illness or condition that the person experiences as unacceptable and which has not been mitigated by other means".

As we have pointed out, the OLRE uses the expression "euthanasia" [Arts. 6(4), 14 and 17(5), for example] and the term "provision of aid to die" [Arts. 4(1), 13 and 14, among others] interchangeably. And it establishes two "modalities", in Art. 3(g), the direct administration of a lethal substance to the patient by the competent health professional (point 1) and what could be called assisted suicide by that professional through the prescription or supply of that substance (point 2).

The OLRE does not cover cases of direct active euthanasia that are not related to the euthanasic context thus defined, such as "passive euthanasia" (i.e. the "not adoption of treatments aimed at prolonging the life and disruption of those already urged according to *lex artis*") and "indirect active euthanasia" (defined as the "use of drugs or therapeutic means that alleviate physical or psychic suffering even if they accelerate the patient's death – palliative care").

(b) The Articles of the OLRE are unequivocal as to the status of a subjective public right and of a provision conferred therein on the claim to request and receive, once the legal requirements have been met, the "necessary assistance in dying" (Art. 1) or, in other words, the "provision of euthanasia" [Art. 17(5), among others]. This is consistent with what was anticipated in its preamble: "this Law introduces into our legal system a new individual right such as euthanasia".

Indeed, the act refers expressly to the "right recognised in this Law" and, correlatively, to "the duties of health workers" and to the "obligations of the administrations and institutions concerned" (Art. 1). But beyond these nominal mentions - also present, for example, in Art. 4(1) - it is the body of law as a whole that proves the nature of the subjective situation regulated by lawmakers and the public identity of the person who is ultimately obliged to declare it, if

applicable. This is irrespective of whether, once it has been declared, it can be carried out by the own requester or by a doctor [Art. 3 (g)], either in public, private or subsidised health centres, or at home (Art. 14).

The provision of aid to die is recognised by a "decision" [Art. 10 (3) to (5)] of an "administrative body" [each of the guarantee and evaluation commissions): Art. 17(2) and single transitory provision] called upon to verify whether "the requirements and conditions laid down for the proper exercise of the right to apply for and receive the provision of aid to die are met" [Art. 10(1)] and which adopts the "final decision" on its recognition or denial [Art. 10(4)]. Unfavourable decisions are subject to appeal "before the contentious-administrative jurisdiction" [Arts. 10(5) and 18(a), fifth paragraph, and fifth additional provision].

This is a genuine administrative procedure (Arts. 8 to 12, in particular) started at the request of the petitioner ["interested party", in the sense of Art. 4(1)(a) of Law 39/2015, on the common administrative procedure of public administrations], in the course of which what is still a file is generated (Art. 70 of the same Law 39/2015) and, in particular, certifications and reports are issued [Arts. 5(1)(d) and (2), as well as 8(3), (4) and (5) OLRE, among others] and at the end of which, if the regulated requirements have been met (Arts. 5, 6 and concordant Articles) and the procedures prescribed to accredit and assess it (Arts. 8 to 10) have been completed, the right to the provision in question would be recognised. A binding recognition for the public health services and health administrations, which must "ensure the right to provide aid to die" and its "adequate management" [Arts. 13(2) and 16(2)], as well as for the health centre, whether - as has been said - public, private or subsidised (Art. 14) and the health personnel concerned [Arts. 1, second paragraph, 2, 9 and 10(4)]. The right to conscientious objection of these professionals is recognised (Art. 16 and additional provision seven), which cannot undermine access to the service or its quality (Art. 14).

The Organic Law thus sets up an entitlement of a benefit nature vis-à-vis the public administrations, a condition that is supported by the inclusion of this benefit in the common portfolio of services of the National Health System and by its public financing [Art. 13(1)].

(B) Justification

According to the preamble of the OLRE, the aim is to "provide a legal, systematic, balanced and guaranteeing response" to euthanasia, which the lawmakers perceive as "a sustained demand from today's society" which they must "meet [...] by preserving and respecting its rights and adapting for this purpose the rules that order and organise our coexistence". In this sense, it is stated that, as defined by the Organic Law, euthanasia "connects with a fundamental right of the constitutionally protected person such as life, but which must also be cohoned with other rights and values, equally constitutionally protected, such as the physical and moral integrity of the person (Art. 15 SC), human dignity (Art. 10 SC), the higher value of freedom [Art. 1(1) SC], ideological and conscientious freedom (Art. 16 SC) or the right to privacy [Art. 18(1) SC]".

Starting from this premise, the preamble justifies the specific regulatory model it has opted for in order to make these constitutional rights and principles compatible with the due guarantees. For this reason, it decides to set up euthanasia as a legally acceptable practice in certain cases, provided that specific requirements and guarantees are observed, while at the same time it rules out, by considering it an insufficient protection system, the option of a model that merely decriminalises conduct that involves some form of aid to die another person at that person's express wish.

(C) Eligibility requirements

Art. 5 OLRE lists the requirements that the requester must meet, indicating that all of them must be met in order for the right to the provision of aid to die to be recognised. Apart from the requirement of "having Spanish nationality or legal residence in Spain or city registration that proves a period of stay in Spanish territory longer than twelve months" and "being of legal age" [Art. 5(1)(a)], all these requirements revolve around two axes, namely the concurrence of a situation of unbearable suffering due to irreversible and objectively verifiable medical causes (qualified by lawmakers as "euthanasic context"), and the existence of a free, informed and conscious will to end one's own life expressed by a capable person.

(a) As regards the existence of a "euthanasic context", Art. 5(1)(d) establishes as one of the requirements for the recognition of the provision, "suffering a serious and incurable illness" or "serious, chronic and incapacitating condition", both situations to be understood "in the terms

established in this Law". According to Art. 3(c), a serious and incurable illness is the one that "by its nature causes constant and unbearable physical or psychic suffering without the possibility of relief which the person considers tolerable, with a limited life prognosis, in a context of progressive fragility". On the other hand, and according to Art. 3(b), a serious, chronic and incapacitating condition is the "situation that refers to limitations which have a direct impact on the physical autonomy and activities of daily life, so that it does not allow to fend for itself, as well as on the capacity for expression and relationship, and which have associated constant and intolerable physical or psychic suffering for those who suffer from it, there is a certain or high probability that such limitations will persist over time without the possibility of healing or improvement appreciable. Sometimes it can be an absolute dependence on technological support". As will be explained later, in both cases the OLRE requires that the corresponding situation be certified by several doctors.

(b) On the other hand, Art. 4(2) OLRE establishes that the decision to request the provision of aid to die must be "autonomous", that is, "based on [the person's] knowledge of its medical process, after having been adequately informed by the responsible health team", and it must be recorded in the medical record that the information has been received and understood by the patient. Ultimately, lawmakers intend the decision to be completely "free" and "individual, mature and genuine, without intrusion, interference or undue influence" [Art. 4(3)].

To this end, the general rule, provided for in Art. 5(1) OLRE, is that the requester must be capable and aware at the time of the application [paragraph (a)], in which case the procedural requirements provided for in paragraphs (b), (c) and (e) of the same Art. 5(1) apply, to which we will immediately refer.

As an exception, Art. 5(2) OLRE foresees that these procedural requirements do not apply where the responsible physician certifies that the person involved in a euthanasic context "is not in full use of their powers and cannot lend their free, voluntary and conscious conformity to make the requests", provided that the person concerned "has previously signed a document of prior instructions, living will, advance wills or legally recognised equivalent documents, in which case aid may be provided to die in accordance with the provisions of that document. If the patient has appointed a representative in that document, the latter will be the valid interlocutor for the responsible physician".

(D) Procedure and organisation

The OLRE designs an administrative procedure aimed at verifying *ex ante* and controlling *ex post* the respect of the legally established requirements for each request for aid to die. A procedure involving different administrative bodies, which can be summarised as follows.

(a) The first stage of the procedure is initiated by the request of the person concerned [Art. 5(1)(c)] and is carried out before the "responsible physician". 'Responsible physician' means a physician responsible for coordinating all patient information and healthcare, as the primary interlocutor of the patient in all things relating to his care and information during the care process, and without prejudice to the obligations of other professionals involved in the care proceedings". This first request must be dated and signed by the requesting patient (or by any other means of proof of his or her unequivocal will), and signed in the presence of a health professional who shall rub it [Art. 6(1) and (2)].

Upon receipt of the request, which must be included in the patient's medical record [Art. 6(2)], the responsible physician must, within a maximum of two days, carry out a "deliberative process" with the patient regarding his or her diagnosis, therapeutic possibilities and expected results, as well as possible palliative care, making sure that he or she understands all this information, which must be provided in writing within a maximum of five days [Art. 8(1)]. In order to carry out this deliberative process, the responsible physician must first verify that the requirements of nationality or residence, majority of age, capacity and consciousness [Art. 5(1)(a)], voluntariness [Art. 5(1)(c)] and euthanasic context [Art. 5(1)(d)] are met.

Fifteen calendar days after the first request, if the patient maintains his or her will, he or she must make a second request, also in writing, addressed to the responsible physician [Art. 5(1)(c)] and the latter, within two days, shall resume the deliberative process with the patient "in order to address [...] any doubts or need for further information" [Art. 8(1)]. However, if the responsible physician considers that the loss of the applicant's ability to grant informed consent is imminent, he may accept any term under 15 days if he or she deems it "appropriate depending on the concurrent clinical circumstances", which he or she must record in the medical history [Art. 5(1)(c)].

Twenty-four hours after the completion of the deliberative process, the physician shall seek the patient's decision to continue or withdraw the application. If the patient decides to continue with the procedure, confirming for the third time his or her wish to die, the doctor in charge must inform the health team and, if the patient so requests, the relatives and friends he or she indicates. At this point, the physician must also obtain the signature of the informed consent document [Art. 8(2)].

In the event of a "refusal" of the provision of aid to die by the responsible doctor, which must be in writing and reasoned [Art. 7(1)], the patient may "complain" to the guarantee and assessment committee within a maximum of 15 working days, a possibility about which the responsible doctor must inform the patient [Art. 7(2)]. Irrespective of whether or not this complaint has been made, the responsible physician who "refuses" the request shall, within five days of notification of the refusal, send the documentation referred to in Art. 7(3) to that committee.

(b) The second phase of the procedure prior to the recognition of the provision is carried out before the "consultant physician", i.e. "a doctor with training in the field of pathologies suffered by the patient and not belonging to the same team of the responsible physician" [Art. 3 (e)].

Once the informed consent has been signed by the patient, the doctor in charge must contact the consultant physician so that, after studying the medical records and examining the patient, he/she may verify whether or not the legal conditions are met, within a maximum period of ten days, for which purpose he/she will draw up a report that will become part of the patient's medical records, the conclusions of which must be communicated to him or her [Art. 8(3)].

In the event of an unfavourable report by the consultant physician, the patient may "appeal" before the guarantee and evaluation commission [Art. 8(4)] with the same procedure as for "refusals" by the responsible physician in Art. 7(2).

(c) The third phase of the procedure, which only proceeds once a favourable report has been issued by both the responsible and the consultant physicians, consists of the prior verification of the requirements for the recognition of the provision by the Guarantee and Evaluation Commission, a multidisciplinary body existing in each of the autonomous

communities (as well as in the cities of Ceuta and Melilla) and which must have a minimum number of seven members, including medical, nursing and legal staff (Art. 17).

Upon receipt of the medical communication referred to in Article 8(5), the Chairman of the Guarantee and Evaluation Commission shall designate, within a maximum period of two days, two members of the Commission, a medical professional and a lawyer, to verify whether, in their view, the requirements and conditions laid down for the proper exercise of the right to apply for and receive the provision of aid to die are met [Art. 10(1)], for which purpose they will have access to the patient's clinical record and may meet with the responsible physician and the requester [Art. 10(2)]. Within a maximum period of seven calendar days, the two members of the Commission shall issue a report that, if favourable, shall serve as a decision for the purposes of the performance of the service [Art. 10(3)]. The final decision shall be made known to the Chairman in order, in turn, to transfer it to the responsible physician to provide aid to die; all this must be done within a maximum period of two calendar days [Art. 10(4)].

If the report of the two members of the Commission is unfavourable, a complaint may be lodged with the Commission itself, which must take a decision within a maximum period of twenty calendar days; this procedure also applies to refusals by the responsible or the consultant physicians [Arts. 10(3) and 18(a)]. Where there is no agreement between the two members of the Commission, verification shall be submitted to the plenary of the Guarantee and Evaluation Commission, which shall issue a final decision [Art. 10(3)].

Unfavourable decisions of the commission may be appealed before the contentious-administrative jurisdiction [Art. 10(5)]. The appeal will be processed through the procedure foreseen for the preferential and summary protection of the fundamental rights of the individual in the legislation on contentious-administrative jurisdiction (fifth additional provision). Similarly, the end of the period of twenty calendar days without a decision shall entitle applicants to understand their request for aid to die denied, with the possibility to appeal before the contentious-administrative jurisdiction [Article 18(a)].

(d) The procedural milestones described above vary in cases where the responsible physician certifies - in accordance with the protocols of action determined by the Interterritorial Council of the National Health System: Art. 5(2) - which the patient is in a situation of "*de facto* incompetency". It is defined as "a situation in which the patient lacks sufficient understanding

and will to govern himself or herself autonomously, fully and effectively, irrespective of whether support measures exist or have been taken for the exercise of his or her legal capacity" [Article 3(h)]. In that case, the benefit can be granted as long as the patient (who must meet the aforementioned requirements of age of majority, nationality or residence) is in a medically certified euthanasic context and has previously signed a prior instruction document to that effect.

In cases of *de facto* incompetency, the request for the benefit may be submitted to the responsible physician by a person of full legal age and capacity, accompanied by the prior instruction document signed by the patient; or, if there is no person who can submit the request on behalf of the patient, by the patient's doctor [Art. 6(4)]. On the other hand, the doctor responsible is required to implement the provisions of the prior instructions (Article 9). Even in the case of *de facto* incompetency, the consultant physician and the guarantee and evaluation commission are required to verify that the legal conditions are met [Art. 8(3)].

(e) The "provision of aid to die" (Art. 11) will only be granted if there is a favourable decision by the guarantee and evaluation commission and if the requester has not exercised his or her rights to revoke this decision or to request a deferral of the administration of aid to die [Art. 6(3)]. Death as a result of the provision of aid to die will have the legal consideration of natural death for all purposes (first additional provision).

The service is provided by the responsible physician "with utmost care and professionalism, with the application of the corresponding protocols, which will also contain criteria as to the form and time of performance of the service" [Article 11(1)]. It may be carried out in public, private or subsidised health centres and even at home, without any impairment of access or quality of care (Art. 14). If the patient is conscious, he or she must inform the responsible physician of the mode of assistance: euthanasia or assisted suicide. In the first case, the responsible physician and the other health professionals shall assist the patient until the moment of death [Art. 11(2)]. In the case of assisted suicide, the responsible physician and his or her team, "after prescribing the substance to be self-administered by the patient himself or herself, shall maintain the proper task of observation and support to the patient until the time of his or her death" [Art. 11(3)].

(f) Once the aid to die has been provided, and within a maximum period of five working days after the death, the responsible physician must forward to the guarantee and evaluation

commission two documents providing certain information (Art. 12), so that the latter can check within a maximum period of two months whether the provision of aid to die has been made in accordance with the procedures provided for by law [Art. 18 (b)].

(E) Other issues

In addition to regulating the conscientious objection of health professionals in the terms that will be detailed in PoL 10 (Art. 16), the OLRE includes several provisions aimed at safeguarding confidentiality in the processing of the personal data of individuals requesting the benefit (Arts. 15 and 19), at guaranteeing the resources and means of support necessary for the application of the law to persons with disabilities [Art. 4(3) and additional provision four] and at establishing mechanisms to ensure maximum dissemination of the Organic Law among health professionals and the general public (additional provision seven).

The regime foreseen in the OLRE closes with the modification of Organic Law 10/1995 of 23 November 1995 of the Criminal Code, with the aim of decriminalising euthanasic conducts carried out in compliance with the conditions established in the law itself, maintaining the classification as a crime in the opposite case (first final provision). This is completed with the provision that the infringement of the provisions of the OLRE is subject to the sanctioning regime of Chapter VI of Title I of the General Health Act 14/1986, without prejudice to the possible civil, criminal and professional or statutory responsibilities that may correspond (second additional provision).

6. Challenge of the whole Organic Law 3/2021 on substantive grounds

(A) Positions of the Parties

(a) By invoking constitutional case-law and the case-law of the European Court of Human Rights, the appeal argues the “radical unconstitutionality” of the entire OLRE for the substantive reasons detailed in the Facts of this judgment and which, to facilitate understanding of the text, are summarised below.

Euthanasia, configured in the OLRE as the “provision of aid to die”, would be unlawful in our legal system. This assessment is based on three considerations: (i) the “absolute” nature of

the fundamental right to life (Art. 15 SC), which constitutes the ontological basis for all the other rights and must be protected even against its holder, without there being a fundamental right to one's own death; (ii) the lack of a constitutional basis for the subjective right to seek and obtain that benefit; and (iii) the disproportionality with which lawmakers would impinge on the fundamental right to life by setting up an aid to die.

The absolute nature that the appellants attribute to the fundamental right to life determines that this right cannot yield to any other constitutional right or value, contrary to what is maintained in the preamble of the OLRE. If this were the case, not only would the fundamental right to life itself be irreparably extinguished, but also the other constitutional rights and values, the basis of which is precisely life. Neither the dignity nor the freedom of the person can justify euthanasia, as the former does not depend on the personal perception of its holder and the latter does not include a right to one's own death. Nor can justification for euthanasia be found in physical and moral integrity, in ideological freedom and freedom of conscience, or in the right to privacy, rights whose content would not exempt the State from its positive obligation to protect human life. The configuration of the provision of aid to die as a right would contradict constitutional case-law and that of the European Court of Human Rights, insofar as there would be no right to one's own death, and would "directly" violate the fundamental right to life, without any other constitutional rights or values being able to be invoked in its defence.

In the appellants' view, this would make an assessment of proportionality unnecessary, although the appeal submits in the alternative that the rule would not pass such an assessment either. It is claimed that the OLRE lacks, on the one hand, regulatory "quality", understood as a requirement of "accessibility and foreseeability", in relation to the legal certainty required by Art. 9(3) SC. To this end, the definition of the concept of "serious, chronic and incapacitating suffering" in Art. 3(b) OLRE is criticised, which, due to its indeterminacy, would lead to a "slippery slope" in the application of euthanasia. On the other hand, it is argued that the OLRE does not satisfy what the complaint identifies as the principle of adequacy, because euthanasia would lack a legitimate aim, being contrary not only to Art. 15 SC, but also to Arts. 43, 49 and 50 SC. Finally, it is argued that the contested regulation would also fail the assessments of necessity and proportionality in the strict sense, because the universalisation of palliative care, which the OLRE would not guarantee, would be an equally effective measure, and less restrictive for the fundamental right, in order to avoid the patient's suffering. The reference to palliative care in Articles 5(1)(b) and 8(1) OLRE would be a "purely formal information requirement" that

would not guarantee “full accessibility and universalisation of such care”, which would result in the “most drastic restriction of the primary fundamental right”, the “radical unconstitutionality” of the OLRE.

(b) The State Attorney has objected to this general challenge with arguments that can now be summarised as follows.

On the one hand, he argues that a distinction should be made between the “biological fact of life” and the fundamental right to life. According to the State Attorney, neither the case-law of the Constitutional Court nor the case-law of the European Court of Human Rights suggests that life “becomes an absolute element that obliges the holder of the right to life to live even against his or her will, or that requires the State to impose the right to continue living”. It is argued that the free, voluntary and conscious decision of a person to put an end to his or her life is an event that would, in principle, fall “outside” the scope of Article 15 SC, which protects life against attacks by third parties, even though this constitutional provision does not include the right to demand “one’s own death” from the State. In the absence of a legitimate constitutional basis, the State cannot coercively impose itself on the will of a person who freely decides to end his or her life. Neither the Constitutional Court nor the European Court of Human Rights has held that it is in itself unlawful, in certain circumstances, to provide aid to the person who has taken such a decision.

On the other hand, the State Attorney argues that lawmakers can regulate euthanasia, as this would be based on other constitutional rights or values at stake, such as dignity, bodily integrity (with the consequent possible rejection of clinical treatment) and the right not to suffer inhuman or degrading treatment [Arts. 10(1) and 15 SC]. Although one cannot strictly speak of a conflict of rights, since the person who decides on his or her own death neither exercises nor harms the fundamental right to life, but only affects, in principle, life as a “legal right”, it is also not true that in the cases of the OLRE only human life should be taken into consideration as a legally protectable right. In a situation in which the person does not wish to continue living, and even more so in a euthanasic context, a series of constitutional principles and rights that undoubtedly support that decision or may be affected if it is ignored, must also be weighed. By providing for the assistance of the State to enable those who freely decide to die in safety and dignity to do so, the OLRE serves to ensure that these values and rights, starting with dignity and

free self-determination, can be fully developed in accordance with the will of the person who wishes to die.

The State Attorney also points out that the precautions or warnings in the appeal concerning the feared "slippery slope" to which the OLRE could give rise in the course of its application would have no place in the abstract appeal of unconstitutionality. As for the alleged disproportionality of the OLRE due to the lack of effective universalisation and guaranteed accessibility to palliative care, it alleges that the provision of aid to die has "an autonomous character and does not exclude palliative care".

(B) Delimitation of the issues raised and preliminary considerations

Having summarised the arguments defending and refuting the main claim of the appeal, in order to proceed to its examination, it is necessary to delimit the contours of the legal-constitutional problem posed by the contested Organic Law and to establish some assumptions.

(a) As we have indicated in PoL 5, the OLRE regulates "active and direct euthanasia", configuring it as a subjective right of a benefit nature, provided that it takes place, as its preamble explains, (i) in a medically contrasted "euthanasic context", that is to say, a "context of suffering due to an incurable illness or condition which the person experiences as unacceptable and which could not be alleviated by other means", and (ii) "at the informed, express and repeated request over time" of the person seeking assistance to end his or her own life.

Our judgment must therefore be restricted to this specific question, without reaching other possible cases relating to the end of one's own life which could occur in reality and which are not regulated in the OLRE, such as those produced outside the euthanasic context defined by lawmakers or those relating to other forms of euthanasia.

The Court will also follow the synonymity established by lawmakers between the expression "euthanasia" and the term "provision of aid to die", and will not question the normative identification, under the generic denomination of euthanasia, of the two modalities foreseen in Art. 3(g) OLRE: direct administration of a lethal substance to the patient by the competent health professional, on the one hand, and prescription or supply of that substance by the competent health professional in such a way that the patient can self-administer it, on the

other hand. Whether or not this conceptual equation is debatable from one or another dogmatic or academic approach, this point has not given rise to controversy between the parties.

(b) The core of the question we have to resolve is whether or not the Constitution allows the lawmakers to regulate as a licit activity what the OLRE describes as "direct active euthanasia" - which requires, by definition, the help of third parties - when the requisites of the subject's freedom of decision and the existence of a medically verifiable situation of extreme suffering are met. Only in the affirmative would it be appropriate to examine whether, additionally, the lawmakers can configure such a lawful activity as the content of a subjective public right of a benefit nature in the terms in which the contested Organic Law does so.

In its proper sense, there is no precedent in the case-law of this court for the specific question now before us. This determines, on the one hand, that for our judgment, it is appropriate to resort to the case-law of the European Court of Human Rights on the matter, which has been summarised in essence in PoL 4 of this judgment, as a particularly qualified interpretative parameter [Art. 10(2) SC]. On the other hand, the novel nature of the question that we must now address does not prevent us from taking into consideration previous rulings of this court that both the appellants and the State Attorney argue in defence of their respective claims, although given the differences in the case it is not possible to automatically and without nuance transfer this case-law here. We refer, specifically, to CCJ 53/1985, of 11 April 1985, handed down in an appeal of unconstitutionality thirty-eight years ago on the first law decriminalising various cases of abortion, and to the judgments handed down in various appeals for *amparo*, even more closely linked to the resolution of specific conflicts and which, in addition, referred to the singular problem of the cases of refusal by a minor to undergo a blood transfusion for religious reasons (CCJ 154/2002, 18 July) and of the forced feeding of subjects under the custody of the public authorities in penitentiary centres (CCJs 120/1990, 27 June; 137/1990, 19 July, and 11/1991, 17 January).

Likewise, special consideration must be given to the fact that, unlike what has happened in the majority of cases in relation to direct active euthanasia so far examined by the European Court of Human Rights, as well as by the constitutional courts around us, this court is now called upon to rule on the constitutionality, not of prohibitive criminal rules, but of a legal regulation that enables its practice (for example, CCJ 49/2008, of 9 April, PoL 4).

(c) Finally, in the analysis of the overall challenge to the OLRE, two hermeneutical criteria must be borne in mind. On the one hand, the interpretation of the Constitution must take into account the specific historical context in which it is made. In this respect, the Court pointed out that, based on the judgment of the Supreme Court of Canada of 9 December 2004, which takes up the expression of *Privy Council, Edwards v. Attorney General for Canada* of 1930-, " the Constitution is a 'living tree' (...) i.e. a progressive interpretation allows a constitution to adjust to the realities of modern life as means to guarantee its own relevance and legitimacy. This is so not only because the basic principles of the constitutional text are applicable to situations not envisaged by its founders, but also because the public powers -and the legislator in particular- gradually update these principles. Furthermore and because the Constitutional Court, when ensuring that any such updating conforms to the Constitution, endows the rules with a content to enable their reading in light of modern-day issues and the needs of current society; as otherwise there is the risk of an unfulfilled Constitution" (CCJ 198/2012, 6 November, PoL 9). From this perspective, it should be borne in mind that, although this is the first time that the Court has been called upon to address the problem of euthanasia, it is not in itself a new issue, because it is a universal dilemma.

(b) On the other hand, this Court is obliged to interpret the rights, principles and values concerned taking into account the principle of unity of the Constitution (inter alia, CCJs 113/1994, 14 April, PoL 9; 179/1994, 16 June, PoL 5; 292/2000, 30 November, PoL 11; and more recently, 9/2010, 27 April, PoL 3), a hermeneutic criterion that shows the relationship and interdependence of the different elements of the constitutional text and requires it to be interpreted as a harmonious whole. Thus, as the appellants propose, it is not possible to carry out our analysis from the sole and isolated consideration of the fundamental right to life and life as a constitutionally protected legal right. In a euthanasic context such as the one defined by the contested organic law, a serious situation of tension arises, with the liberty and dignity of the person and his or her life as poles, as neither the appellants nor the State Attorney deny, but they disagree as to the constitutional relevance, the normative structure and the constitutionally protected content of each of them. In our scrutiny, we must pay attention to the set of value-based decisions embodied in the Constitution, which are in a relationship of mutual dependence and interaction and whose harmonisation or practical concordance the interpreter must seek to achieve. With the particularity that we are dealing with elements of constitutional relevance which - without prejudice to their objective dimension - correspond to one and the same person, unlike what happens in ordinary situations of inter-subjective conflict.

(C) On the alleged constitutional ban on direct active euthanasia

(a) General approach

With these assumptions, our judgment must begin by clarifying whether, as the appellants claim, the Constitution absolutely prohibits any regulation of direct active euthanasia, since only if this is not the case would it be appropriate to examine the constitutional conformity of the specific regulation that the contested Organic Law makes of it.

In support of its rejection of the constitutional possibility of that legislation, the appeal makes two types of constitutional challenge. The first is the radical opposition of direct active euthanasia to the right to life and the constitutional right to life (Art. 15 SC), which the appellants reinforce with the incompatibility with the guiding principles of social and economic policy set out in Arts. 43, 49 and 50 SC. Following this first and principal complaint, they argue the absence of a constitutional basis for the right to euthanasic aid established by law. This leads us first to examine the scope of the right to life and, if its delimitation does not prevent it, to address the constitutional anchorage of the right to the provision of aid, although it should be noted from the outset that the two issues are linked.

(b) Scope of the fundamental right to life

The claim argues that the fundamental right to life has an absolute character and, derivatively, that the State has a duty to protect life even against the will of its holder and that the right does not include a right to one's own death. None of these considerations is convincing as a radical and definitive obstacle to the constitutionality of the regulation of euthanasia in question, as we will argue below.

(i) Human life is not only the subject-matter of the fundamental right set out in Art. 15 SC, but also the genuine basis without which the remaining rights would have no possible existence, which places it as the *prius* of the person and of all its manifestations. It must therefore be seen as an objective constitutional value that demands preservation and respect from the public authorities (CCJs 53/1985, 11 April, PoL 3, and, among others, 32/2003, 13 February, PoL 7).

The right to life is set up as the right to the protection of the physical existence of persons, which entails negative duties for the public authority, or duties of abstention, and positive duties, of protection against attacks by third parties (in this sense, CCJ 120/1990, 27 June, PoL 7) or even its own, as will be pointed out, in certain hypotheses. This has also been stated by the European Court of Human Rights when interpreting and applying Art. 2(1) ECHR, which enjoins the State not only to "refrain from the 'intentional' taking of life (negative obligations)", but also to "take appropriate steps to safeguard the lives of those within its jurisdiction (positive obligations)" (ECHR of 5 June 2015, *Lambert and others v. France,* § 117; similarly, ECHR of 4 October 2022, *Mortier v. Belgium,* § 116).

However, these considerations do not support an interpretation of Art. 15 SC - "[e]veryone has the right to life" - that attributes an absolute character to life and imposes on the public authorities a duty of unconditional protection that implies a paradoxical duty to live and, to that extent, prevents the constitutional recognition of autonomous decisions about one's own death in situations of suffering due to a medically verifiable incurable illness or condition that the person experiences as unacceptable.

(ii) It is true that the affirmation of the absolute nature of the right to life appears as *obiter dicta* in some of the decisions of this court cited in the appeal (CCJ 48/1996, 25 March, PoL 2). Whatever the meaning that may be attributed to this polysemic qualification, this assertion would entail - excluding the manifest absurdity of a self-referential right, that is, without alterity - the thesis that the person would have to bear, in merit of Art. 15 SC, a sort of constitutional obligation to stay alive or, in other words, that the public duties of protection deriving from the proclamation of the right would have to prevail in any case over the will of the person who decides to put an end to his or her own life or to assume, in a different hypothesis, lethal risks to himself or herself. Put in general and unqualified terms, the thesis is not constitutionally acceptable. In this respect, various considerations can be put forward in relation to the counter-evidence shown by the legal system, on the one hand, and principally, to the incompatibility of the absolutist thesis with the Constitution, on the other hand.

(iii) From the perspective before us, we note at the outset that the very decisions invoked in the appeal disprove the alleged absolute nature of the right to life and the constitutional right to life. It should not be forgotten that CCJ 53/1985 upheld the constitutionality of several cases of abortion, even on the basis of the value of human life. It should not be either forgotten that

CCJ 120/1990, which endorses the forced feeding of inmates on hunger strike, is careful to emphasise the limited scope of such authorisation from the perspective of the impact on the right to life. It supports the decision regarding those who are inmates in penitentiary centres and risk their lives in order to condition the exercise of the administration's powers, but expressly distinguishes this situation from the "decision of a person who assumes the risk of dying in an act of will that only affects him or her, in which case the unlawfulness of compulsory medical care or any other impediment to the realisation of that will could be upheld" (PoL 7; in the same line, CCJ 137/1990, PoL 5).

Moreover, contrary to what the appellants argue, this constitutional case-law does not lead to a general prohibition of suicide, even if it rules out a negative aspect that includes the right to one's own death and considers that those who kill themselves by their own hand act in a free sphere of law and, therefore, within the framework of the general principle of freedom and not in the exercise of a right (CCJs 120/1990, PoL 7; 137/1990, PoL 5, and 11/1991, PoL 2). However, it should not be forgotten that the aforementioned decisions admit the possible unlawfulness of measures to prevent death that would have been decided by the person in different circumstances. An overall consideration makes it clear that those statements constitute an answer to the specific question then analysed, that is, whether the right to life includes a right to face one's own death that can be opposed to the State's decision to articulate an impeditive mechanism, as the appellants claimed. And it is this specific possibility that is rejected in the judgments, which concluded that "it is not possible to admit that Article 15 of the Constitution guarantees the right to one's own death and, consequently, the claim that coercive medical assistance is contrary to this constitutionally non-existent right lacks constitutional support" (CCJs 120/1990, PoL 7, and 137/1990, PoL 5). In no way can it be deduced from that case-law that it is constitutionally impossible to admit euthanasia, much less a pronouncement on the iusfundamental problem that it raises.

Thirdly, we must highlight that constitutional case-law supports, based on the fundamental right to personal integrity, proclaimed in Art. 15 SC, the free and informed decisions to refuse medical treatment even when that may lead to a fatal outcome (CCJ 37/2011, PoL 5), as we explained in PoL 4. This is an endorsement that excludes the alleged unrestricted protection of life not only in logical terms, but also in terms of the delimitation of the fundamental right, and which implies the admission of a certain availability of life linked to the autonomy of the person. It should be remembered that it is the power of self-determination over interventions on

one's own body, regardless of their efficacy or healing purpose, which "legitimises the patient, in the use of his or her autonomous free will, to decide freely on therapeutic measures and treatments". And that choosing between the different possibilities, consenting to their practice or rejecting them, is "the most important manifestation of the fundamental rights that may be affected by a medical intervention", without being limited by a foreseeable consequence of death (inter alia, CCJ 37/2011, PoL 5). In short, self-determination over one's own body prevents the activation of life protection through life-saving therapies against the patient's will.

(iv) As this case-law shows, beyond the contrast of the legal realities enunciated with an absolutised concept of life, the impact of dignity and self-determination on the interpretation of the right to life is constitutionally transcendental in order to reject this understanding.

In line with the approach of the European Court of Human Rights *(Mortier v. Belgium,* § 124 and 128), the interpretation of Art. 15 SC in order to review the compatibility of the right to life with decisions on its conclusion and, more specifically, with medical assistance in dying in the context of euthanasia, must take into account, in accordance with the aforementioned requirements of systematic and evolutionary interpretation, that the provision of Art. 15 SC is part of a constitutional axiology that has freedom as the highest value of the legal system [Art. 1(1) SC] and dignity and the free development of the personality as the foundations of the political order and social peace [Art. 10(1) SC]. To this extent, in contrast to what is defended in the appeal, the Constitution does not accept a conception of the right to life and the protection of the value of life that is disconnected from the will of its owner and, therefore, indifferent to his or her decisions on how and when to die.

The enshrining of freedom as the highest value of the legal system [Art. 1(1) SC], "evidently implies the recognition, as a general principle inspiring it, of the autonomy of the individual to choose between the various life options that are presented to him or her, in accordance with his or her own interests and preferences" (inter alia, CCJ 132/1989, 18 July, PoL 6).

On the other hand, this same power of self-determination with respect to the configuration of one's own existence is derived from the dignity of the person and the free development of personality, clauses which are "the basis of our system of fundamental rights" (inter alia, CCJ 212/2005, 21 July, PoL 4). This court has pointed out that dignity "is a spiritual

and moral value inherent to the person, which is singularly manifested in conscious and responsible self determination of one's own life and which is accompanied by a claim for the respect of others" (CCJ 53/1985, PoL 8 and, in a similar sense, inter alia, CCJ 192/2003, 27 October, PoL 7). The same may be said about the free development of personality, which "protects the autonomous configuration of one's own life plan" (CCJ 60/2010, 7 October), excluding obstacles or public interference - perhaps also, in some cases, interventions which are sometimes called 'paternalistic' - which limit or hinder a personal development which the Constitution wishes to be 'free' without sufficient grounds: free, above all, from State intervention.

In addition, the right to conscious and responsible self-determination of one's own life crystallises mainly in the fundamental right to physical and moral integrity (Art. 15 SC). This right protects the essence of the person as a subject with the capacity for free and voluntary decision, which is violated when the individual is mediatised or instrumentalised, thus forgetting that every person is an end in himself or herself (CCJs 181/2004, 2 November, PoL 13, and 34/2008, 25 February, PoL 5).

In short, in our constitutional system, individual freedom for the autonomous adoption and implementation of private and intimate personal decisions of profound vital relevance enjoys *prima facie* protection through the recognition of freedom as a superior value of the legal system [Art. 1(1) SC], the principles of dignity and free development of the personality, expressly set up in the Constitution as "foundations of political order and social peace" [Art. 10(1) SC], and the fundamental rights closely linked to these principles, among which the right to physical and moral integrity is particularly relevant (Art. 15 SC).

The right to life must be read in connection with these other constitutional provisions and thus be interpreted as a channel for the exercise of individual autonomy with no restrictions other than those justified by the protection of other rights and legitimate interests. When it comes to the life decisions we are analysing, respect for this self-determination must also take into account situations of objective extreme suffering that the person considers intolerable and that affect the right to personal integrity in connection with human dignity. The content of the right to life must be consistent with these other values and constitutional rights of the person in order to avoid transforming a right of protection against the conduct of third parties (with the reflection of the obligation of protection of the public authorities) into an invasion of the space of freedom

and autonomy of the person, and the imposition of an existence alien to the person and opposed to the free development of his or her personality, lacking any constitutional justification. The weight of the constitutional values and rights that affect the right to life, interpreted systematically, determine the scope of the State's duties of protection and underlie the possibility of their restriction.

(v) This understanding is in line with the case-law of the European Court of Human Rights concerning the compatibility with the Rome Convention of the absence of State constraint on end-of-life decisions *(Lambert v. France,* § 136-139).

The European Court of Human Rights certainly excludes that a right to die can be derived from the right to life in Art. 2 ECHR (inter alia *Pretty v. United Kingdom,* § 40) and grants wide discretion to States in deciding whether or not to limit the right to privacy in the interest of the protection of life and the search for a balance between the two interests. What is decisive here is that the interpretation of the provision in accordance with Art. 8 ECHR leads to rule out that it prohibits *per se* a conditional decriminalisation of euthanasia, even if it implies the action of a third party to intentionally end the life of the person requesting it, insofar as it was intended to give individuals a free choice to avoid what in their view might be an undignified and distressing end to life, human dignity and freedom being the very essence of the Convention *(Mortier v. Belgium,* § 137 and 138).

(vi) According to the foregoing, an understanding of the right to life that is transcendent to the individual and immune to his or her free and conscious decisions, which is irremediably opposed to the constitutionality of vital self-determination in euthanasic contexts, cannot be opposed as an original and definitive reason for the unconstitutionality of the law. The Court does not see a difference in assessment which, from the strict perspective of the alleged absolute nature of the protection of life, explains the constitutional admissibility - accepted by the appellants - of the power of self-determination of a patient who refuses life-saving treatment, requests the withdrawal of life support or requires terminal palliative care, with the consequent acceleration of death that these decisions imply, but not of the cases of euthanasia now being examined. Also in this area, the free and conscious decision to die of those who find themselves in situations of extreme personal suffering, caused by serious, incurable or deeply incapacitating illnesses, has a fundamental legal dimension and an openness to the availability of life. We will now turn to this, although we must first address the invocation of the guiding principles set out in Articles 43, 49

and 50 SC with which the appeal reinforces the alleged opposition of the regulation of euthanasia with the protection of life.

(c) Guiding principles of social and economic policy (Arts. 43, 49 and 50 SC)

We must dismiss the accusation of illegitimacy of the OLRE which the appellants associate with the guiding principles of social and economic policy set out in Articles 43, 49 and 50 SC as provisions which, in addition to Article 15 SC, oblige the preservation of life and health and exclude any legitimate purpose of euthanasia.

This is clearly the case with regard to Articles 49 and 50 SC, relating to public policies of specific attention to people with disabilities and senior citizens. Neither the OLRE has incurred in the legal perversion of referring, in a selective manner, to these groups of people - but, in abstract terms, to anyone who meets the "requirements" established in Article 5 - nor can the commitments established for the public authorities in both provisions (the former merely cited without any justification) be understood to be contradicted by the legislative configuration of a provision of aid to die whose meaning differs completely from that which promotes each of these rules.

The same applies to the invocation of Articles 43(1) and (2) SC, which, respectively, recognise the "right to health protection" and provide that "[i]t is incumbent upon the public authorities to organise and safeguard public health by means of preventive measures and the necessary benefits and services". The appeal states that the Constitution obliges, "in the face of illness, suffering and death", to "the preservation of life and health" and that the "service provided by doctors in euthanasia is not aimed at protecting the health of the sick, but at putting an end to it once and for all". Once again, this argument places the legal-constitutional debate in a field that is alien to the problem of the legal regulation of euthanasia. The lawmakers have introduced the provision of aid to die in the face of what may well be called the - after all ineluctable - failure of medical science to heal the patient or alleviate their suffering [sections (b) and c) of Art. 3 OLRE] and it is difficult to contrast this legal order with a right to the protection of health from which no obligations derive for the patient, as has already been pointed out, and which does not make therapeutic obstinacy good, or in accordance with medical science, either.

(d) The right to self-determination regarding one's own death in euthanasic contexts

Having dismissed the allegation of incompatibility with the due protection of life and with the aforementioned guiding principles, the allegation regarding the lack of constitutional basis for direct active euthanasia in contexts of extreme suffering such as those covered by the Organic Law under challenge must also be rejected. As we reason below and as can be deduced from the above, this ground is to be found in the fundamental rights to physical and moral integrity - personal integrity, in short - of Art. 15 SC which, in connection with the principles of dignity and free development of the personality of Art. 10(1) SC, protect the right of the individual to self-determination regarding his or her own death in euthanasic contexts, a right which externally delimits the scope of application of the fundamental right to life and which is protected by the Constitution.

(i) As we have anticipated in PoL 4, it is the case-law of this Court that the rights to physical and moral integrity of Art. 15 SC include a right to self-determination of the person because, in addition to "protecting 'bodily integrity' (CCJ 207/1996, 16 December, PoL 2), 'they have also acquired a positive dimension in relation to the free development of the personality', aimed at its full effectiveness" (inter alia, CCJ 37/2011, PoL 3). For this reason, this court has declared that the right to personal integrity protects, without prejudice to details now irrelevant, those who freely, informed and responsibly refuse to undergo one or another medical or health treatment [CCJs 120/1990, PoL 8; 137/1990, PoL 6; 154/2002, PoL 9(b), and 37/2011, PoLs 3 to 7], even when that decision, taken in the use of their autonomous free will, could lead to a fatal outcome (CCJ 37/2011, PoL 5).

It is also the case-law of this court that "in order for this right to consent, to decide on any medical acts affecting a subject, to be freely exercised, it is essential that the patient be adequately informed in medical terms on therapeutic measures considered; only if he/she has such information may his/her consent be freely given, choosing from amongst the options available; he/she may also freely decide not to authorise the treatments or interventions proposed by the medical staff. In this way, both consent and information are two closely related rights, so much so that the exercise of one depends on adequately fulfilling the other [...]. Prior information, which has amounted to what is now known as 'informed consent', may therefore be considered a procedure or device with which to guarantee the effectiveness of the principle of a patient's autonomous free will and, consequently, of the constitutional provisions that acknowledge

fundamental rights and may be affected by medical conduct; and, particularly, as an implicit and mandatory consequence of a guaranteed right to physical and moral integrity, thereby acquiring constitutional relevance and determining that the failure to provide this information, or a defective information, may infringe the fundamental right itself" (CCJ 37/2011, 28 March, PoL 5). It is a guarantee established in Basic Law 41/2002 of 14 November 2002 regulating patients' autonomy and rights and obligations regarding information and clinical documentation (Arts. 2 et seq.).

This right to patient self-determination is also protected by the ECHR, even though it does not have a specific right to physical and moral integrity equivalent to that of Art. 15 SC. The European Court of Human Rights has recognised that the right of self-determination with regard to medical treatment is part of the right to respect for private life set out in Art. 8(1) ECHR, even if its exercise could lead to the death of the individual (inter alia ECHR judgments of 29 April 2002, *Pretty v. United Kingdom,* § 63 and 65, and of 5 June 2015, *Lambert and Others v. France*, § 142 and 180).

(ii) In connection with the principles of dignity and free development of the personality [Art. 10(1) SC], the right to personal integrity of Art. 15 SC protects a sphere of self-determination of the person that also protects the individual decision to die by one's own hand, when that decision is taken freely and consciously by a capable human being who is immersed in a context of extreme personal suffering due to clinical causes of extreme seriousness, rationally and objectively verifiable according to the parameters of medical science.

In an extreme situation of this kind, the decision as to how and when to end one's own existence has an insurmountable impact on the rights to physical and moral integrity of the person concerned, as well as on the free development of their personality and, most importantly, on their dignity, a principle which ultimately encapsulates the deepest meaning of the constitutional option which in this specific context derives from Articles 15 and 10(1) SC. Dignity is generally recognised for all persons, but when the constitutional interpreter tries to specify its content, he cannot ignore the obvious fact of the specificity of tragic situations of extreme personal suffering caused by serious incurable or profoundly incapacitating illnesses *(mutatis mutandis*, with regard to the interpretation of the requirements derived from the dignity of the person in the field of maternity, CCJ 53/1985, PoL 8).

In these precise circumstances, it can no longer be said that we are dealing with a generic conduct of disposition of one's own life carried out in the exercise of mere factual freedom, that is, in a sort of free sphere of Law (CCJs 120/1990, PoL 7; 137/1990, PoL 5, and 11/1991, PoL 2), but rather with one of the vital decisions - however extreme and fatal - of self-determination of the person protected by the rights to physical and moral integrity (Art. 15 SC) in connection with the principles of dignity and free development of personality [Art. 10(1) SC]. This right to self-determination guarantees the person immersed in a context of extreme suffering such as the one considered here a space of individual autonomy to draw up and carry out an end-of-life project in accordance with their dignity, following their own conceptions and evaluations of the meaning of his or her existence. It is a sphere of autonomy that the State must respect and to whose effectiveness it must contribute, within the limits imposed by the existence of other rights and values also recognised by the Constitution.

Due to its constitutional basis, this specific right of self-determination requires that it is exercised after a free and conscious decision of the holder. Therefore, our aforementioned case-law on prior information and informed consent as guarantee mechanisms for the effectiveness of the principle of the autonomous free will of the patient and, therefore, of the constitutional provisions that recognise fundamental rights that may be affected by medical actions is fully applicable here, so that the failure to provide this information, or a defective information, may infringe the fundamental right itself (CCJ 37/2011, PoL 5).

In a similar sense, although with a different scope - not limited to the euthanasic contexts which, being those affected by the Organic Law under challenge, are the only ones on which we are now called upon to rule - the European Court of Human Rights has stated 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 within the meaning of Article 8 of the Convention", so that the obligation on the public authorities to intervene is limited to decisions which are not taken with knowledge and freedom (ECHR judgments *Haas v. Switzerland,* § 51; *Koch v. Switzerland,* § 52; and *Mortier v. Belgium,* § 124, 135 and 136). A conclusion reached by the European Court of Human Rights after noting that "human dignity and liberty are at the very heart of the Convention" *(Mortier v. Belgium,* § 124).

Finally, the appellants' argument that a person who commits suicide loses his or her dignity and freedom by giving up his or her livelihood cannot be accepted. The free and conscious decision to put an end to one's own life constitutes an expression of the personal autonomy that is inherent to the individual, without it being conceivable to have an absolute understanding of the right to life opposed to the dignity of the person who is in the tragic situation of suffering, whose protection - like the rest of fundamental rights - serves from an individual perspective as a normative concretion (in different contexts, CCJs 194/1994, 23 June, PoL 4; 113/1995, 6 July, PoL 6; 133/2001, 13 June, PoL 5, or 136/2006, 8 May, PoL 6).

(iii) This right of self-determination regarding one's own death in euthanasic contexts also includes the right of the individual to seek and use the assistance of third parties necessary to carry out the decision in a manner compatible with his or her dignity and personal integrity. This assistance may be necessary both to ultimately realise the will to end one's own life and to provide the means to end one's life in a safe and painless, or in other words dignified, manner.

It follows that the Constitution requires the public authorities - in the first instance, lawmakers - to allow third parties to assist the death of a capable person who so decides, freely and consciously, in the kind of extreme situations to which our prosecution refers, and to provide the necessary means to do so. Without necessarily deriving from this a duty of the State to provide services, what the State cannot do is evade its responsibility in this matter, as would be the case if it tried to remain oblivious - through prohibition or the absence of regulation - to the specific problems of those who need the help of third parties to effectively exercise their right in this kind of situation, as this could lead the person to a degrading death, and in any case would make each individual, when deciding on his or her own death and carrying it out, depend on his or her specific and personal physical, social, economic and family conditioning factors. Both results are incompatible with Arts. 10(1) and 15 SC. As will be indicated below, this public duty to give effectiveness to the right to self-determination does not, however, entail a constitutional requirement of total and indiscriminate permission for third parties to assist in the free and conscious decision to die by a capable person in a euthanasic context.

A similar approach has been taken by the European Court of Human Rights when, after framing the right to decide how and when to end life under Art. 8(1) ECHR, it states that "preventing by law a person from exercising his or her choice to avoid what in their view might

be an undignified and distressing end to life" may amount to interference with that right *(Mortier v. Belgium*, § 135, with further references).

(e) Dismissal of the complaint

The above considerations lead to the rejection of the first part of the substantive unconstitutionality complaint that the appellants direct against the OLRE as a whole, based on the alleged constitutional impossibility of configuring direct active euthanasia as a lawful activity.

The Constitution does not require, any more than the ECHR does, an absolute protection of human life that could be opposed to the free and conscious will of its holder, nor is that understanding of life compatible with the consideration of the person that derives from the constitutional text as a whole. Rather, the decision to end one's own life, freely and consciously adopted by someone who, while in full use of his or her mental faculties, is immersed in a situation of extreme suffering due to particularly serious, irreversible and objectively verifiable medical causes, is one of the vital decisions protected by the right to self-determination of the person that derives from the fundamental rights to physical and moral integrity (Art. 15 SC) in connection with the recognition of the principles of dignity and free development of the personality [Art. 10(1) SC]. This right to self-determination entails the obligation of the State to provide the necessary legal means to allow the necessary third party assistance so that the person immersed in one of the tragic situations referred to in our judgment can exercise his or her right to decide about his or her own death in conditions of freedom and dignity.

However, this does not in itself mean that any regulation of third-party aid in dying in a euthanasic context is in itself compatible with the Constitution. For this compatibility to exist, it is necessary that the lawmakers, who set up the mechanisms to give effectiveness to the right to self-determination regarding one's own death in euthanasic contexts, establish sufficient protection measures for the constitutional rights, principles and values that may be affected by the exercise of this right, as is examined in detail below.

(D) On the alleged unconstitutionality of the regulatory model embodied in the contested Organic Law

(a) General approach

Having ruled out the possibility that the Constitution is *per se* opposed to the legal provision of euthanasia, the question we have to clarify is whether the lawmakers, in giving regulatory attention to those who seek public assistance to put an end to their own life and in establishing a right to a provision for this purpose, has established sufficient guarantees that the death thus caused does not violate any of the constitutional rights and values at stake.

At this point, it is necessary to clarify the methodological guideline to be followed in our judgment. In the alternative, the appellants argue that, if the right to life is considered to be susceptible to modulation, the specific balancing of the right to life as set out in the OLRE would be unconstitutional because it allows an attack on this right that does not meet the requirements of the principle of proportionality. According to their approach, the provision of aid to die would constitute a measure of interference with the fundamental right to life, the constitutionality of which would be conditional on its proportionality, understood as a prohibition of excessive restriction of fundamental rights.

This approach cannot be accepted. As has been reasoned, the legislative authorisation of direct active euthanasia constitutes a measure aimed at guaranteeing the right of self-determination of the individual with respect to his or her own death in contexts of extreme suffering which, with constitutional anchorage in the fundamental right to physical and moral integrity, does not imply in principle an interference with life either as a fundamental right or as an objective constitutional value. This is without prejudice to the caveat that life could be harmed in the absence of sufficient protective measures to prevent undue influence or abuse by third parties, either in the making of the decision to die or in its implementation. The State must not only refrain from interfering in people’s lives, but must also avoid, as far as is factually and legally possible, interference by subjects other than the holder of those rights. This requirement is crucial in the matter we are now examining, because the participation of a third party implies the incorporation into the end-of-life process of an external agent that transcends the personal sphere of the individual who intends to die and, in the absence of sufficient legal safeguards, that

may expose the individual concerned to the risk of undue influence, manipulation and abuse, with the consequent infringement of his or her right to life.

It should be added that, although it does not form part of the grounds of challenge, it cannot be ignored that any regulation of direct active euthanasia must also respect the right to self-determination which serves as a constitutional basis and delimits the respective areas of application of this right and the right to life. As we have pointed out on other occasions, when compliance with the State's duty to protect a legal right or fundamental right implies that the lawmakers have to carry out positive actions in its defence that conflict with fundamental rights of freedom, the constitutionality review cannot be approached exclusively from the perspective of sufficiency in the fulfilment of the duty of protection, but must necessarily assess whether the legislative action respects the essential content of the fundamental rights of freedom affected by it and is not disproportionate (inter alia, CCJs 120/1990, 27 June, and 215/1994, 14 July).

Within these limits, it is up to the public authorities - and, in the first instance, to the lawmakers - to adopt sufficiently effective protective measures to prevent such a regulation, and its subsequent application in practice, from having a constitutionally inadmissible impact on the life of the individual. Lawmakers enjoy a wide freedom of configuration when it comes to responding to their duties to protect people's lives against aggression by third parties. They can opt for different models made up of one or other protective measures of a material, organisational and/or procedural nature, as long as the latter achieves the protective result required by the Constitution and, moreover, does so without disproportionately interfering with the patient's right to self-determination or affecting its essential content.

On the other hand, it falls to this court to review the conformity with the Constitution of the specific option adopted by the lawmakers in regulating direct active euthanasia. Due to the specific constitutional framework of this matter, this must be carried out, as far as the protection of life is concerned, through an assessment of proportionality understood not in the classic sense of prohibition of excess (on this aspect, inter alia, CCJ 148/2021, 14 July, PoL 3), but in its manifestation as a prohibition of defect, that is, as a proscription of non-existent or insufficient protection. This a deficit would exist if lawmakers had not adopted any protective measures at all, if the measures adopted were manifestly inadequate to achieve the required objective of protection or if they were not sufficient to provide the level of protection required by the Constitution. Therefore, it is not our task to analyse whether there could be other more effective

systems of protection of life (which would have in fact a greater impact on the fundamental right to self-determination regarding one's own death in euthanasic contexts, an impact that should be measured in the light of the principle of proportionality understood as a prohibition of excess), but only to determine whether the system provided for in the OLRE complies with reasonable minimum standards of protection. Only if the answer to this question were negative could the censure directed by the appellants against the Organic Law in its entirety be shared.

This is the perspective from which the specific regulatory model chosen by the lawmakers in adopting the OLRE must be examined, and from which the general objections which the appellants have raised against it in this respect must also be addressed. This censure, relating to the legal delimitation of the euthanasic context and to effective access to palliative care, cannot be set aside simply because the appeal sets them out in the context of the alleged assessment of proportionality understood as a prohibition of excess - which has just been dismissed as a guideline for control - but must be considered from the perspective of the prohibition of the non-existence or lack of enough protection. For the rest, and to facilitate the understanding of our arguments, the appellants' subsidiary complaints relating to specific provisions of the OLRE will be examined in the following legal grounds, even though most of them are also based, in part, on the alleged inadequacy of the level of protection afforded to life by the OLRE.

(b) The State's protection duties in this context

In order to rule on the constitutionality of the OLRE from this perspective, it is necessary to determine which are the constitutional duties of protection towards third parties with respect to the matter regulated by the OLRE. Once this canon has been established, will it be possible to examine whether it has been satisfied by the lawmakers.

(i) It should first of all be made clear that, in this context, the Constitution imposes requirements of protection vis-à-vis third parties not only in terms of life as a fundamental right and as an objective constitutional value –the only perspective mentioned in the appeal– but also in the light of the fundamental right to self-determination of the death itself in euthanasic situations. However, since no breach of these latter duties of protection has been raised in these proceedings and there are no elements that lead this court to doubt that they have been satisfied

by the contested organic law, our judgment must be limited to verifying whether the lawmakers have observed their duties to protect the lives of people against third parties.

The constitutional duty to protect the fundamental right to life against attacks by third parties is embodied in the State's obligation to ensure that the decision to end one's own life in situations of extreme suffering is taken and completed in accordance with the free and conscious will of a capable person, which requires the interaction of sufficient mechanisms to ensure that the information, thought, stable and foreign nature of such an important decision is informed. It is important to point out that, in so doing, the content of that duty of protection coincides with the content of the right to self-determination for the death itself in euthanasic contexts, as is clear from our case-law, already cited and applicable here, on informed consent as a requisite and constitutional guarantee of the exercise of the right to personal integrity (Art. 15 SC). It should also be noted that the existence of a genuinely, free and conscious will on the part of a capable person is the element which marks the boundary between the area of protection of the fundamental right to life and the fundamental right to self-determination in relation to death itself in euthanasic situations.

Similarly, the European Court of Human Rights ruled with reference to the State duties to protect life in *Mortier v. Belgium*, § 139, which takes up the consideration of the United Nations Human Rights Committee that euthanasia does not constitute interference with the right to life if it is surrounded by strong legal and institutional guarantees enabling it to be ascertained that medical professionals apply an explicit, unambiguous, free and informed decision of the patient so that the patient is protected from pressure and abuse. In order to identify the specific guarantee standards which will necessarily have to be met by the lawmakers within its margin of configuration, it may be useful [ex Art. 10(2) SC] to take account of the case-law of the European Court of Human Rights on the conditions of euthanasia – practised in the context of a legislative choice of depenalisation – which ensure compliance with positive obligations to protect life. These safeguards relate to three elements: protective legislation as regards the acts and procedure prior to euthanasia, practice which complies with the legislative framework and subsequent review *(Mortier v. Belgium*, § 141). A brief reference to these patterns should be made for guiding purposes, given that the case-law of the European Court of Human Rights is not a direct parameter of constitutionality and that the guarantees mentioned in *Mortier* are linked to the problem raised in the present case, the euthanasia practised at the request of a person suffering from psychiatric

problems and in accordance with legislation which did not provide for a system of prior verification, aspects that differ from the model established by law which we are examining.

The first requirement lies in the existence of a legislative framework relating to acts prior to euthanasia ensuring that the patient's decision to end his or her life is taken freely and in full knowledge of the facts, which may be interlinked by means of a prior control by an independent body and, in the absence of that control, by the existence of sufficient substantive and procedural guarantees in the legislation (§§ 145 and 146). It is in this context that the European Court of Human Rights examines in *Mortier* the forecast of a repeated request unconnected with external pressure, verified by a doctor, the definition of the situation of suffering, the additional involvement of independent and specialised doctors in pathology or the setting of a period between the request and the act of euthanasia (§§ 150-153). That legislation must be clear and precise, in order to enable the citizen to know the limits imposed on the exercise of the right to decide the time and manner of death *(Gross v. Switzerland,* §§ 63 and 69). Secondly, having established a clear and precise legal framework, it is crucial that euthanasia is practised in compliance with this regulation, so that the legal guarantees are satisfied and effectively operate as a barrier against possible abuses, ensuring a fully voluntary decision and in the medical situations that the lawmakers have set out. As a third element, reference is made to a subsequent review complying with the investigation obligations which enshrines the right to life under Article 2 of the ECHR. As we know, that provision imposes, alongside positive substantive obligations, procedural obligations inherent in an efficient and independent judicial system which, in the event of death, is capable of establishing the facts, demanding liability on the part of the guilty persons and providing adequate compensation to victims. The obligation to investigate possible death cases due to homicide action also applies to cases "where an act of euthanasia was the subject of a criminal complaint by a relative of the deceased, plausibly indicating the existence of suspicious circumstances" (§ 167). However, the European Court of Human Rights considers that where death was the result of an act of euthanasia carried out under the legislation, which permitted it subject to strict conditions, a criminal investigation was not usually required, as it only became mandatory under suspicious circumstances (§ 179). In order to satisfy the requirements of the protection of the right to life, successive review is crucial and must be particularly rigorous in the absence of a prior review, which may be interlinked through an administrative body, provided that it enjoys independence, which the European Court of Human Rights considers to be particularly important when it comes to obtaining medical opinions (§§ 171 and 176).

(ii) As regards the intensity of the duties to protect third parties imposed on the State by fundamental rights, their determination must be made taking into account the constitutional importance of the constitutional values and rights they protect, the seriousness, extent and imminence of the risk or threat to which they are exposed and the reasonable degree of protection of those rights by the rightholder concerned. It is clear that, when it comes to the regulation of direct active euthanasia, both the relevance of the fundamental right likely to be affected (life, in this case) and the seriousness of the threat to which it is exposed (its definitive and irreparable elimination) is maximum. It is necessary to insist at this point on the double phenomenological particularity of the right to life: the irreversible nature of the implementation of the decision to put an end to it and its existential dimension as a biological medium for other rights. On the other hand, in the presence of legislation relating to euthanasic contexts, such a right accrues to persons who are in a particularly vulnerable situation due to the extreme suffering in which they find themselves, which could lead to create particular difficulties in protecting themselves.

These circumstances determine the constitutional enforceability of a high level of protection of life. In order to prevent otherwise irreversible damage, it is incumbent on the lawmakers to be rigorous both in determining the factual assumptions and procedures for requesting aid in dying and in ensuring the corresponding and obligatory guarantees and controls, so that the individual is sufficiently protected from the risk of undue influence, manipulation and abuse by third parties.

(c) Procedure

That being so, the OLRE regulatory model can be analysed to determine whether it is within the constitutional limits we have just drawn.

(i) Before addressing the specific allegations of unconstitutionality raised in the complaint on this point, it is necessary to examine the whole model of protection of life against third parties established by the Organic Law. This is necessary because that model cannot be assessed solely on the basis of a decontextualised and isolated reading of the provisions referred to in the appeal, but account must be taken of the complex legal system in which it is embedded, the essential characteristics of which have been described in the fifth ground, and which may be summarised as follows.

From a reading of the preamble of the OLRE, in relation to its articles, it is clear that lawmakers have opted for a system of regulation and public provision of aid in dying in euthanasic contexts, structured as a subjective public right, on the understanding that a model of this type offers greater guarantees against possible abuses by third parties than an option that merely decriminalises direct active euthanasia. It is an assessment which cannot be regarded as unfounded, either in the abstract or, in particular, in the light of the specific system of life protection measures put in place by the OLRE, which is structured around four fundamental axes.

The first of these relates to the fact that the provision of aid to die can only be dispensed - apart now from the singular problem of cases of "de facto incompetency" [Arts. 5(2), 9 and related provisions OLRE], which is dealt with in PoL 8 of this judgment - after the manifestation of what the OLRE calls an "informed consent" of a "capable" person and which is "free, voluntary and conscious" [Arts. 3(a), 4(2), 5(1)(a), 5(1)(e) and 6(1)]. Therefore, assistance in dying cannot be provided without the consent of the individual, nor by a person who is not capable, nor with the consent of a representative [Arts. 5(2), 6(4) and 9], nor with a consent that is not informed, free, voluntary and conscious. In accordance with the foregoing, provision is made for a mandate to guarantee "the means and resources of support, material and human, including universal accessibility and design measures and reasonable adjustments that are necessary for persons requesting the provision of aid to die to receive the information, form and express their will, give their consent and communicate and interact with the environment , freely, so that your decision is individual, mature and genuine, without intrusion, interference or undue influence" [first subparagraph of Article 4(3)]. Consistent with this is the free revocability of the request for death assistance and the deferral of its administration once it has been recognised. [Article 6(3)].

The second substantive guarantee provided for by the OLRE is the delimitation of a "euthanasic context", as cited in its preamble, as a factual requisite necessary to justify the request for aid to die. In accordance with the contested rule, that request will be possible together with other conditions only in two cases: that of "serious, chronic and disabling illness" and "serious and incurable disease", causing, respectively, "constant and intolerable physical or mental suffering for the person" or "constant and unbearable physical or mental suffering for which there is no possibility of relief which the person considers tolerable" [Article 3(b) and (c)]. These limits mean that the lawmakers did not extend the provision of aid to die –or the consequent conditional decriminalisation of the euthanasia– to all contexts and situations in which the person sought to

obtain assistance from third parties in order to end his or her own life, but reduced that possibility to euthanasic contexts characterised by extreme personal suffering on serious, irreversible and objectively verifiable medical grounds. The definition of the euthanasic context thus operates as a mechanism for the protection of life as a fundamental right and an objective constitutional value.

The third block of guarantees provided for in the Organic Law, which is strictly speaking instrumental to the two substantive guarantees mentioned above, includes procedural and organisational safeguards relating to the recognition of the benefit and its materialisation. On the one hand, this includes the exhaustive delimitation of the requirements for the recognition of the provision (Arts. 5 and 6), as well as the imposition on medical personnel of precise duties of information and neutral advice to the patient [Arts. 5(b) and 8(1)], information that is not generic, standardised and disconnected from the purpose of protecting the constitutional rights at stake, but is specific, qualified and oriented towards making other public benefits available to the individual.

On the other hand, the OLRE has foreseen a prior and compulsory administrative procedure to verify the concurrence of the requirements for access to the benefit, articulating a detailed *ex ante* control of direct active euthanasia. It requires repeated requests from the patient with certain formalities, to guarantee the voluntary nature and firmness of his or her decision [Arts. 5(1)(c), 8(1), 8(2) and 8(3)]; several minimum waiting periods, to protect the need for such a transcendental decision to be taken after due consideration [Arts. 5(1)(c), 8(1) and 8(2)]; specific duties of motivation and documentary justification [Arts. 4(2), 5(1)(c) and (e), 6(2), 6(3), 7(2), 8(3) and 10(3)]; and the involvement in this procedure of several unrelated medical professionals [the “responsible physician” and the “consultant physician”: Arts. 3(d) and (e) and 8] and of an independent collegiate body made up of medical, nursing and legal personnel (the guarantee and evaluation commission: Arts. 10, 12, 17 and 18), expressly prohibiting the involvement of “those who incur in a conflict of interests” and “those who benefit from the practice of euthanasia”, a precaution that connects with the provision that the service may be provided in public, private or subsidised health centres and at home, without this affecting the quality of care (Art. 14).

In connection with this last aspect, the OLRE also contains guarantees concerning the materialisation of the benefit. The lawmakers have provided for the possibility of choosing between two modalities [Art. 3(g)], requiring in both cases that the provision be carried out with

the intervention of a health professional and through the administration of a substance, and that the provision be provided "with the utmost care and professionalism on the part of health professionals, with the application of the corresponding protocols" [Art. 11(1)] and requiring these professionals to accompany and assist the patient until the moment of death [Arts. 11(2) and 11(3)], a decision which, as mentioned above, the patient can postpone at any time [Art. 6(3)].

The OLRE has additionally designed a system of obligatory subsequent administrative control that must be substantiated *ex officio* before the guarantee and evaluation commission [Art. 18(b)], a guarantee that is connected with the imposition on the administrative bodies that intervene in the prior procedure of reinforced obligations of information and documentary justification after the provision of the service (Art. 12).

The fourth and last block of protection measures includes the provisions of the OLRE relating to the system of guarantees for administrative complaints [Arts. 7(1), 8(4), 10(3), and first to third paragraphs of Art. 18(a)] and judicial complaints [Art. 10(5), fifth paragraph of Art. 18(a) and fifth additional provision], which will be dealt with in more detail in PoL 7. This block includes the express reference to the applicability of the sanctioning regime provided for in Chapter VI of Title I of the General Health Law 14/1986, without prejudice to the possible civil, criminal and professional or statutory liabilities that may correspond to breaches of the provisions of the OLRE itself (second additional provision). This section can also include the maintenance of the criminalisation of euthanasia when it is carried out without strictly complying with the requirements set out in the Organic Law (first final provision).

The Court considers, without prejudice to the detailed analysis that follows, that this framework of substantive and procedural guarantees satisfies the State's duty to protect the fundamental rights at stake from third parties, including life.

(ii) Having established the above, and moving on to examine the specific complaints of the appellants, we must first address the complaint regarding the lack of accessibility and foreseeability which, according to the appeal, would derive from the imprecision of the legal definition of "serious, chronic and disabling condition", one of the two types of euthanasic contexts that allow for the provision of aid to die [Art. 5(1)(d) OLRE] and which the lawmakers define in this way: "a situation which refers to constraints having a direct impact on the physical

autonomy and activities of everyday life, with the result that it does not make it possible to rely on itself, on expression and correlation capability, and involving a constant and intolerable physical or mental connection for the person suffering from it, it is certain or highly likely that such limitations will persist in time without the possibility of recovery or significant improvement. Sometimes it can be an absolute dependence on technological support" [Art. 3(b) OLRE].

The complaint argues that the defect in this definition is the lack of quality of the law, which it supports by several considerations. First, that the "constraints" referred to in this point in the Organic Law "could apply to practically any elderly or incompetent person". Secondly, the definition operates a "subjectivity" of suffering that would make it possible to include any person suffering from a mental disorder in the scope of application of the rule, so that "in the event that the mental illness causes dependence (as happens with all of them), mental suffering (as happens with all of them) and there is a high probability of persistence over time without appreciable improvement[,] life becomes unworthy". Third, the definition does not require the existence of a "serious and incurable illness", as that would be – as will be seen – the other case to request the provision, referred to in Article 3(c) OLRE, for which no specific allegation of unconstitutionality is made in the appeal. The legal concept would be "so open-ended" that "anything, and in particular any psychological disability or illness" could be included". The State Attorney argued that legal rules are intended to be general and that the lawmakers had made a "considerable effort to be precise" in order to guide clinical practice.

In order to judge this complaint, we must begin by recalling that, as we have already indicated, the very limitation of the right to seek and obtain assistance in dying in the euthanasic contexts established by the lawmakers operates, in principle, as a mechanism for the protection of life. At this point, it must be assessed whether this delimitation is sufficiently precise for the guarantee to be effective or whether, on the contrary, it effectively leaves the factual conditions for the recognition of the benefit uncertain, with the consequent increase in the risk to life and also - it should be added - to the self-determination of the person.

The appellants do not dispute that under the abstract assumption defined by the lawmakers in Art. 3(b) OLRE, factual circumstances can be subsumed that justify, according to the regulatory model set out in the Organic Law, the request and obtainment of the provision of aid to die. They object to the vagueness of the article and the possibility of its application,

therefore, to “any disability or psychological illness”, in which that justification could not be found. A censure that this court does not share.

The precautions in the appeal are unfounded in the face of the very expression “suffering”, a legal notion which, contrary to what is claimed, is not, given the context, different in quality to that of “illness” [Art. 3(c) OLRE] nor does it include ailments or disorders of a psychological nature, even though it could be of that nature, as the provision provides, the “constant and intolerable” pain that must necessarily be associated with the suffering; it should be pointed out that these features of suffering would be clinically identifiable or recognisable as those symptoms, despite the appellants’ reticence.

“Disease” and “illness” are synonymous terms according to the Dictionary of Medical Terms of the Spanish Royal Academy of Medicine. The first of these was used indistinctly by the bill which was at the origin of the OLRE to refer to the cases contemplated in sections (b) and (c) of Article 3, and no different conclusion can be drawn from the amendment to the first of these sections, which led to the substitution of one word for another (amendment no. 170 in the Congress of Deputies, which affected several provisions of Article 3 and whose justification was to obtain, according to its authors, a “greater precision of the text”: “greater precision of the text”: “Official Gazzette of the Parliament. Congress of Deputies”, no. 46-4, 4 November 2020, p. 111). This is without prejudice to the differences between the cases provided for in one paragraph and the other, in particular the requirement in paragraph 3(c) of a “limited life expectancy”.

The “suffering” defined in Article 3(b) must always be presented as a somatic ailment or illness in its origin, although the constant and intolerable suffering that the Organic Law requires in this point may be of a psychological nature. Its preamble is conclusive in this regard. When referring to the “euthanasic context”, it begins by clarifying that it “must be delimited according to certain conditions affecting the physical situation of the person suffering physical or mental pain”. This distinction between physical pathology or ailment [“with no possibility of cure or appreciable improvement” or “incurable”, Art. 3(b) and (c), respectively], on the one hand, and the physical or psychological suffering associated with it, on the other, fundamentally excludes that the OLRE, contrary to what the appellants claim, intends or permits the inclusion of “psychological illness” or even “depression” among such “ailments”.

The censure which, beyond these objections, is directed by the complaint against Art. 3(b) OLRE is based on an isolated criticism of each of its requirements, or even of each of the terms used in the provision. This hermeneutic dismemberment is not adequate to challenge a complex definition, where several statements include a unitary sense, following the lawmakers' decision. There is no reason to exclude this sense that is easily identifiable by medical science, which should have the final say, even if in the opinions based on it "the absolute terms of safety or certainty are usually excluded" (CCJ 53/1985, PoL 10). Nor can such a requirement be made of the legal definition at issue or of any other which, by means of inevitably abstract statements, could be conceived as an alternative.

The reference in Article 3(b) of Organic Law on the Regulation of Euthanasia to a "serious, chronic and incapacitating suffering" is compatible with legal certainty, since, although it contains a margin of appreciation, it is susceptible to being defined in a manner "in accordance with the general idiomatic sense of the term" (CCJ 53/1985, PoL 10), which eliminates the risk of absolute indeterminacy in terms of its interpretation or that insurmountable doubts about the required conduct may be generated in those to whom it is addressed. Indeed, the definition requires the concurrence of various circumstances susceptible to medical assessment: on the one hand, the existence of "limitations that directly affect physical autonomy and activities of daily living, in such a way that it is not possible to fend for oneself, as well as the ability to express oneself and to relate"; on the other hand, that these limitations are associated with "constant and intolerable physical or mental suffering for the sufferer"; and, in addition, that there is "a certainty or high probability that these limitations will persist over time without the possibility of healing or appreciable improvement". Lawmakers are not required to be more precise, as there are sufficient interpretative instruments to avoid the creation of legal uncertainty in the application of the rule, bearing in mind that the OLRE itself has provided that the concurrence of the situation foreseen in its Art. 3(b) must, in any case, be established by at least two different and independent medical practitioners, as well as by a collegiate administrative body made up of medical and legal professionals (the guarantee and evaluation commission), procedural precautions that allow the margins of vagueness that the rule may present in its application to specific cases to be compensated for.

For the reasons set out above, these grounds of unconstitutionality must be rejected.

(iii) Secondly, we must examine whether the lawmakers have violated their duty to protect life due to the terms in which the OLRE refers to palliative care, where this care could perhaps mitigate, if accepted by the affected person, the ongoing and continuous suffering from which he or she is suffering.

Palliative care is referred to in Arts. 5(1)(b) and 8(1) OLRE. The first of these provisions establishes that in order to receive the provision of aid to die, the person must fulfil, among other requirements, that of having "in writing the information that exists about his or her medical process, the different alternatives and possibilities for action, including access to comprehensive palliative care within the common portfolio of services and the benefits that the person is entitled to in accordance with the rules of care for dependency". The second provides, as far as is relevant here, that upon receipt of the first request for the provision of aid to die, the responsible physician shall carry out "a deliberative process with the requesting patient on his or her diagnosis, the therapeutic possibilities and expected results, as well as possible palliative care, making sure that the patient understands the information provided to him or her. According to the applicants, those provisions impose a "purely formal information requirement" that would not guarantee "full accessibility and universalisation of such care", which would result in the "most drastic restriction of the primary fundamental right", the "radical unconstitutionality" of the OLRE.

First, the Court must point out in this regard that an appeal of unconstitutionality is, strictly speaking, a suitable channel for judging "laws, regulatory provisions or acts with the force of law" [Art. 2(1)(a) LOTC, on the basis of the provisions of Art. 161(1)(a) SC] and cannot be directed against a block of legality or a part of the regulatory system or the legal system, but only against certain legal texts and legislative formulas (CCJs 24/1982, 13 May, PoL 12; 86/1982, 23 December, PoL 5, and 45/2019, 27 March, PoL 5). It cannot either give rise, for the same reason, to control the fulfilment and effectiveness of one or other legislative policies in an open and indeterminate manner, however necessary these may be to optimise, without detriment to the lawmakers' margin of freedom, constitutional mandates or to complement the provisions of other legal provisions. Whether or not palliative care has achieved the "universalisation" that the appeal lacks is not something that can be examined in these proceedings. A second necessary clarification is that palliative care consists, according to the description in the preamble of the OLRE which was not disputed by the parties, of the "use of drugs or therapeutic means that alleviate physical or psychic suffering even if they accelerate the patient's death", thus integrating

a form of euthanasia different from that regulated by the contested norm (namely, the so-called indirect active euthanasia).

It is not possible to accept the approach of the appeal according to which the provision of aid to die that the OLRE sets out could only be constitutional if the patient had previously been assured access to the palliative care he/she needed, because, as is said, if it is not refused, palliative care could in some cases totally or partially attenuate suffering that only if it were perceived as constant and intolerable would it allow, together with other conditions, to open the way to that benefit [Art. 3(b) and (c) and Arts. 5(1)(d) and 12(b) paragraph 5 OLRE]. It should be objected at the outset that palliative care is not an alternative in all situations of suffering in which the right of self-determination of euthanasic death operates. It is not, in particular, in cases of severe, chronic and disabling conditions where death is not expected soon. Beyond this lack of palliative care to cover all the cases of extreme suffering concerned, it must be objected that underlying this argument is the assumption that palliative care would sufficiently protect the dignity of the person without affecting his or her life, an assumption that cannot be accepted in constitutional terms. The constitutional foundation for the provision of aid to die in the OLRE, which is based on self-determination regarding one's own death in euthanasic contexts, refers not only to freedom, but also to the dignity of the person. It cannot be presumed from a constitutional perspective that the mere elimination or mitigation of physical suffering that might occur through the application of comprehensive palliative care is sufficient to reduce the psychological suffering of the person to levels that allow them to continue living in conditions compatible with their own perception of the dignity of their existence. Palliative care is a therapeutic option that the person may reject on the basis of his or her personal conception of a dignified death, which may lead the individual to prefer the direct anticipation of death, an option also protected by the person's right to self-determination in the euthanasic context. Circumscribing the medical possibilities of the person immersed in an extreme situation of suffering to palliative care would imply a limitation of the right to self-determination in such a way that it is not compatible with the respect for human dignity and the free development of the personality [Art. 10(1) SC] nor with the right to personal integrity (Art. 15 SC). Comprehensive palliative care and direct active euthanasia are, in short, mechanisms that have a relationship of complementarity or alternativeness and not of subsidiarity from a constitutional perspective and in euthanasic contexts.

It is a different matter if, in the application of the OLRE to specific cases, the patient's free decision could be questioned if the affected person does not have the real and effective option

of accessing palliative care, as this could affect the formation of his or her will. By no means do we imply that extreme suffering deprives the person of the ability to decide freely about his or her own death, an approach that would be fundamentally incompatible with the constitutional protection of the patient's right to self-determination in these contexts. What we are referring to is the possibility that the individual may be encouraged to seek assistance in dying that he or she might not have sought if his or her suffering had been alleviated by palliative care.

In this respect, it should be noted that the law provides for the availability of "comprehensive" palliative care [Arts. 5(1)(b) and 8(1)], a benefit that must be available in this context [Art. 43(2) SC]. The specific organisation of palliative care is not its purpose; however, it is contemplated in the regulations of the National Health System, to which Art. 5(1)(b) OLRE refers, as well as in the complementary legislation of various autonomous communities. As discussed in more detail in PoL 4, there is already an extensive regulatory development on the right to palliative care. To qualify these mentions of the OLRE as a "purely formal requirement", as the appeal does, is nothing more than a precaution or misgivings that cannot give rise to a declaration of unconstitutionality [inter alia, CCJs 197/2014, 4 December, and 84/2015, 30 April, PoLs 7(c) of both judgments]. This is without prejudice to the fact that, in order to verify the free nature of the patient's decision, those applying the rule must take into account the effective provision of the palliative care that would be necessary in the specific case, among other elements, in accordance with the state of knowledge of medicine.

The Organic Law does not merit abstract censure of unconstitutionality on this ground.

(d) Dismissal of the complaint

It is clear from the above that the lawmakers have taken into consideration their duty to protect people's lives against aggression by third parties when designing the provision of aid to die set out in the OLRE, and that they have sought to respond to this duty by articulating a protection model based on several elements: (i) the requirement of two material assumptions (a "free, voluntary and conscious" decision of the patient and a "euthanasic context" sufficiently limited and restricted to situations of extreme personal suffering due to serious, irreversible and objectively verifiable medical causes); (ii) mandatory State intervention in the patient's prior decision-making process (through neutral information and counselling, the requirement of several requests and reflection periods, and the involvement of different health professionals independent

of each other and of a multidisciplinary collegiate body in the procedure) and in its implementation; (iii) a compulsory and ex post administrative control compatible with the controls that could be carried out in the courts; and (iv) the provision that failure to comply with the guarantees provided for in the Law itself will give rise to the corresponding civil, criminal, administrative, statutory or professional liabilities, maintaining the criminalisation of euthanasia for such cases.

The Court considers that this system of guarantees and controls satisfies the constitutional standard of protection of life against interference by third parties, because it sufficiently guarantees that the aid in dying regulated by law is provided only to those who, in a situation of extreme suffering and as capable individuals, request it in full freedom and conscience, sufficiently avoiding the risk of errors, abuses and unallowed interference by third parties.

Contrary to what is claimed in the appeal, this conclusion is in no way contradicted by the fact that the lawmakers have chosen to designate assistance in dying in this specific area as a subjective public right and, moreover, has attributed to it the nature of a benefit. There is no constitutional obstacle for lawmakers to set out as a benefit an activity which, in view of its specific configuration, is constitutionally lawful. It is not possible to conclude that there is an insufficient degree of protection of life, either from such a configuration as a subjective right or from the related mandate to the health administrations to give maximum dissemination to the content of the Organic Law and to promote the implementation of the so-called “prior instructions document” (seventh additional provision) among citizens, given the set of guarantees and controls foreseen by lawmakers.

In short, the OLRE guarantees the right to self-determination of the person without leaving life unprotected, to which it provides a sufficient degree of protection and which, according to the lawmakers’ express assessment - which cannot be considered unfounded - is superior to the one that would derive from a system of mere decriminalisation of third party assistance to euthanasia and that is also clearly superior to the one provided by the current legislation with regard to the other forms of euthanasia - passive and indirect active euthanasia; according to the aforementioned constitutional case-law, these are also protected in the right to personal integrity (Art. 15 SC).

In view of the foregoing, the substantive unconstitutionality that the appeal alleges against the Organic Law as a whole must be ruled out, which leads to the rejection of the challenge - a redundant one, strictly speaking - that the appeal formulates against Articles 1, 4(1) and 13, which would be the basis for this general defect.

7. Specific challenges relating to the administrative and judicial guarantee regime

(A) The contested provisions

The first block of subsidiary claims made in the appeal is directed against Articles 7(2), 8(4), 17 - from which paragraphs 1 and 3 must be excluded, as nothing specific is alleged in the appeal in this regard, as indicated in PoL 2 of this judgment - and 18(a) fourth paragraph of the OLRE, as well as against its first additional provision. These provisions set out the following:

“Article 7. Denial of the provision of help to die.

[…]

2. Against this refusal, to be made within a maximum period of ten calendar days from the first application, the person who submitted the refusal may submit a complaint to the competent Guarantee and Evaluation Commission within a maximum period of fifteen calendar days. The responsible physician who denies the request is obliged to inform the patient of this possibility”.

“Article 8. Procedure to be followed by the responsible doctor when there is a request for help to die.

[…]

4. In the event of an unfavourable report by the consultant physician on compliance with the conditions laid down in Article 5(1), the patient may address the Guarantee and Evaluation Commission in the terms provided for in Article 7(2)”.

“Article 17. Creation and composition [of Guarantee and Evaluation Commissions].

[…]

2. In the case of the Autonomous Communities, such commissions, which shall be of the nature of an administrative body, shall be set up by the respective regional governments, who shall determine their legal regime. In the case of the Cities of Ceuta and Melilla, it will be the Ministry of Health that creates the commissions for each of the cities and determines their legal regimes.

[…]

4. Each Guarantee and Evaluation Commission shall have an internal regulation, which shall be drawn up by that Commission and authorised by the competent body of the autonomic administration. In the case of the Cities of Ceuta and Melilla, that authorisation shall be the responsibility of the Ministry of Health.

5. The Ministry of Health and the Chairs of the Guarantee and Evaluation Commissions of the Autonomous Communities shall meet annually, under the coordination of the Ministry, to homogenize criteria and exchange good practices in the development of euthanasia delivery in the National Health System."

"Article 18. Functions.

The following functions are the functions of the Guarantee and Evaluation Commission:

(a) [...] [Paragraph 4] In the event that the decision is in favour of the request for the provision of aid to die, the competent Guarantee and Evaluation Commission shall require the management of the centre to provide within a maximum period of seven calendar days the requested benefit through another doctor at the centre or an external team of health professionals."

"Additional provision 1. On the legal consideration of death.

Death as a result of the provision of aid to die will have the legal consideration of natural death for all purposes, regardless of the coding carried out therein."

In addition, and although they are not specifically challenged, it should be borne in mine the provisions of Articles 7(1), 10(5) and 18(a) fifth paragraph OLRE, which are thoroughly mentioned in the appeal as relevant to assessing the unconstitutionality defects by omission that are denounced in this block of challenges. It reads as follows:

"Article 7. Denial of the provision of help to die.

1. Refusals to provide aid to die shall always be carried out in writing and in a manner motivated by the responsible doctor."

"Article 10. Prior verification by the Guarantee and Evaluation Commission.

5. Commission decisions which adversely inform the request for the provision of aid to die may be appealed to the administrative jurisdiction."

"Article 18. Functions.

The following functions are the functions of the Guarantee and Evaluation Commission:

(a) [...] [Paragraph 5] The end of the period of twenty calendar days without a decision shall entitle applicants to understand their application for aid to die denied, with the possibility of appeal being open to contentious-administrative jurisdiction."

(B) Positions of the parties

The appellants argue - and the State Attorney denies - that these provisions are contrary to Articles 15, 24, 53(2), 106 and 117 SC, for the reasons already outlined in the Facts of this judgment and which are summarised here to facilitate the understanding of the discourse:

(a) The complaint points out, on the one hand, that it is only possible to complain to the guarantee and assessment committee against the "refusal" of the provision of aid by the responsible physician [Art. 7(2) OLRE], without providing any guarantee (either administrative or judicial) against the decision in favour of the provision by the same doctor, which would not

have to be reasoned, as is required by Art. 7(1) OLRE for decisions against the recognition of the benefit. The same is reproached with regard to the consultant physician's report [Art. 8(4)].

On the contrary, the State Attorney argues that the debate concerning the duty of the responsible physician to give reasons for the "refusal" would be superfluous, given the documents in the file in which the factual and legal grounds for his or her decision will be made clear.

(b) On the other hand, the appellants argue that the OLRE "omits the establishment of minimum jurisdictional guarantees for the adequate protection of the fundamental right to life", since if the guarantee and evaluation commission decides against the request, its decision may be appealed before the administrative jurisdiction [Arts. 10(5) and 18(a) fifth paragraph of the OLRE], but "nothing is foreseen about the possibility of appealing a favourable decision" to that request, which would be contrary to the case-law of the European Court of Human Rights on the procedural and jurisdictional guarantees of the right to life and to articles 24, 53(2) and 106 SC, by making any jurisdictional control of such a serious administrative decision impossible. The organic legislator would be obliged by the Constitution to establish a "concrete and clear system of jurisdictional guarantees to verify the legality and constitutionality of such an irreparable decision" and what it could not do is "provide for a complete system of appeal" against the refusal of euthanasia and omit any reference to the "administrative and jurisdictional control of the decision potentially violating the right to life". Nor could it attribute to an administrative body (Art. 17 OLRE) the role that corresponds to the judiciary in a State governed by the rule of law, which would thus be "absolutely bypassed", despite the fact that it is "constitutionally entrusted with the protection of fundamental rights".

In addition, it is argued that the fourth paragraph of Art. 18(a) OLRE establishes an extraordinarily short period of time (seven days) for the provision of the aid once it has been recognised by the guarantee and evaluation commission, which would make any judicial control of an administrative decision of the utmost seriousness impossible and would prevent effective protection of the rights that could assist third parties to prevent death and safeguard the right to life, in violation of Arts. 24, 53(2) and 106(1) SC. The absence of effective control and judicial protection would also derive from the lack of a suspensive attribution to the legal challenges that could be brought by the relatives or friends of the person concerned.

The State Attorney has objected to these criticisms, stating that the OLRE is part of a "pre-existing legal system" and should not have to regulate what is already regulated in other jurisdictional laws. By application of these laws, the Commission's favourable decision is an act of an administrative body that can always be subject to judicial review at the request of whoever alleges and proves a legitimate interest. Prior judicial control is not appropriate not only because it is not a constitutional requirement, but also because it would be contrary to the freedom and dignity of the subject to submit a strictly personal right to the necessary authorisation of a judge or to the exercise of a right of opinion or veto by family or friends.

(c) Finally, the appeal argues that the first final provision of the OLRE would violate the procedural dimension of the right to life (Art. 15 SC), as it would eliminate the State's obligation to determine, by means of a full investigation, the causes of death of a person under its jurisdiction, thus violating Arts. 106, 117 and 24 SC, "insofar as the possible outcome of a judicial investigation would be predetermined legislatively".

In response to this, the State Attorney points out that neither the Constitution nor the ECHR impose an obligation on the State to investigate every death and that there is no offence against life if it is the individual who freely and voluntarily wishes to die, as there is no attack by a third party; only cooperation with death is decriminalised when it is in accordance with the OLRE and, if this is not the case, the provisions of the second final provision of the OLRE should be applied, which establishes that "[i]nfringements of the provisions of this Law are subject to the penalties set out in Chapter VI of Title I of the General Health Law 14/1986, without prejudice to any possible civil, criminal and professional or statutory responsibilities that may correspond".

(C) Procedure

(a) The objections of unconstitutionality of the appeal lack consistency both because the lawmakers did not impose the necessary motivation of the "medical communication" favourable to the viability of the request, which the responsible physician can address to the guarantee and evaluation commission, and because it does not foresee a complaint against this communication or against the "report" of the consultant physician that corroborates, in hypothesis, the fulfilment of the conditions established in Art. 5 OLRE. Both complaints are brought in contrast with the provisions of the cases of "refusal of the provision of aid to die" by the responsible physician,

which requires a statement of reasons [Art. 7(1) OLRE], and the possibility of a claim against unfavourable medical reports [Arts. 7(2) and 8(4) OLRE].

What usually requires justification and eventual remedy is not the opinion that makes the continuation of the procedure initiated by the interested party viable, but the obstacle or opposition to that course of action. However, the "medical communication" [Art. 10(1) OLRE] favourable to the request has the effect of allowing the procedure to continue. Furthermore, this communication must be accompanied by the documentation that certifies compliance with the requirements and conditions that the Organic Law requires for access to this benefit [Arts. 8 and 10(2) OLRE]. And the hypothetical errors or irregularities in the medical action, as well as any possible inadequacies of that "communication", are susceptible to control not only by the guarantee and evaluation commission in its "prior verification" (Art. 10 OLRE), but also in judicial proceedings, as will be reasoned immediately. This leads to the dismissal of the constitutional infringements alleged in this case.

(b) Secondly, the complaint of unconstitutionality for alleged infringement of Articles 24, 53(2) and 106(1) SC, for having excluded the OLRE - as is said - the necessary judicial control and guarantee with respect to the decisions that recognise the right to the provision of aid to die, an exclusion that would derive from the fact that the judicial control review have been expressly provided only for the rejecting decisions from the commission [Articles 10(5) and 18(a), fifth paragraph OLRE]. In connection with this, the appellants claim the unconstitutionality of Art. 17 OLRE, relating to the creation, composition and nature of the guarantee and evaluation commissions, arguing the insufficient nature of the control that the OLRE would attribute exclusively to these administrative bodies, with the consequent postponement of jurisdictional review. This means that the latter objection would be ruled out, without further ado, if the main objection based on such an interpretation of the Organic Law were to be rejected.

This argument will be considered only with regard to the final decisions of the guarantee and assessment commissions [Art. 10(4) OLRE], both of the two commissioners and of the plenary, in the latter case when rectifying the decision of the former by means of a complaint or when settling their disagreement [Art. 10(1) and (3) OLRE], in which the right to the provision of aid to die is recognised, confirming the criteria of the responsible physician and the consultant physician, when verifying that "the requirements and conditions established for [its] correct exercise are met" [Art. 10(1) OLRE]. Therefore, in the first place, the decisions of the plenary of

these commissions that are expressly or tacitly unfavourable, directly or by rejection of claims or appeals, to the exercise of this right, are excluded from consideration here, since as has just been indicated, the Organic Law is explicit with regard to the possible contentious-administrative appeal against them [Articles 10(5) and 18(a), fifth paragraph]. And secondly, we will not examine here the decisions of the commissions that uphold complaints or appeals against the opinion of the medical practitioners [first and fourth paragraphs of Article 18(a), in conjunction with Articles 7(2) and 8(4)] as these decisions do not deserve to be considered final in the context of the OLRE as a whole.

With regard to the latter, it should be pointed out that, as stated in PoL 5, lawmakers have designed a complex administrative procedure structured in two phases. The first is the responsibility of medical professionals who accompany and advise the patient and give their opinion on his or her condition (the "responsible physician" and the "consultant physician"), and the second is a decision-making body without a hierarchical superior, which can be identified as a functionally independent administration, a body for this purpose of "guarantee and evaluation" (Chapter V) or, in other words, of "control" [Art. 8(5)] or "prior verification" (Art. 10), and which is responsible - always after a favourable opinion of these doctors - for recognising or not recognising the provision of aid to die. Neither the "notification" [Art. 8(5)] of the guarantee and evaluation commission by the responsible physician - "medical communication", in the words of Art. 10(1) - nor the "report" or "opinion" of the consultant physician [Arts. 8(3) and 12(a)] constitute acts of administration (Art. 34 of Law 39/2015) that pronounce, not even as a proposal, on the application for the provision of aid to die, but reports or prior opinions of these physicians (whatever the legal status of their professional status may be: Arts. 2 and 14, first paragraph), which, in accordance with their own knowledge, must make a positive assessment of whether the legal conditions are met for the request to be processed, so that the relevant commission can make a decision on it. This is without prejudice to the fact that, in the event of an adverse assessment, the Organic Law provides for a claim or appeal before this administrative body [Arts. 7, 8(4) and 18(a), first paragraph], and the improper legal qualification of such a negative assessment as a "denial of the benefit" cannot lead to the confusion that the claim is causing.

It is the guarantee and evaluation commission, and not the responsible physician or the consultant physician, the one that recognises or denies entitlement to the benefit. This decision, which can only be issued following a favourable opinion from the two aforementioned medical professionals, puts an end to the administrative procedure (Art. 114 of Law 39/2015) and must

be passed on “to the responsible physician [...] to proceed, where appropriate, with the provision of aid to die” [Art. 10(4)]. All this regardless of the somewhat erratic language used by the OLRE when referring to this decision (“report”, which “shall serve as a decision”, of the commissioners, “final decision” of the commissioners or of the plenary itself and, again, “decisions of the commission that report unfavourably on the request” (paragraphs 3, 4 and 5, respectively, of Article 10). Amphibologies that are not insurmountable and in no way affect, in accordance with what the Court has long declared, the validity of these legal provisions (inter alia, CCJ 37/1981, 16 November, PoL 2: it is not within the competence of constitutional jurisdiction to “ensure the technical perfection of laws”). The Court is aware that the usual methods of interpretation of the law offer the jurist technical criteria to give meaning to and systematise the texts and normative statements questioned by the appellants.

Once the procedure laid down by law for the recognition of the benefit has been clarified, the claims that have been raised here can be resolved. Although the appeal makes an initial allusion to the “prior judicial authorisation” which “ordinarily” would guarantee the person against “interference” by the public authorities in their fundamental rights - an allusion which is later illustrated by citing Article 763 of the Civil Procedure Act, relating to non-voluntary internment due to mental disorder -, its grounds for challenge focus on the alleged and unconstitutional omission by the OLRE of the contentious-administrative appeal against the decisions recognising the right to obtain the benefit. This is the only thing that the Court will consider here, since the allusion to that prior judicial review is irrelevant in this part of the appeal, and there is no comparison between any coercive interventions in fundamental rights, on the one hand, and the conscious, voluntary and free request, on the other, which is required by the OLRE to access the benefit it sets out once the other conditions have been met.

The final decisions of the guarantee and valuation commissions recognising the right of access to the provision of aid to die and which open the way to its “implementation” (Article 11) cannot be excluded from judicial review without a manifest breach of the Constitution. By means of the administrative “prior control” [Art. 8(5)] that the OLRE has set out, it must be verified whether “the requirements and conditions established for the correct exercise of the right to request and receive the provision of aid to die are met” [Art. 10(1)], but such administrative acts could not be exempt from any possible judicial control which - at the request of a legitimate party - could reconsider the full compliance with those requirements and conditions in the first phase

of the procedure, carried out by physicians, and which could also judge the correctness of the verification carried out by the guarantee and evaluation commissions.

This is required by the Constitution. Art. 106(1) SC provides for the control by the courts of the legality of administrative action and its compliance with the purposes that justify it, and Art. 24(1) SC proclaims the right to effective judicial protection without defencelessness. Both provisions are closely linked to ensure, as required by Art. 103(1) SC, that the actions of public administrations are fully subject to the law, without allowing "areas of immunity from jurisdiction" that would be irreconcilable with the rule of law [Art. 1(1) SC and, inter alia, CCJ 140/2016, 21 July, PoLs 3 and 11]. As far as the present case is concerned, this means that a public administration should not have the last word on the constitutional rights and goods that could be irreversibly affected by hypothetical breaches of the OLRE's provisions. Judicial review of the administration is unavoidable, and its full legislative exclusion in the abstract would be unequivocally contrary to the Constitution.

However, this court appreciates that, contrary to what the appellants claim, the OLRE has not excluded the control by the contentious-administrative jurisdiction of the decisions of the guarantee and evaluation commissions that recognise the right to the provision of aid to die, which leads to the dismissal of the claim of unconstitutionality that would derive from the alleged lack.

The sectoral laws that regulate the actions of public administrations in no way have to make express mention of the guarantees that, in general, are configured in procedural laws - above all, as far as is relevant here, in Law 29/1998, regulating contentious-administrative jurisdiction - to ensure the full submission of those actions to the law, their control by the courts and the effective judicial protection of legitimate rights and interests. The openness of judicial review, the provision for which the appellants complain is missing, comes directly, without the need for a legal reminder, from the procedural legislation, which thus complies with those constitutional requirements. Fundamental rights "are not necessarily damaged by the mere fact that the rules do not expressly state that they subsist in each case (CCJ 74/1987, 25 May, PoL 4), nor by the possibility that such silence could [...] give rise to a singular infringement of the respective right" (CCJ 148/2021, PoL 6).

The above cannot be overshadowed by the explicit reference that the Organic Law makes to the possibility of challenging decisions that are unfavourable to the request for access

to the benefit [Art. 10(5) and, in conjunction with it, Art. 18(a), fifth paragraph], an unnecessary reference - which must be put in connection with the nature of a legally enforceable subjective right that lawmakers have attributed to the provision of aid to die - of which the appellants make an exclusive or opposite interpretation. This mention could be due to the lawmakers' zeal in configuring the benefit it disciplines as a subjective right or perhaps to the convenience of referring to a specific procedure for its jurisdictional defence (fifth additional provision). However, it is not possible to venture from this that exclusionary conclusion, and certainly unconstitutional, which could only be reached in the face of an unequivocal legal determination [such as those that were judged, for instance, in CCJs 31/2000, 3 February, PoL 3; 149/2000, of 1 June, PoL 3; 202/2011, of 13 December, PoL 4, and 31/2015, of 25 February, PoL 8(b)]. The unconstitutional claim to rule out judicial review of administrative action could only be found in the face of an explicit rule, not on the basis of inferences made by its interpreter.

In short, lawmakers have not closed the way to the possible judicial challenge of the decisions recognising access to the benefit, a challenge that could be brought by those who allege non-compliance with the legal conditions for the administrative recognition of this right - due to defects in the patient's request, to the non-concurrence of the factual requirements that justify the euthanasic benefit or, among other conceivable hypotheses, to disabling irregularities in the course of the procedure - and who have standing to do so in accordance with Art. 19(1)(a) of the aforementioned Law 29/1998. This is without prejudice to the institutional standing that may correspond to the Public Prosecution Service to bring, in particular, the contentious-administrative appeal in the procedure for the protection of the fundamental rights of the individual, today regulated in Chapter I of Title V of the same Law 29/1998, a procedure referred to in the fifth additional provision of the OLRE (in this respect, in general terms, the judgment of the Administrative Chamber of the Supreme Court of 28 November 1990, appeal 2915-1990).

(c) Separate mention should be made of the appellants' complaint regarding the alleged lack of effectiveness of judicial protection against decisions recognising access to the benefit regulated in the Organic Law.

Paragraph 4 of Article 18(a) OLRE is challenged. This paragraph is about the decision of the guarantee and evaluation commission, which, in the words of the OLRE, states that "in the event that the decision is in favour of the request for the provision of aid to die, the competent Guarantee and Evaluation Commission shall require the management of the centre to provide

within a maximum period of seven calendar days the requested benefit through another doctor at the centre or an external team of health professionals". The appeal - as has already been said - considers that this provision prevents effective judicial review of those decisions, because we would be dealing with an "extraordinarily short period of time [...] to execute such a serious administrative decision" and because the lawmakers would have wrongly omitted to give suspensive effect to the contentious-administrative appeal that might be brought against it.

This court has declared that the enforceability of the acts of public administrations is justified by the principle of effectiveness [Art. 103(1) SC] and that it cannot be considered, in general and abstract terms, as incompatible with Art. 24(1) SC, although "from this same fundamental right derives the jurisdictional power to adopt precautionary measures and suspend execution for the reasons indicated by law", since "the full control, without immunities of power, of administrative action imposed by Art. 106(1) SC means that judicial review also extends to the immediately executive nature of its acts" (inter alia, CCJ 78/1996, 20 May, PoL 3, with further references). The right to effective judicial protection "is satisfied, therefore, by facilitating that enforceability can be submitted to the decision of a court and that the court, with the necessary information and contradiction, decides on the stay of enforcement" (CCJ 66/1984, of 6 June, PoL 3).

There is nothing in the OLRE that excludes the possibility of requesting and obtaining the stay of enforcement of the final administrative act by which the guarantee and evaluation commission recognises the right to the provision of aid to die, a possibility that is governed by the provisions of the general legislation for administrative proceedings [Arts. 98(1), 108, 117 and 120 of Law 39/2015, of 1 October, on the common administrative procedure of public administrations] and for court proceedings (Arts. 129 et seq. of Law 29/1998, of 13 July, regulating contentious-administrative jurisdiction).

Nor is there any indication in the OLRE - or, specifically, in its Art. 18(a), fourth paragraph - that exempts the health administration from observing the constitutional case-law according to which the immediate enforcement of an administrative act "if it takes place making access to judicial protection impossible, it may entail the disappearance or irremediable loss of the interests whose protection is sought or even irreparably prejudge the final decision of the process, causing real defencelessness", in such a way that "the right to protection extends to the claim for stay of enforcement of administrative acts which, if formulated in the administrative

procedure, must allow for the judicial challenge of its refusal and if exercised in the process must give rise to the corresponding specific review" (CCJ 78/1996, of 20 May, PoL 3).

In this connection, it should be clarified that the fourth paragraph of Article 18(a) OLRE does not set out, contrary to what the appellants maintain, that the benefit must be provided within the unavoidable and "extraordinarily short" period of seven days from its recognition by the guarantee and evaluation commission.

The request thus equates the fact of "enabling the benefit" referred to in the above-mentioned paragraph with the "provision of aid to die", the final act of health professionals (Art. 11). However, the internal system of the OLRE itself and its parliamentary procedure make it clear that the seven-day period referred to in the fourth paragraph of Art. 18(a) does not refer to the final decision of the procedure (a matter regulated in Art. 10 and, in particular, in its paragraph 4) nor to its implementation through the "performance of the service" within the meaning of Art. 11. The fourth paragraph of Art. 18(a), however, refers exclusively to the legal consequence of the Commission's acceptance of the complaint against the "refusal" of the request by the responsible physician [Art. 7(2) and 18(a), first paragraph] or against the unfavourable report of the consultant physician [Art. 8(4)]. The consequence is not the definitive recognition of the benefit by the guarantee and evaluation commission, as suggested by the appellants, but the resumption of the procedure in accordance with the ordinary procedures provided for in the Organic Law itself, this time with the intervention of "another physician from the centre or an external team of health professionals", a substitution whose rationale lies in the previous unfavourable opinion of the responsible or consultant physicians, depending on the case, and in the consequent opportunity, in the lawmakers' opinion, to give input here to different professionals.

Indeed, contrary to what might be inferred from a hasty reading of Article 18(a) as a whole, the contested fourth paragraph is only intelligible in relation to the initial paragraph of the Article itself, which establishes as the first function of these commissions "to resolve within a maximum period of twenty calendar days any complaints made by persons whose request for the provision of aid to die has been rejected by the responsible physician", a complaint provided for in Article 7(2), and in "terms" also applicable to the possible appeal against the unfavourable report of the consultant physician [Article 8(4)]. Only this connection or sequence between one paragraph and the other makes sense of the mandate of the contested provision in order to allow

the intervention of "another physician from the centre or an external team of health professionals", a substitution that would be caused by the prior opinion of the physician against facilitating the service and by the opportunity, in the lawmakers' opinion, to allow other professionals to intervene.

This is how obvious things would have to be to any reader of this Article 18(a) given the original wording of the proposal for legislation, in which its current first and fourth paragraphs were immediately consecutive ("Official Gazzette of the Parliament. Congress of Deputies", XIV term, no. 46-1, 31 January 2020, p. 9). By virtue of what has been said, it would not be possible today to reach a different conclusion due to the mere and only apparent textual dissociation between the repeated paragraphs that was verified when an amendment was adopted that incorporated into Article 18(a) its current second and third paragraphs, referring to different matters, such as, respectively, the decisions of the complaint against the decision of the two commissioners rejecting the request and the decision settling the disparity of criteria between them (amendment no. 182, "Official Gazzette of the Parliament. Congress of Deputies", XIV term, no. 46-4, 4 November 2020, pp. 119-120).

An argument of a systematic nature must be added to this argument relating to the procedure for the parliamentary drafting of the OLRE, since the interpretation proposed by the appellants would place the contested provision in clear contradiction with the entire prior verification procedure established by lawmakers. The "refusal" of the responsible physician subject to complaint "must be made within a maximum period of ten calendar days from the first request" [Art. 7(2)], that is, at an initial stage in the procedure in which there has not yet been an opportunity to complete, according to the time limits established in the OLRE [Art. 8(1), (2) and (3)], essential procedures such as the successive deliberative processes with the patient, for whom the responsible physician is the "main interlocutor" [Art. 3(d)]. These processes are: midway through the second request, which occurs at least fifteen days after the first [Art. 5(1)(c)], the responsible physician's signature of the informed consent, the corroboration by the consultant physician, trained in the patient's pathologies [Art. 3(e)], the compliance with the conditions set out in Article 5 and, ultimately, the actual certification by the responsible physician of the illness or condition of the person concerned and, if applicable, of his or her *de facto* incompetency [Art. 5(1) d) and 2]. None of these unavailable sequences and acts of the procedure can be carried out directly before the guarantee and assessment commission or be assumed by it, which would mean, as is well understood, incurring in a clear breach of the system of guarantees the lawmakers have

predisposed, completely cancelling the inexcusable initial phase of the procedure, in charge of the medical professionals, and leading to the absurdity that administrative decisions that are positively conditioned by the Organic Law to the prior fulfilment of these guarantees could be adopted, by simply and solely considering these eventual claims.

Thus, the initial ambiguity of the fourth paragraph of Article 18(a) does not require the interpreter to understand that the request to the management of the centre to "provide the requested service" is equivalent, without further ado, to a requirement that it be "provided" (Article 11) within the meagre period of seven days. The ambiguity on this point of the provision - largely due to its location - can and must be cleared up by resorting to that systematic interpretation which harmonises the wording with the whole of the legal body in which it is integrated, thus safeguarding the coherence between the general sense and articulation of the OLRE and this specific rule which, like any other, must not be seen as "an isolated element in the world of Law" [CCJ 126/2021, 3 June, PoL 7(b), among many other similar decisions, since CCJ 22/1981, 2 July, PoL 10]. It is not possible to "read an article of a regulatory text in such a way as to distort the regulatory content of other provision[s] of the same text" [CCJ 101/2016, 25 May, PoL 12; in similar terms, CCJ 41/2016, 3 March, PoL 13(e)].

Ultimately, the challenge to the fourth paragraph of Article 18(a) must be dismissed in so far as the interpretation of this Article proposed by the appellants cannot be upheld. On the contrary, this fourth paragraph must be interpreted in the sense that the request to the centre's management to "provide the requested service through another doctor at the centre or an external team of health professionals" within a maximum period of seven calendar days strictly means that, once the complaint against the "refusal" of the responsible physician has been upheld or the appeal against the unfavourable report of the consultant physician has been accepted [Art. 8(4)], the legally established procedure (Arts. 8, 10 and concordant articles) must be resumed within that maximum period and completed in accordance with the Organic Law in all the procedures and actions that are still pending, if applicable, even with the intervention of professionals other than those who initially reported against the request, as the provision establishes. The OLRE does not, therefore, impose that the benefit be "provided", once it has been definitively recognised by the commission, within seven days, nor does it prevent full judicial protection - including its possible precautionary suspension - in accordance with the provisions of general legislation and constitutional case-law.

(d) The analysis of this block of challenges must be concluded by examining whether, as the appellants argue, the provision that "death as a consequence of the provision of aid to die shall be legally considered as natural death for all purposes" (first additional provision of the OLRE) contravenes the "procedural dimension of the right [to life]", by eliminating "the obligation of the State to determine by a full investigation the causes of death of a person under its jurisdiction".

The European Court of Human Rights has identified in Art. 2 ECHR a procedural obligation to investigate, whenever the circumstances so require, in order to determine possible responsibilities for the facts that led to the death - among other hypotheses - of patients in the care of the medical profession (inter alia, ECtHR of 11 October 2022, *Garrido Herrero v. Spain*, § 71). But this case-law is not transferable to cases of euthanasic deaths such as those contemplated in the OLRE, deaths that do not occur in the course of any health treatment, but are verified by the patient who is under the circumstances that this Organic Law prescribes, circumstances that must be duly accredited throughout the procedure (ECtHR *Mortier v. Belgium*, § 179: "where death was the result of an act of euthanasia carried out under the legislation, which permitted it subject to strict conditions, a criminal investigation was not usually required"). Therefore, the claim of unconstitutionality is, unfounded on this point, as will be explained below.

"Natural death", or death by natural causes, is that which results "from a morbid process in which there is no participation of forces foreign to the organism, nor of third parties" (Dictionary of Medical Terms of the Spanish Royal National Academy of Medicine) or in the negative, and as far as this allegation in the appeal is concerned, "non-violent death or a death unsuspected of criminality" (Art. 340 of the Criminal Procedure Law, to which Art. 343 of the same body of law refers, and Art. 8(3) of Royal Decree 386/1996, 1 March, approving the Regulations of the Institutes of Forensic Medicine). Those who die as a result of the "provision of aid to die" clearly do not die "due to their own death", to put it in classical words, so that what is stated in the first additional provision of the OLRE is a legal fiction which is implicitly but unequivocally based on the legal presumption that the "provision of euthanasia" [Art. 17(5)] has been carried out in full compliance with the Organic Law itself, in such a way that death from this cause will not, never and in any case, give rise to a criminal investigation, which would contradict the very meaning of this legislative arrangement.

It is of course a rebuttable presumption, which should be lifted where there are indications or serious suspicions of crime (in similar terms, ECtHR *Mortier v. Belgium,* §§ 167 and 179). This is the result of paragraphs 5 and 4 of Article 143 of the Criminal Code, as amended by the first final provision of the OLRE. The first of the aforementioned provisions, with full coherence, excludes the criminal liability of anyone who "causes or actively cooperates in the death of another person in compliance with the provisions of the organic law regulating euthanasia". If this were not the case, we would be dealing - apart from other criminalised conducts - with what is prescribed in Art. 143(4) of the Criminal Code, according to which "[w]hoever causes or actively cooperates in the necessary, direct acts causing the death of another person suffering from a serious, chronic and incapacitating illness or a serious and incurable illness, with constant and unbearable physical or psychological suffering, at the express, serious and unequivocal request of that person, shall be punished with a punishment lower by one or two degrees to those described in Sections 2 and 3 of this Article". These latter paragraphs refer, respectively, to the action of whoever "cooperates with acts necessary for the suicide of a person" and to whoever, by means of this cooperation, "goes so far as to execute death". The OLRE entrusts the guarantee and evaluation commissions with the function of "verifying [...] whether the provision of aid to die has been carried out in accordance with the procedures provided for in the law" [Art. 18(b)] and determines in relation to this that infringements of its provisions may give rise, among other responsibilities and sanctions, to those of a criminal nature (second final provision).

These reasons suffice to dismiss this allegation of unconstitutionality and, with it, this block of challenges insofar as it is not possible to assess the lack of administrative and judicial guarantees alleged in the appeal nor, therefore, the violation of the fundamental right to life (Art. 15 SC) due to a breach of the State's duty to protect third parties in this context.

8. Specific challenges concerning the regime applicable to *de facto* incompetent individuals

(A) The contested provisions

The second block of alternative challenges is directed against several provisions of the OLRE concerning the regime applicable to "*de facto* incompetent" individuals. These are Art.

3(d), (e) and (h); Art. 5(1)(c) and 5(2); Art. 6(4); Art. 9; Art. 12(a) fourth paragraph and the sixth additional provision, second paragraph. It reads as follows:

"Article 3. Definitions.

For the purposes of this Law:

[…]

(d) 'Responsible physician' means a physician responsible for coordinating all patient information and healthcare, as the primary interlocutor of the patient in all things relating to his care and information during the care process, and without prejudice to the obligations of other professionals involved in the care proceedings.

(e) 'Consultant physician' means a doctor with training in the field of pathologies suffered by the patient and not belonging to the same team of the responsible physician.

[…]

(h) 'Situation of *de facto* incompetency' means a situation in which the patient lacks sufficient understanding and will to govern himself or herself autonomously, fully and effectively, irrespective of whether support measures exist or have been taken for the exercise of his or her legal competence."

"Article 5. Requirements for receiving the provision of aid to die.

1. In order to receive the aid to die, the person must meet all of the following requirements:

[…]

(c) Having made two applications voluntarily and in writing, or by another means to be recorded, and other than the result of any external pressure, leaving a separation of at least fifteen calendar days between the two.

If the responsible physician considers that the loss of the applicant's ability to grant informed consent is imminent, he may accept any minor period he deems appropriate depending on the concurrent clinical circumstances, which he or she must record in the medical history.

[…]

2. The provisions of point (b), (c) and (e) of the previous subparagraph shall not apply in cases where the responsible physician certifies that the patient is not in full use of their powers and cannot lend their free, voluntary and conscious conformity to make the requests, complies with paragraph 1(d), and has previously signed a document of prior instructions, living will, advance wills or legally recognised equivalent documents, in which case aid may be provided to die in accordance with the provisions of that document. If the patient has appointed a representative in that document, the latter will be the valid interlocutor for the responsible physician.

The assessment of the situation of *de facto* incompetency by the responsible physician shall be made in accordance with the protocols of action determined by the Interterritorial Council of the National Health System."

"Article 6. Requirements for requesting help to die.

[…]

4. In the cases provided for in Article 5(2), the application for the provision of aid to die may be submitted to the doctor responsible by another person of legal age and fully capable, together with the prior instruction document, living will, advance wills or legally recognized equivalent documents, previously signed by the patient. If there is no person who can apply on behalf of the patient, the treating physician may submit the application for euthanasia. In such a case, that doctor who treats you will be entitled to request and obtain access to the prior instruction document, advance wills or equivalent documents through persons designated by the health authority of the relevant Autonomous Community or by the Ministry of Health, in accordance with point 1(d) of Article 4 of Royal Decree 124/2007 of 2 February regulating the National Register of Prior Instructions and the corresponding automated file of personal data."

"Article 9. Procedure to follow in cases of *de facto* incompetency.

In the cases provided for in Article 5(2) the responsible physician is obliged to apply the provisions of the previous instructions or equivalent document."

"Article 12. Communication to the Guarantee and Evaluation Commission after the provision of aid to die.

Once the aid to die is provided, and within a maximum period of five working days after the death period, the responsible physician must forward to the Guarantee and Evaluation Commission of his Autonomous Community or Autonomous City the following two separate documents and identified with a registration number:

(a) The first document, stamped by the responsible doctor, referred to as a 'first document', shall contain the following information:

[…]

(4º) If the applicant had a prior instruction document or equivalent document and it indicated a representative, full name of the same. Otherwise, the full name of the person who filed the request on behalf of the *de facto* incompetent individual."

"Additional provision 6. Measures to ensure the provision of aid to die for health services.

[…]

It [the Interterritorial Council of the National Health System] shall also develop the protocols referred to in Article 5(2) within the same period [three months after the entry into force of the Law]."

As indicated in PoL 2(b), Art. 3(e) and the first paragraph of Art. 5(1)(c) must be excluded from our examination, as the appeal does not contain any specific grounds to support their unconstitutionality.

(B) Positions of the parties

The appeal includes four separate claims of unconstitutionality in this section. Their common feature is the alleged violation of articles 15, 24 and 53(2) SC due to the absence of sufficient guarantees in the regulation of the conditions for the recognition of the provision of aid to die for those who are in a situation of "de facto incompetency", in the sense of the Organic Law itself. These deficiencies are linked in the complaint to what the appellants consider to be an insufficient degree of "quality" of certain legal definitions, the attribution of broad discretionary powers to those applying the law and the lack of requirement of prior judicial intervention to adjudicate "incompetency" which, in their opinion, will allow euthanasia to be applied regardless of the current will of the affected individual and ignoring practically all of the requirements set out in the OLRE (an effect the State Attorney denies). The appeal argues that all this, and in particular the shortcomings of the contested legal definitions, would lead to a "slippery slope" in which "the initial restrictive conditions allowing for the recognition of the right to die" would be progressively blurred, giving rise to a "social message of silent coercion [...] to elderly" or "disabled" persons.

The specific complaints included in this block of challenges and the correlative arguments of the State Attorney, set out in detail in the Facts, can now be summarised as follows:

(a) With regard to the concept of "*de facto* incompetency", Article 3(h), the second paragraph of Article 5(2) and the second paragraph of the sixth additional provision are challenged on the grounds of a manifest "lack of legal quality". On the one hand, those provisions omit absolutely the criteria to be followed in assessing the existence of such a situation and, on the other hand, the exact determination of those criteria is referred to an administrative body (the Interterritorial Council of the National Health System) with the omission of any guarantee arising from an intervention by the judicial authorities.

On the contrary, the State Attorney argues that the concept of "*de facto* incompetency" [Art. 3(h) OLRE] is not difficult to understand. It points out that the lack of "sufficient

understanding and will" to determine oneself is a factual question that requires a case-by-case examination and no more legislative precision. It also indicates that the OLRE offers the same clarity and precision on this point than the one set out by other regulations for similar cases with similar concepts, such as Art. 200 of the Civil Code when defining the causes of incompetency or the autonomous legislation on care for people at the end of their lives. According to the State Attorney, the "protocols" according to which the situation of de facto incompetency must be assessed are not regulatory and do not refer to essential aspects of the rights involved.

(b) The definition and effects of the "prior instruction document [previously signed by the patient], living wills, advance directives or legally recognised equivalent documents" [first paragraph of Art. 5(2) and Art. 6(4)] are challenged. The appellants argue that the regime of a "document" like that seriously lacks clarity and this leads to an unconstitutional lack of quality of the law, both because of the indefinite validity that the OLRE grants it and because of the vague and imprecise concepts that make any type of documentary instrument valid, in which a wish or a manifestation expressed in a moment of life that has already passed. It is also alleged that the binding nature of such a document means that those who are "*de facto* incompetent" are deprived of the possibility to revoke or postpone their request for aid to die, a possibility that is generally recognised in Art. 6(3) OLRE, without any judicial guarantee.

The State Attorney argues that the appeal's criticism of the vagueness of the legal description of the aforementioned document does not correspond to what the Law says, which does not refer to just any document, but to prior instructions (Art. 11 of Law 41/2002, of 14 November) and, on this basis, to the similar instruments that, under different names, have been implemented by the different health services. He points out that the process of drawing up and signing this document varies in each autonomous community, although all of them have incorporated guarantees and controls to ensure legal certainty and the free expression of the patient's will, such as the signing of the document before a notary public or several witnesses. Therefore, he affirms, the Law does not equate the prior instruction document to any documentary instrument, but to the one that is legally recognised with the same effects of Art. 11 of the aforementioned law. Finally, it should be recalled that revocability is essential in this type of document [Art. 11(4)], so that as long as the person is competent, it is understood that he/she wishes it to remain in force.

(c) The mechanism for assessing the *de facto* incompetency provided for in articles 5(2) and 3(d) is contested because, it is said, the "incompetency adjudication" is carried out outside the judicial authorities, and because "without any judicial supervision, compliance with all the requirements of article 5 of Organic Law 3/2021, except that of being of legal age and national or resident in Spain, is left in the hands of the responsible physician, who is not even required to have any specific training whatsoever". For similar reasons, the special regime foreseen for requests regarding the provision of aid to die when the responsible physician considers that the loss of competency of the applicant to give informed consent is imminent [second paragraph of Art. 5(1)(c)] is contested. The appeal argues that it is unconstitutional to attribute to the responsible physician both the power of deciding whether or not the loss of competency is imminent, and the possibility of ignoring the protocol provided for in the law itself in order to set any shorter period that he or she considers appropriate, thus ignoring the separation of at least fifteen calendar days that there must be between the two requests required by the OLRE.

On the other hand, the State Attorney considers inadmissible the criticism in the appeal that the verification of the *de facto* incompetency is in the hands of the responsible physician, understood as a doctor who is not necessarily a specialist in the patient's ailments. With regard to the latter, he points out that, according to Art. 3(c) OLRE, the responsible physician is in any case a medical practitioner, and should therefore be a doctor with sufficient knowledge to assess the patient's condition and whether or not he or she is *de facto* incompetent. To this, he adds that the Organic Law does not leave the existence of any *de facto* incompetency to the physician's exclusive assessment, but establishes a whole series of procedural guarantees in order to verify whether the requirements of Art. 5 are met, including those of section 2 (which cover both incompetency and the existence of prior instructions). This is done not only by the responsible physician, but also by the consultant physician and finally by the guarantee and evaluation commission. The appeal does not share either that it should be a judicial body that determines this *de facto* incompetency, as it points out that this figure would be no more than an additional guarantee to prevent the provision of aid to die to someone who does not have full capacity for self-determination, even if such a person has not been adjudicated incompetent (or a judgment on support measures, in accordance with Law 8/2021 of 2 June).

(d) Finally, the possibility that euthanasia may be requested by a person other than the patient declared to be *de facto* incompetent and, specifically, the "patient's doctor" [Articles 6(4) and 12(a), paragraph 4] is contested. The appellants submit that it is unconstitutional both to grant

that power to a third-party practitioner, without judicial mediation, and to confer on him the capacity to "request and obtain access" to the prior instruction document (or equivalent document) of the patient through the persons designated by the health authorities of the autonomous community concerned or by the Ministry of Health, in accordance with Article 4(1)(d) of Royal Decree No. 124/2007 of 2 February regulating the National Register of Prior Instructions and the corresponding automated file of personal data, in breach of Article 18(1) SC.

The State Attorney objects to this challenge by pointing out that the appelants' premise that the OLRE allows a third party, the patient's representative or a doctor, to request, without any legal guardianship, the death of an alleged *de facto* incompetent person, is incorrect. In the opinion of the State Attorney, both Art. 6(4) and Art. 12(a), paragraph four, of the Organic Law, in line with what is expressed in the preamble, show that the submission of the request "on behalf of the patient" by one of the aforementioned persons implies, strictly speaking, the transfer of the patient's previously expressed will in a prior instruction document.

(C) Procedure

(a) The examination of the unconstitutionality allegations included in this block of challenges must begin with a preliminary clarification of the meaning and effects of the regime that the OLRE has designed for *de facto* incompetent persons.

As the State Attorney points out, the appeal is based at this point on an erroneous reading of the provisions of the contested Organic Law. If this situation of incompetency occurs, the requirements for access to the provision of aid to die are not "relaxed" at the discretion of the responsible physician -as the appellants maintain- but restricted, since the right to the benefit can only be recognised if the patient has previously signed a prior instruction document, living will, advance directives or legally recognised equivalent documents [Art. 5(2)] and if the strict terms of these documents so admit and in the terms in which they admit it [Arts. 5(2) and 9]. Contrary to what is alleged in the appeal, the situation of *de facto* incompetency would not lead to dispensing with the "consent" of the affected individual, but to establishing the impossibility of providing it by any other means than that of the prior document that the patient could have signed at some moment.

This makes clear the interdependence between the legal provision on the "*de facto* incompetency" and its reference to the prior document that the patient may have signed at the time. If this document did not exist, the patient who was not "competent and aware" [Art. 5(1)(a)] would never be able to receive, whatever his or her circumstances, the provision of aid to die that the Organic Law has established. In a correlative sense, the provisions of this document could in no case replace the current will of the competent patient who did not express, in the terms required by the OLRE, his or her request to seek that assistance.

Lawmakers have thus opened up, by means of these complementary provisions, the possibility that the euthanasia service may also be received by those who, unable to request it autonomously in the present, had disposed their decision and met the other conditions, something which in our legal system is already contemplated, in general, with regard to healthcare treatments (Art. 11 of Law 41/2002, basic law regulating patient autonomy and rights and obligations regarding information and clinical documentation) and to which the European Court of Human Rights has recognised special relevance, albeit to very different effects from those considered here (judgment already mentioned above in *Lambert and others v. France*, § 143, 178 and 179, resolving a controversy over the possible withdrawal of life support from a patient in a vegetative state). The legal regulation of the provision of aid to die could not have disregarded in this specific aspect elementary requirements of equal treatment between patients who are in similar conditions of illness and suffering, even if only some that are already in this extreme situation, are capable of requesting the help that others, in prevention of not being able to do so, once positively documented that they would have to be provided for this aid in similar circumstances.

Moreover, it should be recalled that the proceedings at issue here concern provisions of law, the validity of which cannot be called into question by merely warning of their possible irregular application, hypothetical transgressions from which no rule of law is immune and which, should they occur, would be subject to the corresponding remedies and penalties. In other words, there is no room in this constitutional process for "precautionary or preventive considerations of hypothetical future unconstitutionalities" or "forecasts or anticipations of the results contrary to the Constitution to which the application of some of the contested rules would lead" [CCJ 191/2016, PoL 3(a)].

(b) The complaint regarding the definition of the *de facto* incompetency of the patient [Arts. 3(h), 5(2) second paragraph, and sixth final provision, second paragraph, of the OLRE] must be dismissed.

Lawmakers have dedicated a specific provision to the definition of the concept "de facto incompetency", which is described as "situation in which the patient lacks sufficient understanding and will to govern himself or herself autonomously, fully and effectively, irrespective of whether support measures exist or have been taken for the exercise of his legal capacity". [Article 3(h) OLRE]. As the State Attorney points out, this definition offers no problems for its reasonable understanding and is analogous to that used, for similar cases, by other state regulations (the former Art. 200 of the Civil Code, repealed by Law 8/2021 of 2 June 2021 that included Title XI on support measures for persons with disabilities) and regional regulations (those relating to the care of persons at the end of their lives). Moreover, the "*de facto* incompetency" is a reality that is difficult to define precisely and can only be identified by a generic definition that refers to the ordinary circumstances of life and illness and to medical criteria. In fact, medical science has analytical tools to diagnose the situation where the patient is incompetent to understand and want.

We cannot either agree with the appellants' censure on the legal provision that the assessment of the *de facto* incompetency by the responsible physician shall be made in accordance with the protocols of action determined by the Interterritorial Council of the National Health System. The mere observation that the Council is an "administrative body" (Art. 69 et seq. of Law 16/2003 of 28 May 2003 on the cohesion and quality of the National Health System) whose "criteria" in this respect are unknown and the criticism that any judicial intervention is here omitted show that the appellants are far from providing solid, or even discernible, grounds for the challenge. There is no apparent reason to doubt the constitutionality of the provision of protocols whose adoption could hardly correspond to the judicial authority or be imposed on the lawmakers themselves, and which cannot be understood to be vetoed by any non-delegable constitutional legislation, since none of them must be understood as to prevent, without nuances, any reference to subsequent regulations on matters of such a markedly technical nature [CCJs 160/2013, 26 September, PoL 7(b), and 51/2019, 11 April, PoL 7].

(c) Likewise, the criticisms of unconstitutionality directed against the references in the Organic Law to the "prior instruction document, living wills, advance directives or legally

recognised equivalent documents" and to their effectiveness in the procedure [Arts. 5(2) and 9 OLRE] must be dismissed.

It is necessary to begin the analysis of this complaint by recalling that the prior instruction document (or equivalent document, as referred to above) is an essential requirement for a patient who is not "competent and aware" [Art. 5(1)(a)] to be able to receive the provision of aid to die that the Organic Law has instituted once the rest of the legal requirements have been met. It is important to point out, though, that it obviously follows from what has been said that the patient's advance will could in no way be substituted or contradicted here by the granting or refusal of a "consent by representation" such as that provided for in general for health treatments [Art. 9(3) of Law 41/2002], a regulation to which Article 287(1) of the Civil Code refers today, relating to certain representing functions of the guardian of the person in need of support. This is guaranteed by the OLRE which, in the face of the *de facto* incompetency, only recognises the effectiveness of the patient's own prior document and which sets out in Article 3(h) that the finding of that incompetency will be "regardless of whether or not support measures exist or have been adopted for the exercise of legal capacity".

The preamble of the Organic Law states that the document referred to in Art. 5(2) "already exists in our legal system", albeit for other purposes (Art. 11 of Law 41/2002: "prior instructions" of the person regarding, as stated in section 1 of this article, "the care and treatment of their health"). This statement by the lawmakers and the second statement already made in the articles [Art. 6(4)] on the national register of prior instructions regulated by Royal Decree 124/2007 of 2 February 2007, -adapted to the OLRE by Royal Decree 415/2022, of 31 May-, are to be taken into account by the interpreter to identify the meaning of the document and some of the minimum requirements which, in accordance with those statements in the OLRE and with its own direct provisions, this instrument should in any case satisfy in order to achieve the effectiveness that in principle is granted to it. The legally recognised and, obviously, revocable document as prescribed in Art. 11(4) of Law 41/2002 - as revocable as the patient's request at any time [Art. 6(3) OLRE] - would have to be signed in conditions of full freedom ["free person [...]": Art. 11(1) of the same Law 41/2002] by whoever is of legal age, capable and conscious [Art. 5(1)(a) OLRE]. The document would have to verify in a reliable manner, in the form prescribed by law, the will of the person signing it to receive, with the requirements and under the conditions of the OLRE, the provision of aid to die if he/she were to find him/herself in a situation of *de facto* incompetency and in one of the cases contemplated in Art. 5(1)(d) of the

Organic Law. This is consistent with the configuration of this document in our legal system as an instrument aimed at guaranteeing respect for the autonomy of individuals, by allowing the patient to influence future medical-care decisions and facilitating health professionals to adopt the alternative that is most respectful of their wishes when they do not have the capacity to decide for themselves (according to the preamble of the aforementioned Royal Decree 124/2007). It should be noted that prior instructions must always be in writing and that their content cannot be applied if it is contrary to the legal system, to medical science or if it does not correspond to the eventuality that the interested party had foreseen at the time of expressing them [Art. 11(2) and 3 of Law 41/2002].

This leads to the dismissal of the complaint relating to the alleged "lack of legal quality" due to the indeterminacy in which the lawmakers would have incurred by referring to that document, according to the appeal. With a guarantee of the minimum conditions required here, it must be the laws that recognise the effectiveness of the type of prior document, whatever it may be called, which reliably accredits the unequivocal will of the individual in accordance with the OLRE. Should this not be the case, the legal system keeps the corresponding jurisdictional channels open, but what is not possible in a procedure such as the present one is a "conjectural judgment, detached from all normative specification" (CCJ 88/1993, 12 March 1993, PoL 5) on what those legal provisions set out or could set out.

The objection regarding the "indefinite validity" that the OLRE would have given to this advance manifestation of will cannot either be upheld. The Organic Law does not require the document provided for in Article 5(2) to be periodically confirmed or renewed by the person who has signed it, a circumstance that does not affect any provision or principle of the Constitution. The decision to predispose the request for the provision of aid to die must always be mature and responsible, like the request made in the present, and the lawmakers may well presume that the will thus expressed remains real and effective as long as it has not been rectified in form by the person who expressed it at the time.

In short, the decision to obtain assistance to die in a euthanasic context that is reflected in the prior instruction document must also be taken "freely, voluntarily and consciously" and must be "manifested" by the person who is in "full use of his or her powers" -as required by Art. 3(a) of the law for all cases. This general requirement implies that the control of the assumptions of euthanasia that must be carried out, under the protection of articles 5(2), 8(3) and (5), 9 and 10

OLRE, both by the consultant physician and by the guarantee and evaluation commission, in the particular case of *de facto* incompetency can be extended to the verification of the capacity of the grantor at the time of signing the prior instruction document, according to the specific circumstances of the case. The alleged lack of competency is also grounds for challenging the final decision on the recognition of entitlement, which is the responsibility of the guarantee and evaluation commission before the contentious-administrative jurisdiction. As the provision of aid to die must always be based on the unequivocal consent of the applicant, it may in certain circumstances justify a kind of deferred challenge of a prior instruction document that does not faithfully reflect a genuine decision taken by the person concerned in full use of his or her faculties, in the procedure provided for in the OLRE. This is without prejudice to the fact that the basic state regulation of said document and the implementing regulations of the autonomous communities may establish additional guarantees to ensure the full capacity of the grantor, as well as that he/she is fully aware of the consequences that the aforementioned document entails in the regulatory regime of the law.

Moreover, it is manifestly inconsistent to consider that the aforementioned document could contradict the "current will" of the patient who is *de facto* incompetent, insofar as such a situation arises precisely when the patient is not in the full use of his or her faculties and cannot give his or her free, voluntary and conscious consent to make the requests. Until this situation is reached, the aforementioned document does not come into play, which, as has just been indicated, is in any case revocable [Art. 11(4) of Law 41/2002].

(d) The complaint regarding the assessment of the "situation of *de facto* incompetency" [Art. 5(2) and (3)(h)] and the assessment and effects of the situation of "imminent loss of the applicant's capacity to grant informed consent" [Art. 5(1)(c), second paragraph] cannot be upheld either.

The positive assessment of the person's capacity to request the provision of aid to die with autonomy [Arts. 3(a) and 4(2) OLRE] is a question that must be examined and determined by the doctors - responsible and consultant physicians - who are called upon by the Organic Law to intervene here [Art. 8(1), (2) and (3)], in accordance with the criteria and guidelines of medical science and experience, without prejudice to subsequent administrative control [Arts. 10 and 18(b)] and that which may later come to correspond to the jurisdiction. The same nature and legal regime must apply to the medical assessment of the lack of that capacity, regardless of the fact

that this initial finding may additionally require, in a prudent assessment of the circumstances, the consultation of a specialist in the pathologies that may be determining a *de facto* incompetency in the case [the OLRE itself seems to contemplate, in this respect, the opinion of several "consultant physicians": Art. 12(b)(9)].

Although it is clear from the above, it should be noted that the application of the Organic Law on this point is subject to a series of procedural guarantees, as in the rest of its points, in order to verify whether the legal requirements for the recognition of the provision of aid to die are met, with this verification corresponding not only to the responsible physician, but also to the consultant physician -this one with the necessary "training in the field of the pathologies suffered by the patient" and who does not belong to the same team as the responsible physician: Art. 3(e) - and to the guarantee and evaluation commission, as well as, where appropriate, to the contentious-administrative jurisdiction. It should not be forgotten that the independence of the consultant physician may be subject to scrutiny by the Commission. The intervention of this consultant physician in the event of the patient's *de facto* incompetency is expressly provided for in Art. 8(3) OLRE. A provision that unequivocally establishes that it must verify compliance with the conditions set out in Art. 5(2) of the law. Then, the reference in Art. 8(5) to the control by the guarantee and evaluation commission (which is developed in Art. 10), "[o]nce the provisions of the previous paragraphs have been complied with", refers to the case of *de facto* incompetency in Art. 5(2) OLRE. This means that the final act of the Commission in the specific case of "*de facto* incompetency" can also be challenged, as in the general system, before the courts of the contentious-administrative jurisdiction.

The prior judicial intervention, which the appeal here alleges is lacking, is by no means required by the Constitution. We are not dealing here with what the appellants call an "incompetency", an expression that is meaningless today in our legal system (Law 8/2021, of 2 June, reforming civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity). Nor is there any comparison to be made between the certification of the *de facto* incompetency that, if the patient's prior wishes were documented, would allow assistance in dying to be granted and, on the other hand, the restriction of personal freedom resulting - in the example given in the appeal - from an involuntary admission to a hospital. Imposing oneself on the will of the individual and giving effect to the decision that he or she issued when he or she was competent to do so are opposing actions that can only be compared by making a premise, against all logic, of the very thing that one wishes to prove.

If there is no legal-constitutional obstacle to the *de facto* incompetency being assessed by doctors in the first place, neither should there be any obstacle to the responsible physician for establishing the imminence of the patient's loss of competency, after his or her first request, in order to "accept any shorter period" than the ordinary fifteen days between that first request and the second, provided that he or she does so "according to the clinical circumstances, which must be recorded in the medical record" [first and second paragraphs of Article 5(1)(c)]. The lawmakers must demand and guarantee that the decision to ask for aid to die, in addition to being conscious, voluntary and free [Art. 3(a)], comes from the matured and meditated determination of the person. Articles 4(3) and 12(b)(6) speak of "mature and genuine" meditation and of "reflection and reiteration of the request", and the imposition of two successive requests responds to this, but the fifteen-day period that the lawmakers have generally established obeys their free and prudent assessment of opportunity, an assessment that can be weighted and qualified, as the *Cortes Generales* have done here, in view of the singular circumstances that the provision contemplates. The appellants may well protest in political terms against this exceptional provision of the OLRE, but the Court sees no reason to disapprove of it in law.

(e) Lastly, the claim of unconstitutionality that the appeal makes against the possibility that a third party submits the request to receive the provision of aid to die on behalf of a person with *de facto* incompetency and, specifically, the "patient's doctor", who can for this purpose access the register to obtain a prior instruction document or equivalent report [Arts. 6(4) and 12(a) paragraph 4 of the OLRE], must be rejected.

The appellants focus this complaint on the alleged violation of the right to personal privacy [Art. 18(1) SC]. Contrary to the appeal, the OLRE does not provide that a third party may "request" the death of a person declared *de facto* incompetent. Strictly speaking, what is envisaged is that the request be submitted "together with the prior instruction document [or an equivalent document] previously signed by the patient" [Art. 6(4) OLRE], i.e. a third party is allowed to transfer the patient's own previously expressed wishes, not those of the person submitting the request. This is confirmed in the preamble of the Organic Law, when it indicates that "the possibility of requesting this assistance by means of a legally recognised prior instruction document or an equivalent document is also set out".

This is an important clarification, as respect for the fundamental right to life prevents the specific euthanasia service that Organic Law 3/2021 has established from being claimed and

obtained for another, if the latter has not predetermined it at the time, without prejudice to what, for the most faithful fulfilment of the advance will, could have been entrusted in this prior document to a possible "representative", who would be, in that hypothesis, "the valid interlocutor for the responsible physician" [first paragraph, last indent of Art. 5(2)]. If, on the contrary, that predetermination existed, no one would be able to oppose the will that was formalised in advance by the person concerned, provided that, once the *de facto* incompetency had been certified, the requirements of the OLRE were met and all the formalities established therein were complied with (as can be seen from Article 9, according to which "[i]n the cases provided for in Article 5(2), the responsible physician is obliged to apply the provisions of the prior instruction document or equivalent document").

That being so, the appellants' claim of unconstitutionality on this point is unfounded. As far as this case is concerned, the invoked fundamental right to personal privacy implies "the existence of an area of a personal and private sphere as opposed to the action and knowledge of others", the consequent duty on third parties to "to abstain from any intrusion into the intimate sphere" and "the prohibition to make use of it" (inter alia, CCJ 172/2020, 19 November, PoL 4). It is clear that the person who predisposes the request for euthanasia in case of not being able to do so at the time intends that this request is known and attended to by the physician who, if necessary, assist the patient, something only possible through the submission of that request, which is strictly personal, by third parties (ultimately, by the "patient's doctor") [PoL 7(D)(c) OLRE]. For similar reasons, the patient's right to the protection of his or her personal data [derived from Art. 18(4) SC, a provision that the appeal does not cite] is not affected, when it is "his or her doctor" the one who is precisely and exclusively empowered here, once the situation of *de facto* incompetency has been certified, to obtain the prior document from the register and "present the request for euthanasia" [Art. 6(4)] which is formalised therein.

It should be noted at this point that, according to the literal and systematic wording of Art. 6(4), the physician referred to in the OLRE as the "patient's doctor [...]" is not for these purposes - and could not be, given his or her necessary neutrality and independence: ECHR, *Mortier v. Belgium*, § 162 - the responsible physician (rather, the recipient of the request), but one of the "other professionals involved in the care provided" to the person concerned [Art. 3(d), final indent]. This also derives from the parliamentary work itself, in the course of which the wording of the proposal for legislation on this point was rectified, which provided that "[i]f there is no person who can submit the request on behalf of the patient, the responsible physician may

submit the request for euthanasia" ["Official Gazzette of the Parliament. Congress of Deputies", no. 46(5), 10 December 2020, p. 16; see also amendment 245 tabled in the Senate, from which the current text originates: "Official Gazzette of the Parliament. Senate", no. 141, 17 February 2021, p. 142].

For the reasons set out above, this allegation of unconstitutionality must also be dismissed and, with it, this second block of specific challenges. It cannot be understood that the regulation in the OLRE of the conditions for the recognition of the benefit for those who find themselves in a situation of *de facto* incompetency grants the fundamental right to life a protection against interference by third parties that does not reach the necessary level required by the Constitution, in the terms set out in legal ground 6(D).

9. Specific challenges to certain references of the OLRE regarding its implementation

(A) The contested provisions

The third set of alternative claims in the appeal is directed against Article 5(2), second paragraph, Article 17(5), the sixth additional provision and the third final provision of the OLRE. These provisions set out the following:

"Article 5. Requirements for receiving the provision of aid to die.

[…]

2. […]

The assessment of the situation of *de facto* incompetency by the responsible physician shall be made in accordance with the protocols of action determined by the Interterritorial Council of the National Health System."

"Article 17. Creation and composition [of Guarantee and Evaluation Commissions].

[…]

5. The Ministry of Health and the Chairs of the Guarantee and Evaluation Commissions of the Autonomous Communities shall meet annually, under the coordination of the Ministry, to homogenize criteria and exchange good practices in the development of euthanasia delivery in the National Health System."

"Additional provision 6. Measures to ensure the provision of aid to die for health services.

In order to ensure the equality and quality of care of the provision of aid to die, the Interterritorial Council of the National Health System shall draw up within three months of the entry into force of the Law a manual of good practice to guide the correct implementation of this Law.

It shall also develop the protocols referred to in Article 5(2) within the same period."

Final provision 3. Ordinary nature of certain provisions.

This Law is an organic law with the exception of Articles 12, 16(1), 17 and 18, the additional provisions first, second, third, fourth, fifth, sixth and seventh, and the single transitional provision, which are of the nature of ordinary law."

(B) Positions of the parties

In this block of challenges, the appeal claims that Articles 5(2) and 17(5), as well as the sixth additional provision of the OLRE, "do not determine substantial aspects such as the end of human life and the extinction of the fundamental right to life; the content of those provisions is completely undefined and they do not even have regulatory status". This would violate the requirement of quality of the law (Art. 15 SC, in conjunction with Art. 9.3 SC), non-delegable legislation [Art. 53(1) SC] and the non-delegable organic legislation [Art. 81(1) SC]. The third final provision is criticised for denying the organic nature of the sixth additional provision, without further argumentation.

On the one hand, the appellants maintain the unconstitutionality of the second paragraph of Art. 5(2) OLRE and its sixth additional provision *in fine*, on the grounds that they provide a

"blank empowerment" and "without any regulatory predetermination" to the Interterritorial Council of the National Health System (a "merely administrative body") when it is entrusted with drawing up the protocols for the assessment of the situation of *de facto* incompetency, an aspect that the appeal describes as an "essential element" of the system regulated by the OLRE insofar as, according to the appellants' interpretation, "the assessment of a *de facto* incompetency by the responsible physician [...] makes it possible to disregard the direct and immediate consent of the person to cause his or her own death".

On the other hand, the appeal claims the unconstitutionality of Art. 17(5) OLRE, as it orders that the Ministry of Health and the Chairs of the Guarantee and Evaluation Commissions shall meet annually, under the coordination of the Ministry, "to homogenize criteria and exchange good practices in the development of euthanasia in the National Health System". It also claims the unconstitutionality of the first paragraph of the sixth additional provision insofar as it orders the Interterritorial Council of the National Health System to draw up "a manual of good practice to guide the correct implementation of this Law" with the aim of "ensuring the equality and quality of care of the provision of aid to die". According to the appellants, these questions "cannot be referred to a manual of good practice or to an administrative protocol for action, but must be perfectly predetermined in the Organic Law that regulates such an essential and determining issue as the extinction of the fundamental right to life".

On the contrary, the State Attorney argues that these provisions do not infringe the non-delegable organic legislation, which in any case must be interpreted restrictively (CCJs 5/1981, 13 February, and 173/1998, of 23 July), as they do not regulate "essential aspects of the rights involved", given their non-regulatory nature (as we would be dealing with mere "practical guides or recommendations") and their purpose, which would only be the due coordination and correct application of the OLRE, bearing in mind the technical nature of the matter and the "decentralised nature" of the National Health System.

(C) Procedure

(a) In order to examine the allegations of unconstitutionality denounced in this block, it is necessary to briefly recall the core of the constitutional case-law on the scope of constitutional reservations to the law, given that the one relating to the requirements of certainty and precision of the law has already been outlined in the preceding point of law.

This court has pointed out that the constitutional reservations to the law prevent lawmakers from disempowering themselves in favour of other regulatory sources to regulate that which the Constitution entrusts to them (for example, CCJ 31/2018, 10 April, PoL 7). Without prejudice to this, we have also indicated that no constitutional reservation to the law should be understood in such terms as to prevent, without nuances, any reference to subsequent regulations on matters of a strong technical nature [CCJs 160/2013, 26 September, PoL 7(b), and 51/2019, 11 April, PoL 7]. And, with regard to the non-delegable organic legislation provided for in Art. 81(1) SC, we have reiterated that it must be interpreted restrictively [thus, since CCJ 5/1981, 13 February, PoL 21(a)]. In addition, and although the present block of challenges does not refer to the empowerment of the administration to approve regulations, this court has pointed out that, with regard to matters not constituting the core of those assigned to organic laws by Art. 81(1) SC, but related to it, development is feasible not only by ordinary laws, but even by regulations, as long as it does not involve the direct development of a fundamental right and that the references to the regulation do not distort the purpose pursued by those reservations (CCJs 6/1982, 22 February; 131/2013, 5 June, and 134/2013, 6 June).

(b) The complaint relating to the administrative approval of action protocols for the assessment of the situation of *de facto* incompetency [second paragraph of Article 5(2) and sixth additional provision *in fine]*, which partly reiterates the complaint made by the appellants in the previous block of specific challenges, must be rejected for the reasons set out in the examination of the latter.

As we have indicated, Arts. 3(h) and 5(2) OLRE define with sufficient precision the concept of "situation of *de facto* incompetency"; a situation which, contrary to what the appellants claim, does not lead to dispensing with the consent of the person, but to establishing the current impossibility of giving it. The "action protocols" stated in the contested provisions refer not to the definition of the de facto incompetency, but to the "assessment" of its occurrence in the specific case by the responsible physician. This assessment is a factual question that requires a technical examination on a case-by-case basis and not a more specific one than the Organic Law does here, nor is it conceivable that lawmakers, whether organic or ordinary, would be in a position to establish specific guidelines for technical assessment on this point. Therefore, the legislative determination is enough, and it could not lead to a finding of a defect in the quality of the law, nor any blank referral to the administration in order to regulate central elements of the euthanasic service.

(c) The challenge to the provisions that attribute to administrative bodies the "homogenisation of criteria and exchange of good practices in the development of the provision of euthanasia in the National Health System" [Art. 17(5)] and the "drafting of a manual of good practice to guide the correct implementation of this Law" with the aim of "ensuring the equality and quality of care of the provision of aid to die" (first paragraph of the sixth additional provision) cannot be either upheld.

As with Art. 5(2) OLRE and its sixth additional provision *in fine*, it is clear that none of these provisions entrust administrative bodies with the regulation of aspects covered by non-delegable legislation (neither ordinary nor organic), nor does it imply that the regulation contained in the Organic Law incurs the defect of "lack of quality of the law" that the appeal states. Both Art. 17(5) OLRE and the first paragraph of its sixth additional provision refer to the application of the regulatory framework provided by the organic lawmakers: they seek, in a "direct line of execution" of the Organic Law [CCJ 97/2020, 21 July, PoL 5(C)(a)], that its application is carried out in a harmonious or concordant manner throughout the national territory and do not enable the development, complement or integration of the OLRE at a regulatory level, which would be a prerequisite for the examination of whether, as is said, the non-delegable legislation could have been undermined. As this is the object of the sixth additional provision, it is clear that it is not covered by the non-delegable organic legislation of Art. 81(1) SC - something which, moreover, is not argued in the appeal -, which means that the complaint made on this point against the third final provision of the OLRE is dismissed.

This suffices to dismiss the censure against these legal provisions.

10. Specific challenges concerning the conscientious objection regime for health professionals

(A) The contested provisions

The last block of alternative claims in the appeal is directed against the third final provision [in conjunction with Art. 16(1)] and Art. 16(2) OLRE. These provisions set out the following:

"Final provision 3. Ordinary nature of certain provisions.

This Law is an organic law with the exception of Articles 12, 16(1), 17 and 18, the additional provisions first, second, third, fourth, fifth, sixth and seventh, and the single transitional provision, which are of the nature of ordinary law."

"Article 16. Conscientious objection of healthcare professionals.

[…]

2. Health administrations shall create a register of health professionals who are conscientious objectors to carry out aid to die, which shall record declarations of conscientious objection for the implementation of the death aid and which shall be intended to provide the necessary information to the health administration so that the health administration can ensure adequate management of the provision of aid to die. Registration shall be subject to the principle of strict confidentiality and the regulations for the protection of personal data."

Although they have not been specifically challenged, in order to examine this complaint it is also necessary to take into account the provisions of Arts. 3(f) and 16(1) OLRE, as argued respectively by the State Attorney and the appellants. It reads as follows:

"Article 3. Definitions.

For the purposes of this Law:

[…]

(f) 'Objection of health awareness' means the individual right of health professionals not to meet those demands for health action under this Law which are incompatible with their own convictions."

"Article 16. Conscientious objection of healthcare professionals.

1. Health professionals directly involved in the provision of aid to die may exercise their right to conscientious objection.

The refusal to make such a benefit on grounds of conscience is an individual decision of the healthcare professional directly involved in its implementation, which must be expressed in advance and in writing."

(B) Positions of the parties

(a) The appeal understands, on the one hand, that the force of ordinary law that the third final provision attributes to Art. 16(1) OLRE is "manifestly unconstitutional because conscientious objection to the practice of euthanasia constitutes an essential part of the exercise of the fundamental right to ideological and religious freedom" [Art. 16(1) SC], which would entail "the mandatory application of all the guarantees [...] that the Constitution establishes for the regulatory development of fundamental rights and freedoms, including, as far as is relevant here, that their essential content and basic conditions be regulated through an organic law" [Art. 81(1) SC].

Against this, the State Attorney argues that the right to conscientious objection derives directly from the Constitution (CCJ 53/1985) and is set out in Art. 3(f) OLRE, which has the force of an organic law, while Art. 16(1) OLRE does not determine "essential elements" for the exercise of the right, but rather establishes a "merely formal duty" in order to formulate in advance and in writing the "intention" to object, but "without requiring a certain advance notice which, if not complied with, would imply a loss of the right", and therefore "does not fall within the scope of non-delegable legislation".

(b) On the other hand, with regard to Art. 16(2) OLRE, the appellants consider that the regulation it establishes for the register of conscientious objectors is contrary to the Constitution because: (i) conditioning the objection to registration means "singling out those who object to collaboration in the death of a person", which is "not entirely unrelated to the risk of discrimination and stigmatisation"; (ii) the objecting position is neither final ("as it may change in the course of professional practice") nor absolute ("as it may depend on specific cases that motivate this approach, while other cases would not"), so that a register of "monolithic conception [...] does not appear to be a realistic instrument in which to accommodate such a complex professional issue"; (iii) in any case, the obligation imposed on health professionals by Art. 16(2) to declare their status "opposes" Art. 16(2) SC, which exempts any person from declaring their beliefs; and (iv) in particular, the register violates the principle of proportionality, as it is neither

adequate (there would be no "causal link" between the guarantee of provision and conscientious objection) nor necessary (as there are other less intensive measures, such as an internal archive, and there is no "extreme need" to implement it, which "generates more impediments to the general interest than benefits for those affected and for the provision of the health service"). This is irrespective of the fact that "the anticipated objection must necessarily be recorded in an existing register for organisational purposes of the health administration".

The State Attorney argues on the contrary that the "final aim" of the register [Art. 16(2) OLRE] is to ensure the effective provision of aid to die, with the "only exception" with respect to paragraph 1 that "the protection of the fundamental right to privacy and the protection of personal data is directly involved here" (Art. 18 SC), which would justify the legislator having attributed it the force of an organic law. Without prejudice to this, he points out, in reference to the complaint on the third final provision, that the register, as such, does not require an organic law (CCJ 151/2014), so that the mere prior written communication to exercise conscientious objection would require it even less. In any case, he maintains that these requirements are not disproportionate, especially when the exercise of the right is not conditional on the declaration of objection having been previously entered in the register, which would have been recognised in the Manual of good practice in euthanasia approved by the Interterritorial Council of the National Health System (which would indicate that health administrations must accept unregistered objections and would admit both the "supervening" objection and the reversibility of the decision).

(C) Procedure

(a) The examination of this last block of challenges must start from the constitutional configuration of conscientious objection.

The Constitution expressly refers to it only as an exemption to the "military obligations of Spanish citizens" and the fulfilment of the possible "compulsory military service" [Art. 30(2) SC], areas in which it is shown to be connected with the ideological freedom guaranteed by Art. 16(1) SC, according to the early warning of this court (CCJ 15/1982 of 23 April, PoL 6). Apart from what was set out in that first constitutional provision, Art 16(1) SC "by itself would not be sufficient to free citizens from constitutional or 'sub-constitutional' duties for reasons of conscience, with the risk of relativising legal mandates" (CCJs 160/1987, 27 October, PoL 3;

321/1994, 28 November, PoL 4; 55/1996, 28 March, PoL 5, as well as Constitutional Court Order 135/2000, 8 June, PoL 2).

However, the legislator should not ignore or disregard, when regulating certain matters, the possibility that the unconditional imposition of certain obligations could seriously compromise the freedom of conscience of some of the persons concerned, by placing them at the exceptional crossroads of renouncing rationally arguable moral convictions, although not shared by the majority, or suffering, by being consistent with them, the sanction that would be associated with the non-fulfilment of a legal duty. In this sense, and only in this sense, one must understand the assessment that the Court made in the past, in the light of the silence of a specific legal regulation, as conscientious objection "is part of the content of the fundamental right to ideological and religious freedom" (CCJ 53/1985, PoL 14).

It follows from the above that in no way does there exist in our legal system, on the basis of Art. 16(1) SC, a generic fundamental right to refrain, on the grounds of conscientious imperatives, from any legal duties, which would constitute an inconceivable, absurd power of individual veto over legislation and "the very negation of the idea of the State" (CCJ 161/1987 of 27 October PoL 3). A different scenario is that the legislator may, or even in some cases must, recognise the morally controversial nature of certain normative decisions on vital matters and then allow, with due safeguards for the general interest, that the individual initially obliged may be exempted from complying with a mandate that is not reconcilable with his or her most deeply held convictions. Under these circumstances, freedom of conscience could be compromised if the legislator had completely disregarded, against all reason, such situations of conflict or extreme personal commitment, provided that they had sufficient cultural roots and if the guarantees that had been established for this purpose were ignored by means of specific acts or decisions, eventualities in which the jurisdictional remedies for the protection of the fundamental right set out in Article 16(1) SC would undoubtedly remain fully open. In short, there is no general or indeterminate right to conscientious objection, but there are conceivable cases in which a judicial defence of freedom of conscience may be appropriate in the face of the law's complete disregard of an objection that should have been considered by lawmakers, or against those who have applied the law without respecting its provisions to protect any individual who might declare himself or herself as objector.

(b) The Court does not agree with the finding of unconstitutionality directed against the status of ordinary law which the third final provision of the OLRE ascribes to Article 16(1) of the OLRE.

The fact that conscientious objection to the euthanasic benefit [second subparagraph of Article 16(1)] may possibly be raised before the courts, on the basis of the right set out in Article 16(1) SC, does not mean that it is itself a fundamental right for the development of which an organic law is required under Article 81(1) SC. One thing is the question of the procedural safeguard regime where certain objecting arguments come within the freedom of conscience and a different thing is that of the type of legislative source which must, where appropriate, provide for and regulate a specific objection when the newly envisaged situations are present. In view of the confusion between the two levels in which the appeal is involved, it is enough to refer to the reiterated constitutional case-law that has even denied this non-delegable legislation for the regulation of the only form of objection constitutionally provided for, the one set out in Article 30 (2) SC, based on the fact that the development referred to in Article 81(1) SC is, strictly speaking, that of the rights under the first section of Chapter II of Title I of the Constitution itself, together with other considerations (CCJs 160/1987 and 161/1987, PoL 2 in both judgments). It should be added, however, that the definition of "health conscientious objection" as an individual right for professionals not to satisfy any demand for euthanasic action that may prove to be incompatible with their own beliefs is in the nature of an organic law in Article 3(f) OLRE.

(c) Similarly, the provision that health authorities must create a register of objecting health professionals deserves the complaints of unconstitutionality made by the appellants.

It should be clarified that registration does not condition the exercise of conscientious objection, as it is sufficient that it is expressed "in advance and in writing" for it to be effective [Art. 16(1), second paragraph, OLRE]. The Court cannot either argue the description of the register as "monolithic in conception" or as an "[un]realistic instrument", a criticism that is more appropriate to a parliamentary debate.

The provision of these registers has an objective purpose that is in no way reprehensible in law, which is to "provide the necessary information to the health administration so that it can guarantee adequate management of the provision of aid to die" [Article 16(2)], a guarantee that is entrusted to the public health services [Article 13(2)], without access to and quality of care

being undermined by the exercise of conscientious objection to health care (Art. 14). For these purposes, it makes no sense that the health administrations should know which professionals are not available, in principle, to be directly involved in the provision of the service [Article 16(1), first paragraph]. It should be recalled that the OLRE, as it was required, took care to ensure that "the register shall be subject to the principle of strict confidentiality and the regulations for the protection of personal data" [Article 16(2), last paragraph].

Lastly, the appellants' assertion that the registration and entry in it of declarations of objection are inconsistent with the constitutional provision that "[n]o one may be compelled to make statements regarding his religion, beliefs or ideologies" [Article 16(2) SC] cannot be upheld. This is a criticism that, if one were to follow the argument of the appeal, it could also be raised – with equal lack of reason – against the inexcusable written manifestation of the decision to object [Article 16(1), second paragraph, not challenged]. The exercise of conscientious objection "cannot, by definition, remain in the intimate sphere of the subject, since it results from exemption from the performance of a duty and, consequently, the objector "must provide the necessary cooperation if he wants his right to be effective in order to facilitate the task of the public authorities in that regard [...], collaboration which already begins, in principle, by the renunciation of the holder of the right to keep it -in the face of external coercion- in personal privacy, since no one may be compelled to make statements regarding his religion, beliefs or ideologies [Article 16(2) SC]" (CCJ 160/1987, PoL 4, which is repeated in CCJ 151/2014, PoL 5). Some of the conclusions reached by the last of the above-mentioned judgments can be transferred here in the face of a different controversy, although on this point analogous to the present one: "The creation of a regional register of professionals with the aim of the regional administration being aware, for organisational purposes and for the proper management of this health service, of those who, in exercising their right to conscientious objection, refuse to perform this practice [...] does not imply, per se, a limit to the exercise of the right to conscientious objection [...], nor a disproportionate and unjustified sacrifice of the rights to ideological freedom and privacy, without it being possible to assert [...] that the purpose of this is to keep a list of objectors with the aim of discriminating against them and retaliating against them ["risk of discrimination and stigmatisation", in a less extreme expression of the current appeal], as this is an assertion without any PoL and on which a complaint of unconstitutionality cannot be based".

Therefore, the latter requests for unconstitutionality are dismissed.

OPERATIVE PART

In view of the foregoing, the Constitutional Court, by the authority conferred by the Constitution of the Spanish Nation, has decided to dismiss the action of unconstitutionality brought against Organic Law No 3/2021 of 24 March 2007 regulating euthanasia.

The present judgment shall be published at the State Official Gazette.

Delivered in Madrid, on 22 March 2023.

Opinions

Concurring opinion given by Judge María Luisa Balaguer Callejón to the judgment issued regarding the unconstitutionality appeal no. 4057-2021

With the greatest respect for the criteria reflected in the judgment referred to in the heading, I believe it necessary to formulate this vote, in exercise of the power provided for in Art. 90(2) of the Organic Law on the Constitutional Court (OLCC), to put on the record some of the arguments that I set forth in the Plenary deliberation and which are not sufficiently developed in the legal grounds that lead to the dismissal of the appeal of unconstitutionality, a dismissal with which I totally agree.

The essential doubt of constitutionality raised against Organic Law 3/2021 of 24 March 2021 regulating euthanasia confronts this law with the right to life enshrined in Art. 15 SC and with the duties of protection of life demanded of the State and derived from Arts. 43, 49 and 50 SC. In order to overcome the alleged opposition, the judgment develops its main argument on two levels. The first denies the absolute value of life as a right, as previous case-law had held, and rejects that the prohibition to regulate the type of direct active euthanasia and medically assisted suicide regulated by Organic Law 3/2021 can be derived from Art. 15 SC. The second level builds the constitutional support for the specific legislative option under appeal, linking the subjective right to passive euthanasia and medically assisted suicide in the cases provided for in the law with the fundamental right to physical and moral integrity, which is also included in Art. 15 SC. Therefore, the PoL of the judgment mainly revolves around the interpretative reconstruction of the scope of Article 15 SC, making use of Articles 1(1) and 10(1) SC, and very slightly of Article 18 SC, to formulate this reconstruction.

In my opinion, the judgment should have opted to focus the debate not so much on the content and scope of Article 15 SC, or on the question of whether or not this provision contains a fundamental right to a dignified death, but rather on the content that should be given to the notion of human dignity contemplated in Article 10(1) SC at the present constitutional moment. In other words, the judgment could have contextualised the double argument that leads to the dismissal of the appeal of unconstitutionality by assuming that the capacity to decide on the way in which an adult, free, conscious and sufficiently informed person puts an end to his or her life derives directly from the proclamation of the dignity of the person as the basis of the political

order in which the recognition, promotion and guarantee of the rights of the person are framed. A dogmatic construction with this constitutional link would have provided the future interpreter and the future lawmakers with a more solid basis for shaping a right to a dignified death with a broader profile than those that the law now contemplates, and which limits euthanasia and assistance to suicide to the so-called “euthanasic contexts”, which by no means include all life situations where a person may decide to end their life in dignified and non-violent or degrading conditions.

The argumentative effort of the judgment focuses on denying that life, understood as an absolute value and as an objective constitutional right, can be an insurmountable limit to the legislative decision to decriminalise support for euthanasia or assisted suicide. This effort is justified on the basis of an analysis of the arguments in the appeal, to which the Court must undoubtedly respond. But the judgment could also have responded by expressly identifying the ethical and moral bias that underpins the party’s approach and that also supports the case-law cited to a large extent, even if only to end up departing from them because they are not suitable for resolving the doubts of constitutionality raised in these proceedings. This bias bases the concepts of life, personhood and dignity on the connection of these with transcendent realities and, therefore, external to the human being. These realities condition the vision of the capacity to self-determine the beginning and end of life, because they assume that this capacity is limited by prior, natural, intangible conditions beyond human control. But the process of secularisation that began with modernity has as one of its objectives to base the concepts of life, dignity and personhood on the generic ideas of rationality and humanity, these two conditions being those that determine membership of the political community and the condition of entitlement to rights.

The approach to Arts. 10(1) and 15 SC, up to this point, has been marked by an unfinished interpretative secularisation, and this judgment gave the Court the opportunity to culminate this process, disassociating itself from the idea that the availability of life itself is outside the legal sphere; from the categorical refusal to understand that death can form part of the recognition of the right to life; or from the conception of life as an undisputed requisite for the exercise of rights, without completing this affirmation with the certainty that biological existence without rational and conscious existence cannot be explained as a condition for the full exercise of human rights.

When Michel Foucault coined the concept of biopower more than forty years ago, he was trying to explain how the State, from the 18th century onwards, rationalised the problems posed by phenomena such as health, hygiene, birth rate, longevity, race, etc., in governmental practice (*Naissance de la biopolitique*, 1979). Foucault explains how the State, at a given moment, begins to confront problems such as those of habitat, living conditions in a city, public hygiene, the modification of the relationship between birth rate and mortality, and a number of political questions arise about how to regulate population flows or population movements, and how the response to these questions, from the perspective of power, means that life, and the body that sustains it, become an object over which power is exercised, that is, a political object.

Therefore, the State exercises power over citizens, understood not only as subjects of law, but also as living beings, with a series of biological conditioning factors, through the capacity of law and institutions to manage people's lives, and the way in which these lives emerge, grow, are organised, produced and end. The legal system defines the norm as a pattern of behaviour and as a rule of obligatory conduct, and the person adapts to the norm or falls outside the system.

The additional issue, which Foucault does not expressly refer to but which we clearly identify in Western legal systems, even today, is that moral, ethical and, essentially, religious biases are easily identified in the definition of the standard norm when we refer to the control of the material, of human life understood biologically.

In recent decades, many Western states, including our own, have opted to reduce the scope of the biopower they exercise over their citizens, the most effective instrument being the decriminalisation of behaviours that translate into various forms of control over the body, from the decriminalisation of different forms of contraception, through the progressive decriminalisation of the voluntary interruption of pregnancy, to the decriminalisation of behaviours related to accompaniment in the end-of-life process, first with the regulation of palliative care, to progress successively towards the decriminalisation of direct active euthanasia and assistance to suicide in certain contexts. This liberation of spaces has gone hand in hand with the progressive reinforcement of the secularity of the State that, in the Spanish context, is not expressly proclaimed in the Constitution, which limits itself to denying state status to any religion [Art. 16(3) SC].

The principle that sustains the loss of State power in this context is the recognition of human dignity, which superimposes the capacity of individual determination over one's own life on the power of the State to exercise control over specific life choices. A principle of dignity that, moreover, is gradually freeing itself from religious conditioning factors to take on an increasingly secular content.

While the judgment describes the regulatory and case-law evolution of the decriminalisation of end-of-life care, to conclude that a contextual, evolutionary and contemporary interpretation of the right to life must also contemplate decisions on how, in certain contexts and only in those contexts, life should come to an end, I miss a reflection on the paradigm shift that underpins this regulatory and case-law evolution. And this change, which allows us to formulate the interpretation contained in the judgment, linking the right to a dignified death with the right to a dignified life, to self-determination over one's own body, and to the guarantee of physical and moral integrity, involves understanding how contemporary political rationality is ceding power over the bodies of individuals to individual autonomy, which is increasingly built on parameters far removed from the limits and conditioning factors given by religion and traditional morality.

Therefore, when the judgment reproduces previous case-law, in which dignity was defined as a "spiritual and moral value inherent to the person" (citing CCJ 53/1985), it is not fully assuming either the change of regulatory paradigm, or the change of analytical paradigm that should allow for a more complete and consistent definition of the concept of dignity as set out in Art. 10(1) SC.

The judgment refers to dignity and the free development of personality as principles of recurring reference, almost as a criterion of constitutional authority, affirming that Art. 15 SC includes a right to self-determination regarding one's own life, which includes the decision to end it when very precise circumstances exist, because this is derived from the recognition of the principle of dignity [Art. 10(1) SC] in conjunction with the principle of freedom [Art. 1(1) SC].

But the recurring reference does not fully give content to the notion of dignity that really sustains the right to a dignified death. The logical leap between denying that Art. 15 SC includes a right to die, and recognising the right to receive help from the State, through the health system to end life when this is an expression of the right to physical and moral integrity (Art. 15 SC),

cannot be made without assuming that dignity is the determining element in the recognition of this dimension of the fundamental right which, until now, had not received express case-law recognition.

The constitutionalised notion of the principle of dignity could serve both to deny State intervention in the decision to end one's own life, and to uphold the necessary State intervention in the materialisation of that decision. An open-ended idea of dignity is not enough to cover the theoretical construction formulated by the judgment. For this reason, it would have been necessary to specify the content of the principle from which it is possible to derive positive obligations of the State, of a welfare or benefit content, as well as the prohibition of introducing disproportionate limits to the full effectiveness of the principle. An example of those limits is the setting of deadlines for making the decision to die effective. In this respect, I think it is worth emphasising that when a person has decided that he or she wants to end his or her life (with all that this means), extending the time limits excessively contravenes Article 15 SC and Articles 2 and 3 ECHR, as it can be understood as degrading treatment or inhuman suffering.

Dignity is recognised as a determining constitutional concept that is included together with the notion of autonomy in all the Constitutions of the second post-war period in order to overcome the liberal freedom-property binomial which had not been able to avoid the serious infringements of rights that occurred throughout Europe in the first half of the 20th century. But despite this fundamental innovation, it has not to date been given the scope it could have assumed, because it has been regarded as a purely instrumental principle. Indeed, this is how it functions in the judgment, as an instrumental principle in interpreting the scope of the right to physical and moral integrity.

However, if we understand the notion of dignity as an autonomous legal principle linked to the need to make the human person intangible, always and in any case vis-à-vis those who hold power, it is possible to inscribe this notion within the progressive deconstruction of biopower, and it is possible to justify that the State should cease to have control over people's vital decisions that affect their capacity for self-determination over their own bodies. This intangibility also implies that the State, and the legal system, must cease to be a transmission belt for moral forms of control over the vital decisions of human beings. The protection of life, as a value and as a right, cannot be understood without the recognition of individual autonomy to make essential decisions about the development of one's own life, which includes the conscious and freely

adopted will with the necessary information about the moment when death puts an end to one's life project. And not only in euthanasia contexts, but wherever self-determination of the will is produced and expressed in conditions of full recognition of personal autonomy and freedom.

The judgment does not manage to detach itself from a certain morality, which we associate with the idea of dignity, so that the argumentation does not allow us to imagine a scenario of regulatory evolution in the recognition of the full self-determination of the individual regarding the end of life. But if we detach the notion of dignity from any religious conception that associates it with transcendence, or with moral considerations, the mere human condition that integrates reason and corporeal matter is the basis for the concurrence of dignity, which does not proceed from any recognition external to the human being. And the non-interference of the State on reason and on the body is the mandate that derives from the recognition of dignity.

This notion of dignity, intimately linked to autonomous decision-making, must be complemented by the definition of the State's obligations deriving from respect for individual autonomy. It is not just a question of limiting State control over the individual, but of recognising that there are obligations on the State to ensure the full exercise of autonomy, especially where self-determination over certain life choices involves the intervention of a particular public service, such as the public health service. In other words, it is not just a matter of decriminalising abortion or suicide assistance by removing repressive control. It is also a matter of ensuring that those who make this choice can count on the assistance of the public service that guarantees medical health services, so that this choice is made in conditions of safety, health, respect for physical integrity, respect for the moral integrity of persons, and the exclusion of any type of degrading treatment.

Understanding dignity in this way requires seeing it as a fundamental principle, of a universal and abstract nature, from which limits to state intervention are derived, and as a mandate for specific action by the public power, which must pay attention to the particular situations that require its active intervention in order to guarantee the full effectiveness of individual decisions of self-determination over one's own life.

Finally, human dignity should not be understood as a principle of exclusively individual projection. While this means recognising a sphere of autonomy for the individual in the face of the exercise of the State's power of control over his or her vital decisions, it also means admitting

that the State must guarantee, in certain cases and with regard to certain individuals, the possibility that the decisions taken can be effectively and fully realised. And this must be assumed, in certain cases, as a condition of the individual's participation in the successive formation of the political community. If the guarantee of dignified material living conditions or sufficient education is a precondition for participation in the political community, dignity will have been established as a structural principle in the construction of the public space and the political community. Improved capacity for individual autonomous decision-making will eventually lead to improved capacity of individuals to make decisions for their political communities, so that the reinforcement of autonomy, coupled with public intervention to guarantee it, reinforces the collective.

Having said all of the above, it is important to recognise the relevance of Organic Law 3/2021 regulating euthanasia, and the text of this decision, which shows that the right to die in a dignified manner should have a constitutional basis or, more explicitly, should be recognised as a new facet of the right to life as an inseparable element of human dignity. This is because, as has been said, our Constitution does not conceive of dignity as a fundamental right, but we must never forget that it is the source and raison d'être of constitutional rights and freedoms. In this sense, granting a subjective and fundamental nature to the right to die with dignity, within the framework of the conditions established by law, means providing the person with a more guaranteed position in the face of possible obstacles that, in their case, may be encountered in this tremendous process of making the decision to stop living because life has become unlivable for the person affected. Converting the right to a dignified death into one more facet of the rights derived from article 15 of the Constitution means recognising the guarantees of fundamental rights in the face of the actions of the public authorities [Art. 53(2) SC]; i.e. a reinforced guarantee of judicial protection through the contentious-administrative procedure for the protection of fundamental rights and freedoms, thus becoming the object of a preferential and summary procedure under the conditions provided for in the Law on Contentious-Administrative Jurisdiction, Articles 114 and following. Moreover, in the event that the ordinary judicial guarantee does not adequately protect the rights of the person concerned, it may be even possible to seek *amparo* before this court.

This protects both the person who decides to end his or her life voluntarily and autonomously, essentially because he or she has reached a point of physical and/or psychological deterioration that makes his or her existence inhumane. But also to those people who, because of

the circumstances of the person who wishes to die, need the help of another person in their process towards a dignified death. Thus, beyond the possible commission of criminal offences, it seems that situations of lack of protection for physicians and others entitled to participate in the process of a dignified death, which could generate a discouraging effect in their actions, leaving the anguish and suffering of the sick person unattended, will be avoided. But it will also put an end to a phenomenon that unfortunately occurs in the health sector of having to initiate other procedures, such as those for asset liability, which do not fit in well with the specific processes for the protection of fundamental rights in the face of the abnormal activity of public administrations and their professionals.

Finally, I would like to point out that the length of the judgment, justified in part by the importance of the constitutional issues raised by the appellants and resolved by the Plenary, gives the reader a feeling that the issues raised are too broad, which is detrimental to the increasingly necessary pedagogical nature that constitutional case-law should have. Complex problems require complex problem-solving arguments, but expressed in the simplest possible way when the ultimate addressees are not only those of us in the legal professions, but the general public. For this reason, I believe that the unnecessary repetition of certain party arguments in the legal grounds should have been avoided, as well as the linear description of previous constitutional case-law, comparative case-law or the pronouncements of international courts unnecessary to the construction of the main argumentative basis of the judgment.

Madrid, on the twenty-second day of March two thousand and twenty-three.

Dissenting opinion issued by Judge Enrique Arnaldo Alcubilla, on the judgment handed down in the action of unconstitutionality No. 4057-2021

With all due respect to the opinion of the judges who made up the majority of the Plenary and in use of the power conferred on us by Article 90(2) of the Organic Law on the Constitutional Court, I express my disagreement with both the operative part and the merits of the judgment that resolves this action of unconstitutionality, for the reasons that I set out and defended at the time during the deliberation and which I restate below.

1. The judgment I disagree with dismisses the action of unconstitutionality brought by over fifty deputies of the parliamentary group in Congress of Vox against Organic Law 3/2021 of 24 March 2021 on the Regulation of Euthanasia, and alternatively, against 13 provisions of that law.

There are essentially two reasons for my disagreement, to which I will add a third methodological ground that is linked to the way the judgment is reasoned.

First, I cannot agree with the reasons for why the judgment rejects the appellants' main complaint, which are based on the emergence of an alleged "new" fundamental right to self-determination regarding one's own death in euthanasic contexts, a right that would correspond to a correlative duty of the public authorities (particularly the legislature) to contribute to its effectiveness. As I will develop later, even if it were accepted that the appellants' complaint should be dismissed -since it can be argued that there is no unconditional constitutional prohibition to regulate euthanasia- I consider that it was completely unnecessary to undertake a dogmatic construction such as the one made in the judgment with which I disagree, as it is clearly excessive in attempting to limit the legitimate options of lawmakers in this delicate matter. In this way, the plurality of options that the Constitution opens up to the lawmakers derives from the conception of the Constitution as a framework of coincidences sufficiently broad to allow different alternatives, without necessarily imposing one in an exclusive and excluding manner except in those points in which the Constitution unequivocally and unconditionally establishes it. Finally, the plurality of options opened up by the Constitution is, in short, nothing more than the expression of political pluralism as the highest value of the legal system [Article 1(1) SC].

Secondly, I disagree with the way in which the judgment has dealt with specific procedural challenges and guarantees necessary to ensure the expression of the free and conscious will of a person who, in such an extreme context as that regulated by Organic Law 3/2021 of 24 March, requests his or her own death through the assistance of third parties.

Lastly, I do not agree with the method of judgment employed by the judgment either, since it is somewhat logically inconsistent, in that the requisites on which it is based in order to resolve the challenges raised by the appellants are then overtaken by the judgment's reasoning, with the result that its conclusions are not consistent with the premises of the judgment that have previously been set out. These logical leaps in reasoning can be seen both when resolving the main complaint, since the Constitution as a framework of possible options ends up becoming a source of obligations for the public power in the sense and direction expressed by a specific parliamentary majority, and when dismissing the allegations linked to the system of guarantees and procedure foreseen in Organic Law 3/2021, insofar as the prior requirement of the maximum measures of protection of rights, principles and constitutional values that may be affected by the exercise of the right to self-determination regarding one's own death in euthanasic situations is then displaced by an extremely lax deference to the lawmakers, which I find difficult to understand in such a delicate context as this.

2. In PoL 2 of the judgment, when explaining the scope of the control of constitutionality that corresponds to this Court, the classical pronouncements of constitutional case-law are recalled, pointing out in one word or another, that the Constitution is not a fixed programme, but -as we recalled- a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds. What logically follows from this is that the Constitutional Court, when deciding on the constitutionality, should limit itself to analysing whether the specific regulatory option set out by the legislator in the legal text subject to trial respects or exceeds the constitutional limits. We cannot agree more.

However, this inexcusable premise regarding the scope of the review of constitutionality that this court is competent to carry out is then contradicted by the reasoning contained in the main PoL 6 of the judgment to dismiss the challenge of the whole Organic Law 3/2021 on substantive grounds. Indeed, despite stating that "[t]he core of the question we have to resolve is whether or not the Constitution allows lawmakers to regulate as a licit activity what the OLRE describes as 'direct active euthanasia'", the judgment does not limit itself to examining - as it

should have done - whether the specific legislative option embodied in that rule respects or contradicts the Constitution. Rather, after exceeding the scope and limits of the control of constitutionality that corresponds to this court, it comes to recognise a new fundamental right, which it guarantees as "the fundamental right to self-determination of one's own death in euthanasic situations", which it ultimately derives from the right to physical and moral integrity (Art. 15 SC), and to which it is attached the nature of benefit. In this way, the judgment closes the way to other possible legislative options in relation to the problem raised (the intervention of lawmakers in an area as extremely delicate as that of the termination of a person's life with the help of third parties in contexts of extreme suffering), imposing precisely the option of Organic Law 3/2021 as the only possible constitutional model. In this way, the statement falls outside the margins of the control of constitutionality that corresponds to this Court, since recognising fundamental rights is a dominion of the Constituent Power, not of the constituted powers and, therefore, not of the Constitutional Court.

In order to shed light on this new fundamental right to self-determination of one's own death in euthanasic contexts, the judgment begins by appealing to the debatable case-law on the understanding of the Constitution as a "living tree" (set out in CCJ 198/2012, 6 November, PoL 9). Then, referring to the principle of the unity of the Constitution as a hermeneutic parameter, it affirms that in the case of the intervention of lawmakers in the area of ending the life of a person with the help of third parties in contexts of extreme suffering, we find ourselves in a situation of tension between the freedom and dignity of the person and his or her life.

With regard to the former, it should be noted that, as has been said by authoritative voices, "the Constitution is not a blank sheet of paper that lawmakers can rewrite at will, just as it is not a blank sheet of paper that can be rewritten by its supreme interpreter without limits". Social realities may even lead to the recognition of new fundamental rights, but constitutional reform is foreseen for this purpose. Neither the lawmakers nor this Court can replace the constituent power, setting themselves up as a kind of alternative constituent powers. In our legal system, a fundamental right is a right created by the Constitution (a constitutional right) and therefore binding on all public authorities, including the legislative power in the first place. In other words, a fundamental right is a right which, by virtue of its definition in the Constitution, the supreme rule of the legal system, is imposed even (and especially) on the lawmakers. This results from Art. 53 SC.

As for the latter, suffice it to say that it is difficult to admit the existence of this contrived conflict between constitutional rights and values that are predicated of the same person: the one that requests the help of a third party to end his or her existence in a euthanasic context. It is impossible to imagine a dispute between two sides of the same person, between two manifestations of the same personal dignity. In reality, the question being centred on the intervention of the public power in this context in which a person decides to put an end to his or her life, what should be determined is whether, and in what terms, the necessary protection of the right to life, which imposes negative duties or duties of abstention and positive duties of protection against third parties on lawmakers, could be excepted in view of the situation of extreme suffering that the law itself defines. This is what the judgment itself will later refer to as a restriction of the scope of the State's duty to protect.

However, this is not the approach adopted to resolve the appeal, since, assuming a role that does not correspond to it, the judgment develops its entire argument in a single sense, that which determines that lawmakers had the constitutional obligation to regulate this matter and that the only possible way to do so is, moreover, the one that derives from Organic Law 3/2021. The univocal nature to which the judgment leads entails a conception that excludes another based on a constructivist reinterpretation of the Constitution from which a non-existent fundamental right derives.

After denying that the right to life (Art. 15 SC) is absolute and prevents the constitutional recognition of autonomous decisions about one's own death in situations of extreme suffering that the person experiences as unacceptable, the judgment, referring to CCJ 37/2011, of 28 March, PoL 5, begins to build up the alleged right to self-determination regarding one's own death in euthanasic contexts as a fundamental right anchored in Art. 15 SC, in its dimension of "right to physical and moral integrity", as a manifestation of the dignity of the person and the free development of his or her personality, and as opposed to the "right to life", which must now be read in connection with these other constitutional provisions, insofar as they grant protection to an alleged "new" fundamental right to self-determination of the person which, according to the judgment, is protected by the Constitution.

First of all, it must be said against such reasoning that CCJ 37/2011 cannot be taken out of context. That judgment solved an appeal for *amparo* in which the plaintiff's right to effective judicial protection [Art. 24(1) SC] in conjunction with the right to physical integrity (Art. 15 SC) was declared violated because he had been denied the right to be compensated for the damages

suffered as a result of the performance of a medical operation without having been informed of its risks and without having obtained his consent for it to be carried out. CCJ 37/2011 points out that the patient's informed consent to any medical intervention on his or her person is inherent to his or her fundamental right to physical integrity, which has nothing to do with the problem of direct active euthanasia regulated by Organic Law 3/2021. The fact that a duly informed patient may choose between the various therapeutic possibilities offered to him or her (and even reject them all), does not authorise the conclusion that "self-determination over one's own body prevents the activation of the protection of life through life-saving therapies against the patient's will", as the judgment does.

That conclusion does not follow from CCJ 37/2011 and even contradicts constitutional case-law (for example, that referring to the case of the forced feeding of prisoners on hunger strike, case-law to which the judgment itself has previously referred, by the way, to play down its importance). It is one thing that the fundamental right to physical integrity (Art. 15 CE) empowers every person, once they have received the obligatory information on the therapeutic alternatives available, to choose between undergoing the medical treatment offered or rejecting it, and quite another that the protection of life against the will of that person is forbidden to the public authorities in any case. On the other hand, this statement in the judgment is in any event far away from the constitutional issue raised in the present action: It is not a question of the public authorities protecting life by means of a "life-saving therapy" against the patient's will, but something quite different: medically assisting a person to die in a so-called "euthanasic context".

It is then that the judgment takes the decisive step to enunciate this new fundamental right to self-determination of one's own death in euthanasic contexts, which would be precisely the right regulated in Organic Law 3/2021. Indeed, after deriving the faculty of self-determination with respect to the configuration of one's own existence (or death, if one prefers) from freedom as a superior value of the legal system, in accordance with Art. 1(1) SC (although the value of freedom will later disappear as the constitutional basis of the new right to self-determination of one's own death, which is, moreover, a good example of the lack of coherence shown by the judgment), and the dignity of the person and the free development of personality [Art. 10(1) SC], the judgment adds that this power also "crystallises mainly in the fundamental right to physical and moral integrity" (Art. 15 SC). In this way, the fundamental right to dispose of one's own life in euthanasic contexts is recognised *ex novo*, with the inevitable consequence of devaluing the Constitution.

It is not true, on the other hand, that the judgment's finding of the new right of self-determination regarding one's own death in euthanasic contexts is in line with the case-law of the European Court of Human Rights (particularly in the judgment of 4 October 2022, *Mortier v. Belgium*, but also in the judgment of 29 April 2002, *Pretty v. United Kingdom*). What this case-law affirms is that the right to life (Art. 2 of the European Convention on Human Rights) does not imply an alleged right to die, "whether at the hands of a third party or with the assistance of the public authority", without prejudice to the fact that, if lawmakers decide to decriminalise euthanasia, within its margin of configuration (since the right to life enshrined in Art. 2 of the Convention cannot be interpreted as a prohibition in itself of the conditional decriminalisation of euthanasia), it must do so by duly ensuring that the person who decides to undergo euthanasia does so by means of a free and conscious decision, in order to avoid abuses and thus guarantee respect for the right to life.

The judgment repeatedly insists (perhaps because it believes that by repeating the same argument it will end up persuading of its correctness by the mere fact of insistence) that the right to self-determination regarding one's own death in euthanasic contexts, which is regulated by Organic Law 3/2021, finds its constitutional basis "in the fundamental rights to physical and moral integrity - personal integrity, in short - of Art. 15 CE", "in connection with the principles of dignity and free development of the personality of Art. 10(1) CE", as opposed to the fundamental right to life. This inexorably leads to the conclusion that the State not only "must respect" this "specific right of self-determination" of the individual, but also "must contribute" to its "effectiveness". Therefore, according to the rapport, there is a constitutional right to self-determination of one's own death in euthanasic contexts, from which it follows that the public authorities (particularly lawmakers) have the duty to contribute to making this right effective. The judgment apparently denies that "this necessarily derives in a duty of the State to provide services", but only in appearance, as it immediately denies this by stating that "what the State cannot do is evade its responsibility in this matter, as would be the case if it tried to remain oblivious - through prohibition or the absence of regulation - to the specific problems of those who need the help of third parties to effectively exercise their right in this kind of situation" (euthanasic situations). In fact, the judgment goes on to point out that there is a "public duty to give effect to the right of self-determination", which is nothing more than another way of affirming the benefit character of this fundamental right found - built up - *ex novo* for the occasion.

With this, the judgment has come full circle: Now that the brand new fundamental right to self-determination of one's own death in euthanasic contexts has been established, from which follows the constitutional duty of the public authorities (particularly lawmakers) to "enable the necessary legal means" for its effectiveness, it only remains to affirm that the right to the benefit regulated by Organic Law 3/2021 is precisely what fulfils the State's obligation to give effect to this new fundamental right. This task is addressed in the judgment in the same PoL 6. Thus, after stating that "any regulation of direct active euthanasia must also respect the right to self-determination which serves as a constitutional basis and delimits the respective areas of application of this right and the right to life", a statement in which the inadmissible (and unimaginable) opposition between rights guaranteed in Art. 15 SC and of which the same individual is the holder, and of qualifying as a "fundamental right" the right to self-determination of one's own death in euthanasic contexts, the judgment will conclude that the model chosen by lawmakers in Organic Law 3/2021, configuring the provision of aid to die, fulfils all the constitutionally necessary requirements of the Constitution to guarantee that the decision to end one's own life in euthanasic contexts is adopted and carried out in accordance with the free and conscious will of a capable person, in order to ensure that this decision is free from coercion by third parties, going so far as to state in the judgment that "the very limitation of the right to seek and obtain assistance in dying in the euthanasic contexts established by the lawmakers operates, in principle, as a mechanism for the protection of life".

3. On the other hand, as a logical corollary to the conclusion that the regulation of direct active euthanasia in Organic Law 3/2021 gives effect to the new fundamental right to self-determination of one's own death in euthanasic contexts, the judgment addresses the problem of palliative care in terms that allow us to understand that the eventual replacement of the current lawmakers' option, embodied in Organic Law 3/2021, by another legislative option based on a model of comprehensive palliative care, effectively accessible to all citizens who need it (and, however, without recognising the right to direct active euthanasia) is considered incompatible with the fundamental right to physical and moral integrity (Art. 15 SC). As we have already pointed out, that understanding places this court outside the power of constitutional control that corresponds to it, in accordance with the Constitution and its own Organic Law.

It should not be forgotten that, before the regulation introduced by Organic Law 3/2021, what existed in our legal system, regarding euthanasic contexts, was the right of the individual to live the process of dying with dignity, which translated into the right to avoid unbearable physical

pain through palliative care and to reject the so-called “futile life support”, that is, to refuse treatments that artificially prolong one’s own life. Certainly, according to Art. 15 SC, public authorities have the obligation to protect the life of all individuals, but there is no legal duty to live derived from this constitutional provision (or any other), nor is there a right to die. This is the criterion established by the case-law of the European Court of Human Rights, which has emphasised that the right to the protection of life does not cover an alleged right to dispose of it, as mentioned above. On the other hand, what did exist and does exist in our legal system, as confirmed by constitutional case-law, is the right of all patients to be informed of the possible therapeutic alternatives and to refuse the medical treatment offered, since the informed consent of the patient to any medical intervention on him or her is inherent to his or her fundamental right to physical integrity, recognised, together with the right to life, in Art. 15 CE (CCJ 37/2011).

It should not be forgotten, moreover, that none of the international human rights texts recognises a right to dispose of one’s own life.

It could be concluded that the right to life guaranteed by Art. 15 SC does not lead to a prohibition of decriminalisation of direct active euthanasia, as long as this is carried out with due guarantees to avoid external coercion of the individual who wishes to end their existence in a euthanasic context with the help of third parties (in this regard, judgment of 4 October 2022, *Mortier v. Belgium case*), and therefore that it does not oppose the establishment of a provision of aid to die within the framework of the public health system such as that regulated by Organic Law 3/2021. What is unsustainable is to create an alleged constitutional right to self-determination of one’s own death in euthanasic contexts, anchored in the right to physical and moral integrity (personal integrity, if preferred) of Art. 15 SC, as a sort of fundamental right which the aforementioned law would have come precisely to give effectiveness to. The artifice to which the rapport resorts, deriving this fundamental right to self-determination of one’s own death in euthanasic contexts from the fundamental right to physical and moral integrity (Art. 15 CE) implies devaluing the Constitution, by making it mutate its content outside the reform procedure contained in Title X; and also implies that the Constitutional Court exceeds the powers that correspond to it, as a constituted power, in the control of the constitutionality of laws.

4. Although what I have said so far is the main reason for my disagreement with the judgment dismissing the appeal of unconstitutionality brought against Organic Law 3/2021, regulating euthanasia, my disagreement with it extends to some of the grounds through which the

rest of the challenges against specific provisions of this law have been rejected. In this sense, I understand that, in order to rule out certain defects of unconstitutionality, the judgment contains several interpretations of conformity as the only possible ones, although it fails to qualify them as such and to include them in the operative part, as it should have done.

As I have already mentioned, I believe that the very logic of the judgment, which requires lawmakers to take sufficient measures to protect the constitutional rights, principles and values at stake, should have led to a much more incisive scrutiny of these guarantees, in order to ensure their sufficiency and effectiveness. However, although the judgment acknowledges that life, as a fundamental right and as an objective constitutional value, could be harmed in the absence of sufficient protective measures to prevent undue influence or abuse by third parties, this affirmation does not translate into an understanding of these guarantees which, based on the provisions of the contested law, would overcome the vagueness in which the lawmakers have incurred and would avert the danger of undue influence, manipulation and abuse by third parties of which the judgment itself warns. The Court considers, without prejudice to the detailed analysis that follows, that "this framework of substantive and procedural guarantees satisfies the State's duty to protect the fundamental rights at stake from third parties, including life". I have already stated that I disagree with this conclusion for the following reasons.

5. First, in PoL 7, the judgment addresses the appellants' complaint regarding the infringement of Articles 24, 53(2) and 106(1) SC, as the OLRE has excluded the necessary judicial control and guarantee with respect to the decisions that recognise the right to the provision of aid to die, an exclusion that would derive from the fact that the judicial review has been expressly provided only for the rejecting decisions from the guarantee and evaluation commission [Articles 10(5) and 18(a), fifth paragraph OLRE]. The judgment dismisses this complaint by stating that "the final decisions of the guarantee and valuation commissions recognising the right of access to the provision of aid to die and which open the way to its "implementation" (Article 11) cannot be excluded from judicial review without a manifest breach of the Constitution". And it appreciates that this control of the decisions that recognise the provision of aid to die (about the challengeability of which nothing is said in Organic Law 3/2021, unlike the decisions that deny it) derives from the guarantees that, in general, are structured in the procedural laws (above all, from the provisions of Law 29/1998, regulating the contentious-administrative jurisdiction). And it comes to the conclusion that "[i]n short, lawmakers have not closed the way to the possible judicial challenge of the decisions recognising access to the benefit,

a challenge that could be brought by those who allege non-compliance with the legal conditions for the administrative recognition of this right - due to defects in the patient's request, to the non-concurrence of the factual requirements that justify the euthanasic benefit or, among other conceivable hypotheses, to disabling irregularities in the course of the procedure - and who have standing to do so in accordance with Art. 19(1)(a) of the aforementioned Law 29/1998. This is without prejudice to the institutional standing that may correspond to the Public Prosecution Service to bring, in particular, the contentious-administrative appeal in the procedure for the protection of the fundamental rights of the individual", today regulated in the same Law 29/1998, a procedure referred to in the fifth additional provision of the OLRE.

This reasoning attempts to overlook the fact that Organic Law 3/2021 has established the distinction between decisions upheld or rejected, by stating that it is the latter that are subject to judicial review, so that the judgment deprives the lawmakers' decision of meaning, avoiding to infer an unconstitutional exclusion from their silence with regard to upheld decisions. As can easily be seen, what the judgment actually accomplishes on this point is an interpretation in conformity with the Constitution, which I share, but which should have been recognised as such and included in the operative part.

Indeed, if the logic of the judgment is applied, regarding the need to maximise the guarantees of the process as a way to protect the right to life in this context, it would have been desirable to eliminate any ambiguity on this point, either by declaring the unconstitutionality of the clause "which adversely inform the request for the provision of aid to die" in article 10(5) of Organic Law 3/2021, or by including the interpretation of the provision in the operative part, in accordance with the sense expressed by the judgment. With one or other solution, it would be clear that all the decisions of the commission, both rejection and approval, can be appealed before the contentious-administrative jurisdiction, thus giving certainty to the legal statement. The judgment did not do so through an incomprehensible deference to lawmakers in an area, that of the necessary safeguards, in which the greatest degree of certainty and clarity on the applicable rules is required in order to avoid an infringement of the right to life (Art. 15 SC), "an essential and fundamental right insofar as it is the ontological assumption without which the remaining rights would have no possible existence" (CCJs 53/1985, 11 April, PoL 3, and 32/2003, 13 February, PoL 7, among others).

6. Also in PoL 7, the judgment addresses the challenge of Paragraph 4 of Article 18(a) of Organic Law 3/2021, according to which "[i]n the event that the decision is in favour of the

request for the provision of aid to die, the competent guarantee and evaluation commission shall require the management of the centre to provide within a maximum period of seven calendar days the requested benefit through another doctor at the centre or an external team of health professionals."

The appellants held that the provision establishes an extraordinarily short period of time (seven days) for the provision of the aid once it has been recognised by the guarantee and evaluation commission, which would make any judicial control of an administrative decision of the utmost seriousness impossible and would prevent effective protection of the rights that could assist third parties to prevent death and safeguard the right to life, in violation of Arts. 24, 53(2) and 106(1) SC.

In order to overcome the unconstitutionality of the provision, the judgment imposes an interpretation, based on "the internal systematics" of Organic Law 3/2021 itself and "its parliamentary procedure", according to which the short period of seven days does not refer to the final decision of the procedure or to its implementation by means of the "provision of the benefit", but rather to the consequence that would follow from the commission's acceptance of the claim against the "refusal" of the request for the benefit by the responsible physician or against the unfavourable report of the consultant physician, and which would not be the definitive recognition of the benefit by the commission, but rather the resumption of the procedure in accordance with the ordinary procedures provided for in the Organic Law itself, this time with the intervention "of another doctor from the centre or an external team of health professionals".

Once again, if what was to be analysed was the accuracy of the legal regulation, it must be concluded that the reasoning of the judgment makes up for the lawmakers' imprecision. The judgment gives an interpretation in accordance with the Constitution that I agree with, but which should have been expressly recognised as such in PoL 7 itself and included in the operative part, for elementary requirements of certainty in an area as sensitive as this.

7. PoL 8 of the judgment addresses the question of the regulation of euthanasia of persons in a situation of *de facto* incompetency, with regard to whom Organic Law 3/2021 provides that the right to the provision of aid to die may only be recognised if the patient has previously signed a prior instruction document, living will, advance directives or legally

recognised equivalent documents [Art. 5(2)], and if the strict terms of these documents so admit [Arts. 5(2) and 9].

The problem that arises is that Art. 9 of Organic Law 3/2021, in its literal diction, states that "[i]n the cases provided for in Article 5(2), the responsible physician is obliged to apply the provisions of the prior instructions document or any equivalent document", which could be interpreted to mean that the regime applicable to these incompetent persons is not that of Organic Law 3/2021, but that of the prior instruction document.

In fact, the appellant MEPs object to the lack of quality of the law on this point, an issue that the rapporteur dismisses in PoL 8(C)(c), appreciating that the reference to Law 41/2002 of 14 November 2002, the basic law regulating patient autonomy and rights and obligations regarding clinical information and documentation, is sufficient for this purpose.

In my opinion, it does not seem that the mere reference to the provisions of Art. 11 of Law 41/2002 is sufficient to dispel the doubts about the unconstitutionality of the regulation contained in Arts. 5(2) and 9 of Organic Law 3/2021, for the reasons I indicate below.

First of all, it should be noted that the advance directives document, also known as living will or prior instruction document, is governed by the provisions of Art. 11 of the aforementioned State Law 41/2002 of 14 November 2002 (which defines it as the document by means of which a person of legal age, capable and free, expresses his or her will in advance, so that it is fulfilled when he or she reaches situations in which it is not possible for him or her to express it personally, regarding the care and treatment of his or her health or, when death occurs, regarding the destination of his or her body and vital organs), as well as by the provisions of the different autonomous community laws and their implementing regulations, as the autonomous communities have powers in the field of health, which means that there are very different models in terms of the scope and content of this type of document. The different regional regulations use different names but all of them refer to the same thing: Advance directives document (Catalonia, Balearic Islands, Basque Country, Aragon, Navarre, Valencia and Galicia); declaration of advance living will (Balearic Islands, Andalusia); declaration of advance directives (Castile-La Mancha, Aragon); advance expression of will (Extremadura); prior instruction document (Asturias, Castile and Leon, Madrid, Murcia and La Rioja); or advance manifestations of will (Canary Islands). It follows from this set of rules that there are two ways of granting these

documents in writing as a general rule: it must be done before a notary public or before witnesses, although some autonomous communities allow a third possibility: granting the advance directives document before the authorised official of the autonomous registry or the official of the corresponding health service.

However, neither Art. 11(1) of Law 41/2002, nor any of the regional laws that regulate the living will or advance directives document establish sufficient guarantees to ensure that the person who makes the decision to include a request for active euthanasia in this document in the event of a specific contingency occurring in the future is fully empowered to do so and has previously obtained the necessary information on the therapeutic or palliative options that the health system can offer as an alternative. And they do not do so because neither Art. 11(1) of Law 41/2002, nor any of the regional laws on the matter foresee any type of action that goes beyond the strictly assistance aspect. It is Organic Law 3/2021 that raises the problem, by recognising the right to the provision of aid to die in the euthanasic contexts to which it refers, stipulating that, in cases where it is established that there is a *de facto* incompetency, the responsible physician will apply the provisions of the patient's prior instruction document or equivalent document.

Moreover, when a long period of time elapses between the granting of the living will and the occurrence of the event established in this document, there is also no guarantee that such a decision will remain firm and informed in the light of developments in medical science since then.

This means that this requirement of guarantees is compromised in the case of a request for the provision of aid to die by means of a living will. The difference between the requirement of persistence in the decision, capacity and freedom proper to the common procedure and the absence of any prior and subsequent control of the decision expressed in the living will is quite evident, since the prior control of the conscious, free and voluntary nature of the decision to sign this document itself is not regulated uniformly and is deferred to the provisions of the autonomous community regulations.

The consequence is that prior control is non-existent in the case of *de facto* incompetent persons, as there is no guarantee that the grantor has had access to verified information about the circumstances in which he or she planned to request euthanasia. Moreover, the decision may take effect regardless of the time at which the living will was granted, so that a long period of time

may elapse between the granting of the living will and the actual provision of the aid to die, without being able to use any mechanism of ratification or reaffirmation, such as that required of those who go directly to the health administration to request the aid to die. In view of the above, it is easy to reach the conclusion that there is a lack of sufficient guarantees in the regulation of the conditions for the recognition of the provision of aid to die for those who are in a situation of "*de facto* incompetency".

In order to overcome this difficulty, the judgment admits that, "in certain circumstances", a sort of deferred control by the contentious-administrative jurisdiction could be justified in the event that the procedure provided for in Organic Law 3/2021 is to be started on the basis of the existence of a prior instruction document "that does not faithfully reflect a genuine decision taken by the person concerned in full use of his or her faculties". Thus, once again, a conforming interpretation is introduced to save the unconstitutionality of the contested provisions, which should have been recognised as such in this PoL 8 and included in the operative part.

To this interpretation (which it avoids describing as conforming), the judgment adds a call to lawmakers, so that in the basic State regulation of this prior instruction document or living will, and the autonomous regulations for its development, "additional guarantees are established to ensure the full capacity of the grantor, as well as that he/she is fully aware of the consequences that the aforementioned document entails in the regulatory regime of the law" (of Organic Law 3/2021 on the regulation of euthanasia, as it is understood).

Certainly, it would be convenient, *de lege ferenda*, to design an *ad hoc* legal instrument that would provide greater legal certainty in the case of *de facto* incompetency, since it is clear that neither the document referred to in Law 41/2002, nor the documents regulated in the autonomous legislation are foreseen for active euthanasia. But it is obvious that, in view of the current regulation contained in Arts. 5(2) and 9 of Organic Law 3/2021, which is the one that has been challenged before this court and the wording of which must be followed, the unconstitutionality of this regulation can only be overcome by resorting to an interpretation of conformity such as that indicated in the judgment, i.e., concluding that this regulation is not unconstitutional provided that it is understood that it can be challenged before the contentious-administrative jurisdiction in the event that the procedure provided for in Organic Law 3/2021 is to be implemented based on the existence of a prior instruction document about which there are

doubts as to whether it faithfully reflects an authentic, free, voluntary and conscious decision that the interested party has adopted in the full use of their faculties. Conforming interpretation which, for elementary reasons of certainty, should have been taken into account in the operative part of the judgment.

8. On the other hand, Art. 9 of Organic Law 3/2021 is entitled "Procedure to follow in cases of *de facto* incompetency" and if this title is integrated with the material content of the provision, it could be understood that the procedure to be followed in the case of a *de facto* incompetency is that determined by the provisions of the prior instruction document or equivalent document, and not that provided for in the regulation for the cases of Art. 5(1) of the law itself. The judgment seems to be aware of this problem, as it warns that the provision of aid to die has to be carried out "with the requirements and under the conditions" of Organic Law 3/2021, but this is something that the report deduces, as this law does not expressly say so. It would have sufficed to recall it as such, through an interpretation in conformity with the Constitution. This should have been stated in this PoL 8 of the judgment and included in the operative part, but once again the judgment avoids this at the expense of legal certainty.

9. Finally, one cannot fail to mention the strange reasoning that the judgment uses to dismiss the allegation of unconstitutionality that the deputies formulate against the character of ordinary law that Art. 16(1) of Organic Law 3/2021 (which recognises the right to conscientious objection of health professionals directly involved in the provision of aid to die) gives to the third final provision of the same law.

The judgment states [PoL 10(C)(b)] that the fact that conscientious objection to the provision of euthanasia [Article 16(1)] of Organic Law 3/2021, "may be possibly raised before the courts, on the basis of the right set out in Article 16(1) SC, does not mean that it is itself a fundamental right for the development of which an organic law is required under Article 81(1) SC", as the appelants declare. However, the judgment concludes its argument by adding that the definition of "health conscientious objection" as an individual right for professionals not to satisfy any demand for euthanasic action that may prove to be incompatible with their own beliefs is in the nature of an organic law in Article 3(f) OLRE.

Curiously, the judgment limits itself to recording this contradiction in Organic Law 3/2021, in terms of the regulatory rank of the right to conscientious objection of healthcare

professionals in relation to the provision of aid to die that the law regulates, without drawing any consequences in this respect. In my opinion, this does not keep with the function of purifying the legal order which this court has to perform in the control of constitutionality. If the judgment understands, as it states, that conscientious objection to euthanasia, recognised in Art. 16(1) of Organic Law 3/2021, does not in itself constitute a fundamental right, the development of which requires an organic law, in accordance with Art. 81(1) SC, then there was no other option but to declare in the judgment the non-organic nature of Art. 3(f) of Organic Law 3/2021 (inter alia, CCJs 5/1981, 13 February, FJ 21, and 124/2003, 19 June, PoLs 11 and 13).

And in this sense, my opinion is hereby issued.

Madrid, on the thirtieth day of March two thousand and twenty-three.

CONSTITUTIONAL
COURT OF SPAIN

Dissenting opinion issued by Judge Concepción Espejel Jorquera, on the judgment handed down on 22 March 2023 in the appeal of unconstitutionality No. 4057-2021

With all due respect to the opinion of my fellow judges, I express my disagreement with the judgment that resolves the action of unconstitutionality no. 4057-2021, for the reasons that I set out and defended at the time during the deliberation and which I restate below.

1. First, I disagree with the approach and argumentation of the judgment, which sets as a fundamental right what it calls a "right to self-determination with regard to the voluntary termination of one's own life in euthanasic contexts". It builds this based on Article 10(1) SC and Article 15 SC, and establishes the corresponding regulatory obligation on the part of lawmakers.

In PoL 2(A), under the heading "Scope of Constitutionality Review", the judgment takes up the case-law of the Constitutional Court, based, among others, on CCJ 11/1981, 8 April. That judgment affirms in PoL 7 that "the Constitution is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds", as long as they do not go against it.

It follows, as the judgment from which I disagree recalls, that the scope of the Constitutional Court's jurisdiction is clear: "The work of interpreting the Constitution does not necessarily consist of closing the door on options or variants imposing one of them in an authoritarian manner. This conclusion should only be reached when the unanimous nature of the interpretation is imposed by the play of interpretive criteria. We wish to state that the political and government options are not previously programmed once and for all, so that all that remains to be done in future is implement that previous programme."

Also, the Court recalls that "the lawmakers do not execute the Constitution, but create law freely within the framework that it offers" (CCJ 209/1987, 22 December, PoL 3). It also states that "in the trial of the law, this Court should not act as its own lawmaker, constraining its freedom to dispose wherever the Constitution does not do so unequivocally" [CCJ 215/2016, 15 December, PoL 3 (c), citing CCJ 191/2016, 15 November, PoL 3, based on CCJ 19/1988, 16 February, PoL 8].

Similarly, this Court has pointed out that "the reversibility of regulatory decisions is inherent to the idea of democracy" (CCJ 31/2010, 28 June, PoL 6), and that "this notion, inherent to the democratic principle, grants the legislator a fully legitimate margin of configuration, broad but not unlimited" [CCJ 233/2015, 5 November, PoL 2(d)], as it is subject to the duties that emanate from the Constitution. This is also the case in CCJ 224/2012, 29 November, PoL 11.

However, the decision I disagree with surpasses the assessment limits of the Constitutional Court set out above and, instead of confining itself to examining whether or not the legislative choice is part of the Constitution, enshrines euthanasia as a fundamental right.

The process starts with PoL 4. "Regulatory and case-law context of Organic Law 3/2021", in which it begins by pointing out that the "provision of aid to die" conceived by the lawmakers must be considered "taking into account the cultural, moral and legal evolution that has taken place in recent decades in our society and in the societies around us". As I will explain below, this argument is not set out in detail in the judgment, which does not reproduce either the comparative law or the development of constitutional case-law in other countries. Next, it is already stated that in judging the constitutionality of a law such as the one now being challenged, "it must be ascertained whether the Constitution, as a framework for the meeting of legitimately heterogeneous political-legislative options, responds to and offers coverage for new rights".

PoL 4 sets out the Spanish law and the case-law from the European Court of Human Rights, and PoL 5 analyses the purpose and content of Organic Law 3/2021, thus setting the path for PoL 6, which introduces a number of lines of reasoning which lead to recognition as a fundamental right of the right to self-determination of death itself in euthanasic contexts, with which I respectfully disagree.

The aforementioned PoL 6, in its section (C) (b), "Scope of the fundamental right to life", clause (vi), after alluding to the constitutional admissibility of the faculty of self-determination of a patient who refuses life-saving treatment, requests the withdrawal of life support or requires terminal palliative care -with the consequent bringing forward of death that these decisions imply-, already in the context of the cases of euthanasia now being examined, it points out that "[a]lso in this area, the free and conscious decision to die of those who find themselves in situations of extreme personal suffering, caused by serious, incurable or deeply

incapacitating illnesses, has a fundamental legal dimension and an openness to the availability of life".

Specifically, the aforementioned PoL 6 in section (C) (d) "The right to self-determination regarding one's own death in euthanasic contexts", states that the constitutional basis of direct active euthanasia, which the appellants invoke as lacking "is to be found in the fundamental rights to physical and moral integrity - personal integrity, in short - of Art. 15 SC which, in connection with the principles of dignity and free development of the personality of Art. 10(1) SC, protect the right of the individual to self-determination regarding his or her own death in euthanasic contexts, a right which externally delimits the scope of application of the fundamental right to life and which is protected by the Constitution".

Then, in paragraph (C)(d), after setting out in subparagraph (i) the case-law of this court concerning informed consent and refusal to submit to medical or health treatment, even when that decision, taken in the use of their autonomous free will, could lead to a fatal outcome, in subparagraph (ii), it is argued that, in "tragic situations of extreme personal suffering caused by serious incurable or deeply incapacitating illnesses [...] it can no longer be said that we are dealing with a generic conduct of disposition of one's own life carried out in the exercise of mere factual freedom, that is, in a sort of free sphere of Law (CCJs 120/1990, PoL 7; 137/1990, PoL 5, and 11/1991, PoL 2), but rather with one of the vital decisions - however extreme and fatal - of self-determination of the person protected by the rights to physical and moral integrity (Art. 15 SC) in connection with the principles of dignity and free development of personality [Art. 10(1) SC]. This right to self-determination guarantees the person immersed in a context of extreme suffering such as the one considered here a space of individual autonomy to draw up and carry out an end-of-life project in accordance with their dignity, following their own conceptions and evaluations of the meaning of his or her existence. It is a sphere of autonomy that the State must respect and to whose effectiveness it must contribute, within the limits imposed by the existence of other rights and values also recognised by the Constitution".

Subsequently, in subparagraph (iii) of the same paragraph, it is added that: "This right of self-determination regarding one's own death in euthanasic contexts also includes the right of the individual to seek and use the assistance of third parties necessary to carry out the decision in a manner compatible with his or her dignity and personal integrity".

On this point, the judgment refers to the duty of the State to ensure access to what the Law contemplates as provision of aid to die, in the following terms:

"It follows that the Constitution requires the public authorities - in the first instance, lawmakers - to allow third parties to assist the death of a capable person who so decides, freely and consciously, in the kind of extreme situations to which our prosecution refers, and to provide the necessary means to do so".

It is true that, in the remainder of the judgment, it is added: "Without necessarily deriving from this a duty of the State to provide services" but immediately afterwards, it is stated that: "what the State cannot do is evade its responsibility in this matter, as would be the case if it tried to remain oblivious - through prohibition or the absence of regulation - to the specific problems of those who need the help of third parties to effectively exercise their right in this kind of situation, as this could lead the person to a degrading death, and in any case would make each individual, when deciding on his or her own death and carrying it out, depend on his or her specific and personal physical, social, economic and family conditioning factors. Both results are incompatible with Arts. 10(1) and 15 SC. As will be indicated below, this public duty to give effectiveness to the right to self-determination does not, however, entail a constitutional requirement of total and indiscriminate permission for third parties to assist in the free and conscious decision to die by a capable person in a euthanasic context".

In my view, the last paragraph quoted suffers from lack of precision, may even appear contradictory in its various subparagraphs, and is merely an attempt to avoid the recognition of the establishment of a State's duty to provide benefits, which is what is clearly done in the law and what also results from the declaration of a "public duty to give effect to the right of self-determination".

In the same vein, at the end of paragraph (C) of PoL 6, after reiterating that "the decision to end one's own life, freely and consciously adopted by someone who, while in full use of his or her mental faculties, is immersed in a situation of extreme suffering due to particularly serious, irreversible and objectively verifiable medical causes, is one of the vital decisions protected by the right to self-determination of the person that derives from the fundamental rights to physical and moral integrity (Art. 15 SC) in connection with the recognition of the principles of dignity and free development of the personality [Art. 10(1) SC]", it adds: "This right to self-determination

entails the obligation of the State to provide the necessary legal means to allow the necessary third party assistance so that the person immersed in one of the tragic situations referred to in our judgment can exercise his or her right to decide about his or her own death in conditions of freedom and dignity".

Next, PoL 6(D), "On the alleged unconstitutionality of the regulatory model set out in the contested Organic Law", reiterates the scope of constitutional control, in the same terms as in PoL 2, where it indicates that: "Therefore, it is not our task to analyse whether there could be other more effective systems of protection of life". Immediately afterwards, however, it adds the following in brackets: "which would have in fact a greater impact on the fundamental right to self-determination regarding one's own death in euthanasic contexts, an impact that should be measured in the light of the principle of proportionality understood as a prohibition of excess".

The aforementioned addition corroborates that the judgment not only analyses whether the contested legislative option is in accordance with the Constitution, but also opts for it as the only possible way to guarantee what it repeatedly describes as the "fundamental right to self-determination regarding one's own death in euthanasic contexts", a thesis that I do not share.

In the same vein, point (b) of subparagraph (D), "Duties of protection of the State in this context", continues with point (i), which starts with the following wording: "It should first of all be made clear that, in this context, the Constitution imposes requirements of protection vis-à-vis third parties not only in terms of life as a fundamental right and as an objective constitutional value –the only perspective mentioned in the appeal– but also in the light of the fundamental right to self-determination of the death itself in euthanasic situations".

Then, in the same paragraph (b), concerning the State's duties of protection in this context, the judgment states: "It should also be noted that the existence of a genuinely, free and conscious will on the part of a capable person is the element which marks the boundary between the area of protection of the fundamental right to life and the fundamental right to self-determination in relation to death itself in euthanasic situations".

From the aforementioned quote, from those previously mentioned and from many others contained throughout the different grounds of the judgment, there is no doubt that a fundamental right to self-determination with respect to one's own death has been created, a right not

contemplated in the Constitution and which in the judgment is considered on the same level as the basic right to life, undermining the case-law of this court, which the judgment itself cites in section (C)(b) of PoL 6, declaring that human life is not only the object of the fundamental right set out in article 15 SC, but a necessary condition for the exercise of the rest of the rights, which places it as the *prius* of the person and all its manifestations.

Thus, the Court, instead of limiting itself to analysing whether the contested regulation is in line with the Constitution, elaborates a discourse -with which I disagree- that repeatedly declares the existence of a right of the individual to self-determination with regard to his or her own death in euthanasic contexts which, in my opinion, does not find a basis in the Constitution, unlike what is affirmed in the report.

In this way, the judgment goes beyond the control of constitutionality that it should carry out in the terms set out in CCJs 215/2016, 15 December, PoL 3, and 191/2016, 15 November, PoL 3, among others, cited in CCJ 112/2021, 13 May; imposes a regulatory rigidity that excludes other legitimate options for lawmakers, constraining them by excluding the reversibility of regulatory decisions, inherent to the idea of democracy, proclaimed, among others, in CCJs 31/2010, 28 June, PoL 6, and 224/2012, 29 November, PoL 11. Finally, it ignores the fact that the way to create fundamental rights *ex novo* would be through constitutional reform, in relation to all of which I express my dissenting vote.

2. On the other hand, I do not agree with the argument from the “Regulatory and case-law context of Organic Law 3/2021” that begins in PoL 4. It ends up reaching the conclusion that there is a fundamental right to self-determination in relation to one’s own death in euthanasic contexts.

(a) PoL 4, “Regulatory and case-law context of Organic Law 3/2021”, starts by pointing out that “The ‘right to the provision of aid to die’ set up by lawmakers for people who demand it in euthanasic contexts has to be considered taking into account the cultural, moral and legal evolution that has taken place in recent decades in our society and in those around us. This is an evolution that has affected the values associated with the person, their existence and their capacity to decide freely about their life, their health and the end of their existence, and which, based on certain strong ideas such as patient autonomy and informed consent, has led to an extension of the contents of the fundamental right to physical and moral integrity and of the principles of

human dignity and the free development of the personality In judging the constitutionality of a law such as the one now being challenged, it must be ascertained whether the Constitution, as a framework for the meeting of legitimately heterogeneous political-legislative options, responds to and offers coverage for new rights".

After this initial approach in PoL 4(a) from which I disagree, the judgment goes directly to analysing Spanish law, omitting essential considerations that should have been the starting point for the analysis to be carried out.

It makes no mention of international human rights instruments:

The Universal Declaration of Human Rights states in its Article 3: "Everyone has the right to life, liberty and security of person". Also, Article 30 sets out that: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

On the other hand, the European Convention on Human Rights, after declaring in Article 2 that everyone's right to life shall be protected by law and that no one shall be deprived of his life intentionally save in the execution of the cases provided for in the Convention, states, in Article 17, that: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." Then, Article 18 establishes that: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

The judgment recognises the right to self-determination regarding one's own death in euthanasic contexts, starting from "the cultural, moral and legal evolution that has taken place in recent decades in our society and in those around us".

However, it then also omits any reference to comparative law, which could support this alleged development in neighbouring countries.

It thus silences an obvious reality, namely that the majority regulatory option is the prohibition of assisted suicide and euthanasia.

The express regulation model has been chosen in several states in the United States, Canada, the Australian state of Victoria and New Zealand.

In our closest legal neighbours, which are members of the Council of Europe, only the Netherlands, Belgium and Luxembourg have recognised euthanasia.

Other States, such as Switzerland or Germany, have opted for decriminalisation only, without legal regulation of assisted suicide.

The ECHR gives the signatory countries a wide margin of decision on the matter precisely because there is no consensus on the matter among the forty-six States, with those that have opted for a permissive regulation of euthanasia being clearly in the minority.

Nor does the judgment include any citation of the case-law of the constitutional courts around us, which, for the most part, have ruled in favour of the constitutionality of criminal provisions sanctioning those conducts to help someone kill himself or herself, denying the right to assisted suicide of terminally ill patients, or declaring the unconstitutionality of laws regulating euthanasia. This has been done on two occasions by the Portuguese Constitutional Court in its judgments 123/2021 of 15 March and 5/2023 of 30 January, in which it declared the unconstitutionality of the rules subject to prior review of constitutionality, preventing their entry into force (Decree 109/XIV of the Assembly of the Republic and Decree 23/XV of the Assembly of the Republic), unconstitutionality that has been declared precisely because of the lack of regulatory accuracy in the definition of the cases that enabled the anticipation of death, pronouncements relating to terms that are not substantially different from some of those contemplated in the Law that is now subject to our judgment.

Thus, even if comparative law or the decisions of other constitutional courts are not decisive for our pronouncement, it is in no way possible to share the thesis contained in the judgment that there has been a cultural, moral and, even less so, legal evolution in the countries around us in favour of the capacity to decide on the end of one’s own life that can be taken as a basis for providing cover for new fundamental rights.

(b) I also disagree with the treatment in the judgment of the Court's own case-law precedents set out in paragraph 6(C)(b)(iii).

I respectfully consider that a partial reading of CCJs 53/1985 of 11 April 1985, 120/1990 of 27 June 1990, 137/1990 of 19 July 1990, 11/1991 of 17 January 1991 and 154/2002 of 18 July 2002 is being made.

In my opinion, the aforementioned judgments, analysed in their entirety, lead to a conclusion contrary to that reached in the judgment, since they expressly declare the non-existence of a fundamental subjective right to one's own death.

The judgment with which I disagree, in its PoL 6(B)(b), indicates that the Court's rulings must be taken into consideration, but emphasises that it is thirty-eight years since the first of the judgments was handed down, a nuance that could imply that the Constitutional Court's case law of the 1980s has lost its validity, an approach that I cannot share. It then omits essential considerations contained in those judgments, referring to the diversity of the factual assumptions resolved in those judgments.

Although, as it cannot be otherwise, the quotes of our case-law must take into account the circumstances that arise in each case, it should not be forgotten that they contain pronouncements that cannot be avoided or evaded even if they have been pronounced to resolve other legal questions.

Thus, although it is true that the Constitutional Court upheld the then contested decision with respect to those who were inmates in penitentiary centres and risked their lives in order to condition the exercise of the administration's powers, expressly distinguishing this situation from the "decision of a person who assumes the risk of dying in an act of will that only affects him or her, in which case the unlawfulness of compulsory medical care or any other impediment to the realisation of that will could be upheld" (CCJs 120/1990, PoL 7, and 137/1990, PoL 5), it is no less true that it cannot be ignored that the same judgment cited stated that "[t]he right to life therefore has a content of positive protection that prevents it from being configured as a right of freedom that includes the right to one's own death. This does not, however, prevent us from recognising that, since life is an value of the person who is part of the circle of his or her freedom, the person can in fact decide about his or her own death, but this disposition constitutes a

manifestation of *agere licere*, insofar as the deprivation of one's own life or the acceptance of one's own death is an act that the law does not prohibit and it is not in any way a subjective right that implies the possibility of mobilising the support of the public power to overcome the resistance that opposes the will to die, nor, much less, a subjective right of a fundamental nature in which this possibility extends even in the face of resistance from lawmakers, who cannot reduce the essential content of the right".

Leaving aside the clear sense of CCJs 120/1990, 137/1990 and 11/1991, the judgment introduces a transcendental twist in the argumentation and points out that, in euthanasic contexts, "it can no longer be said that we are dealing with a generic conduct of disposition of one's own life carried out in the exercise of mere factual freedom, that is, in a sort of free sphere of Law (CCJs 120/1990, PoL 7; 137/1990, PoL 5, and 11/1991, PoL 2), but rather with one of the vital decisions - however extreme and fatal - of self-determination of the person protected by the rights to physical and moral integrity (Art. 15 SC) in connection with the principles of dignity and free development of personality [Art. 10(1) SC)".

At this point, the judgment from which I disagree links with the right to self-determination, and states that "it guarantees the person immersed in a context of extreme suffering such as the one considered here a space of individual autonomy to draw up and carry out an end-of-life project in accordance with their dignity, following their own conceptions and evaluations of the meaning of his or her existence". It goes on to say that "[i]t is a sphere of autonomy that the State must respect and to whose effectiveness it must contribute, within the limits imposed by the existence of other rights and values also recognised by the Constitution". It then affirms the constitutional basis of this specific right of self-determination and declares applicable to it the case-law of prior information and informed consent as mechanisms of guarantee for the effectiveness of the principle of autonomous free will of the patient.

I do not agree with this approach which, without due reasoning and without expressly stating it, ends up discarding the case-law set out in the precedents cited and replaces it with a totally different one, lacking in case-law endorsement, in order to create a new fundamental right not contemplated in the Constitution.

(c) I also disagree with the considerations included in PoL 4(b) "Case-law of the European Court of Human Rights", which, in my view, leads to different conclusions from those reached in the judgment.

In PoL 6(B)(b), the judgment assumes that the prosecution must have recourse to the case-law of the European Court of Human Rights on the matter, which the judgment itself summarises [PoL 4(b)].

However, the way in which the judgment takes up the pronouncements of the European Court of Human Rights on this matter is not the most correct, in my opinion, since it cannot be drawn from it what is called in point (ii) the axis of its case-law, namely that the right to respect for private life includes the right to decide how and when to end one's own life, provided that the individual is able to decide freely on this matter and to act accordingly.

First, it should not be overlooked that the European Court of Human Rights does not analyse the laws of States in the abstract, but that its examination is always limited to the specific circumstances of a case and the obligations of States regarding the Convention right concerned. Therefore, any translation of what that Court said must be carefully qualified in order to apply it to the abstract review of the constitutionality of a law, as is now the case.

Nor should it be forgotten that the Constitution does not enshrine the right to privacy with the meaning and scope of the Convention. There is no fundamental right in our Constitution that is comparable in its entirety to the range of rights covered by Article 8 of the Convention. This circumstance alone should provoke particular restraint when it comes to transposing the case-law principles of the European Court of Human Rights regarding Article 8 into our constitutional case-law.

Furthermore, it should be noted that none of the decisions of the European Court of Human Rights cited in the judgment found a violation of Article 8 of the ECHR in its substantive aspect.

In *Pretty v. United Kingdom*, the European Court of Human Rights found no violation of Article 8.

In *Koch v. Germany*, the violation of Article 8 concerns the procedural aspect of the failure of the court to respond to the appellant's allegations, but there is no violation of substantive Article 8, but a violation of a procedural nature.

Gross v. Switzerland should not, in my view, be cited. This is a case in which the Grand Chamber found that the applicant's conduct constituted an abuse of the right to sue and, for that reason, declared the application inadmissible under Art. 35 § 3(a) of the Convention.

Lambert and Others v. France does not deal with Article 8 as a stand-alone claim.

No violation of Article 8 was found in *Mortier v. Belgium*.

It is true that, in *Haas v. Switzerland*, it was held 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 within the meaning of Article 8 of the Convention". However, that judgment also found no violation of Article 8 and the European Court of Human Rights stated that, "even assuming that the States have a positive obligation to adopt measures to facilitate the act of suicide with dignity, the Swiss authorities have not failed to comply with this obligation in the instant case".

In any case, what is stated in the latter judgment is very different from what is stated in the judgment with which I disagree, by reversing the terms categorically.

I reiterate that, apart from the fact that the content of Article 8 of the Convention has a very different scope from the content of the fundamental rights recognised in our Constitution which may be affected by the contested regulation, the fact is that the European Court of Human Rights has not condemned any State for not regulating a euthanasic process in a specific way.

As I pointed out earlier, this regulation has not been required because there is no consensus among the forty-six countries and that is why the European Court of Human Rights, in the issue now addressed, maintains that there is wide discretion on the part of the States when it comes to regulating euthanasia.

In my opinion, the judgment from which I disagree is using the case-law from the European Court of Human Rights in support of the thesis underlying it, always referring to the specific case and circumstances, in order to draw from it alleged general principles which it elevates to a category, when only a specific circumstance in a specific case has been analysed in the light of the national law of a State party to the Convention.

The absence of State constraint on end-of-life decisions is one thing; the establishment of a fundamental right to die is another, which is not only not established, but is rejected in the decisions above.

In short, for the European Court of Human Rights, the right to euthanasia does not derive from the Convention, which does not mean that its regulation in a State with due guarantees is contrary to the Convention.

In the same vein, we should have concluded that the right to euthanasia is not provided for in our Constitution in the judgment from which I disagree. This does not render unconstitutional *per se* a legislative option that regulates such a right with the due guarantees established in the case-law of the European Court of Human Rights on this right.

In reality, the regulation of euthanasia would be an exception to the State's duty to protect life (Art. 15 SC), which is how it is contemplated in most of the countries around us.

In the judgment with which I disagree, the Constitutional Court is going further than what the European Court of Human Rights has said so far by creating a fundamental right of self-determination of one's own death, precisely because what it has said so far is that States enjoy wide discretion.

Furthermore, as I will explain later, the case-law of the European Court of Human Rights cited in the judgment, correctly interpreted, in my opinion, would lead to declaring the unconstitutionality of the regulation of euthanasia in the case of persons who do not have the capacity to give updated consent.

3. I do not agree with the constitutional fit that the judgment makes of the so-called fundamental right to self-determination in relation to one's own death in euthanasic contexts on the basis of the case-law on informed consent.

According to CCJ 37/2011, PoL 5, "patient consent to any bodily intervention is inherent, amongst others, to his/her fundamental right to physical integrity, to prevent any unconsented intervention on one's body, which may not be unjustifiably limited as a result of an illness. This right of self-determination entitles a patient, further to his/her freedom of action, to freely decide on any therapeutic measures and treatments that may affect his/her integrity, choosing from amongst various possibilities, providing his/her consent or withholding the same".

Article 15 SC requires informed consent in medical treatment, which is therefore necessary for the provision of euthanasia, but this article does not, in my opinion, encompass a right to autonomous self-determination regarding one's own death in euthanasic contexts, as the judgment maintains.

On the other hand, Art. 10(1) SC includes criteria for the interpretation of constitutional and legal rules and can be a limit for lawmakers, but I do not believe that it is a source of new fundamental rights not contemplated in the Constitution, as is the case of the so-called right to self-determination of one's own death in euthanasic contexts.

I consider that, instead of building an alleged fundamental right to self-determination in relation to one's own death in euthanasic contexts, based on the regulation and case-law on informed consent and patient autonomy, whose regulations and case-law refer to a clearly different context, namely the need for consent for medical treatment, even if life itself could depend on it, the refusal to maintain the therapeutic effort or even the request for palliative sedation (cases other than those of direct actions to put an immediate end to life through the intervention of third parties, in the modalities contemplated in the Organic Law regulating euthanasia), the judgment should have analysed whether the legislative option chosen by Organic Law 3/2021 is in line with the Constitution by regulating an exception to the State's duty to protect the right to life in euthanasic contexts; thus verifying whether the guarantees provided for in the rule are in line with the case-law of the European Court of Human Rights cited therein and with the default proportionality canon referred to in the judgment itself.

4. I disagree in part with the reasoning by which the judgment dismisses the allegations of lack of quality of the law (as the appeal states) due to lack of terminological accuracy on relevant points affecting the State's duty to protect life and insufficient guarantees, which, in my opinion, should have given rise, at least, to interpretations in line that should have been reflected in the operative part, or could even lead to a finding that the law does not respect the proportionality canon due to a defect that the judgment itself contemplates, due to the non-existence or insufficient protection of the right to life.

In examining the situations contemplated in the rule to define the euthanasic context, the judgment rules out the risk of absolute indeterminacy and concludes that the definitions contained in Art. 3(b) OLRE are compatible with legal certainty, and reasons that "[l]awmakers are not required to be more precise, as there are sufficient interpretative instruments to avoid the creation of legal uncertainty in the application of the rule", and then it adds: "bearing in mind that the OLRE itself has provided that the concurrence of the situation foreseen in its Art. 3(b) must, in any case, be established by at least two different and independent medical practitioners, as well as by a collegiate administrative body made up of medical and legal professionals (the guarantee and evaluation commission), procedural precautions that allow the margins of vagueness that the rule may present in its application to specific cases to be compensated for".

It can be inferred from this that the judgment itself is acknowledging the existence of "margins of vagueness", which affect the essential conditions to request and receive the necessary assistance to die, and it firmly states that those margins of vagueness can be compensated by means of the procedural precautions to which it alludes, which are those contained in Articles 8 and 10 of the Law.

In my opinion, this argument would lead to a different conclusion from that of the judgment, given that, contrary to what is argued in the judgment, the system of guarantees provided for in the aforementioned provisions contains uncertainties and shortcomings that make it questionable, at least, whether it serves to compensate for what the judgment itself calls "margins of uncertainty that the law may present in its application to specific cases".

The legal regulation contains many omissions and inaccuracies.

In particular, on the procedure for appointing the responsible physician and the consultant physician, for whom it is only required that he or she does not belong to the team of the responsible physician, which, in my opinion, does not sufficiently guarantee his or her independence and impartiality.

The professional qualifications of the doctors are not specified; it is particularly significant that the requirement for a specialist in psychiatry is not envisaged, especially when the description of the cases that allow access to the benefit includes physical and psychological suffering. Nor is the intervention of these specialists foreseen in cases where the patient is not in full use of his or her faculties and cannot give his or her free, voluntary and conscious consent.

The regulation of the guarantee and evaluation commission is also vague. It does not establish how its members are to be elected, the proportion between health personnel in its two categories (medical and nursing staff) and legal personnel, the qualifications of health personnel and lawyers, and it is not specified whether they are to serve in the public sector, in the private sector or in any of them.

The involvement of the guarantee and evaluation commission, which is assigned a monitoring function, is devalued in view of the fact that, as a general rule, it does not act as a collegiate body but, in principle, it is sufficient for the verification to be carried out by only two of its members, whose report, if favourable, “shall serve as a decision for the purposes of the performance of the service”. Only if it is unfavourable and there is a complaint would the commission intervene, with an unspecified quorum. This implies a weakening of the guarantees inherent to collegiality. Moreover, of the two members mentioned above, one must be a doctor and the other a lawyer, which means that, in their respective areas of knowledge, only one of them actually acts as a technician; in this situation, there is no contrast of opinions between experts in the same field.

On the other hand, the interview of the members of the commission with the patient is considered to be exclusively optional.

Finally, the norm omits the regulation of various actions, referring to the criteria established in the corresponding protocols. This is the case even with regard to the provision of aid to die, in relation to which it is only established that it must be carried out with the utmost

care and professionalism by health professionals, with the application of the corresponding protocols, which will also contain criteria as to the form and time of the provision of aid to die.

The importance of this matter would require greater accuracy.

In my opinion, the margins of vagueness that the judgment itself acknowledges, together with the deficiencies of the guarantees set out, take us beyond a mere problem of the technical correctness of the rule, outside the Court's judgment, and place us in the aforementioned aspects before an insufficiency of guarantees that affects the assessment of proportionality.

5. I also disagree with the solution given in the judgment to the appellant's allegations concerning the lack of effective availability of palliative care, from which it infers insufficient protection of the right to life.

Regardless of the fact that the patient, due to his or her extreme situation, may not be in optimal conditions for the exercise of his or her individual autonomy, it cannot be ignored that, at least in many cases, he or she only aspires to overcome the trance in which the patient finds himself or herself and not to feel that he or she is an unbearable burden for others and for himself or herself.

In the event that there was a real possibility of being spared suffering by other means, death would disappear as the only option, which would exclude the principle of necessity in the assessment of proportionality.

If the patient is not guaranteed effective, comprehensive social and health assistance, with care that allows them to continue living without pain, and euthanasia is offered as an option that may be perceived as more effective or even the only way out of the situation in which they find themselves, the feeling of uselessness, of being a family and social burden, in short, of lacking "vital value", may determine that they opt for euthanasia without genuine freedom.

As has been stated with regard to other fundamental rights, pressure on the terminally ill patient may produce a "chilling effect" on the exercise of his or her right to life.

It is striking that the regulation, which limits itself to declaring the availability of comprehensive palliative care, in its seventh additional provision: "Training", after stating that "[t]he competent health administrations will set up the appropriate mechanisms to ensure maximum dissemination of the Organic Law among health professionals and the general public", adds that: "as well as to promote among those citizens the execution of the prior instruction document".

It should not be forgotten that, in the face of limited public resources, resorting to euthanasia instead of more costly palliative treatments may, over time, become a pressure factor in favour of euthanasia, both because of the lack of resources to pay for the treatment of terminally ill patients, and because of the influence that this extra cost may have on the patient's decision when deciding, under extremely difficult conditions, on one or other treatment. As a reflection of the scarcity of public resources, a further element of discrimination is added to the detriment of those who do not have their own material and personal resources to be able to move through this terminal phase of life in better conditions.

Therefore, I consider that the judgment does not give the necessary relevance to the failure to guarantee the effective availability of comprehensive palliative care.

The decision considers as a fundamental right what it calls "the right of self-determination regarding one's own death in euthanasic contexts", but does not consider at the same level a fundamental right to palliative care, nor does it require a sufficient guarantee of the effective availability of palliative care.

The judgment recognises that "[c]omprehensive palliative care and direct active euthanasia are, in short, mechanisms that have a relationship of complementarity or alternativeness and not of subsidiarity from a constitutional perspective and in euthanasic contexts".

On the other hand, it admits that "the patient's free decision could be questioned if the affected person does not have the real and effective option of accessing palliative care, as this could affect the formation of his or her will".

It also acknowledges that there "is the possibility that the individual may be encouraged to seek assistance in dying that he or she might not have sought if his or her suffering had been alleviated by palliative care".

This is without prejudice to the fact that, in order to verify the free nature of the patient's decision, those applying the rule must take into account the effective provision of the palliative care that would be necessary in the specific case, among other elements, in accordance with the state of knowledge of medicine.

However, the judgment dismisses the complaint and simply states that the law provides for the availability of "comprehensive" palliative care [Arts. 5(1)(b) and 8(1)], a benefit that must be available in this context [Art. 43(2) SC]. Later on, it continues by declaring that the specific organisation on this matter is not the purpose of the law and that, however, it is contemplated in the regulations of the National Health System, to which Art. 5(1)(b) OLRE refers, as well as in the complementary legislation of various autonomous communities.

It should be noted that information on comprehensive palliative care and on the benefits to which the patient may be entitled is one of the guarantees provided for by the law itself, as is the voluntary formulation of two requests and that these requests are not the result of external pressure.

If it is stated that comprehensive palliative care and direct active euthanasia are mechanisms which, from a constitutional perspective and in euthanasic contexts, present a relationship between them not of subsidiarity, but of complementarity or alternativeness , and it is recognised that consent can be mediated if there is no real and effective option of having palliative care, from my point of view, it is difficult to conclude that the rule sufficiently guarantees the protection of the right to life, as well as to affirm that it declares the availability of that comprehensive palliative care, to finally reason that its regulation is not the object of the law that concerns us.

6. I do not agree with the rejection of the challenge to the provisions relating to the regime applicable to persons with "*de facto* incompetency" (PoL 8), specifically with regard to Article 9 OLRE, a provision that sets out the procedure to be followed when it is established that there is *de facto* incompetency; it points out that in the cases provided for in Article 5(2), the

responsible physician is obliged to apply the provisions of the prior instructions document or any equivalent document.

In this case, all the guarantees on which the judgment generally relies to conclude that there is sufficient protection of the right to life are excluded.

In the case of *de facto* incompetency, it is stipulated that the physician must comply with the provisions of the living will.

The judgment does not even provide a conforming interpretation of this provision which expressly determines that the regime for persons in a situation of incompetency is that of the law and not that of the prior instructions document.

There are reiterated statements in the judgment itself from which I disagree that should have led to the declaration of unconstitutionality of the regulation of this form of euthanasia.

Thus, at the end of PoL 4, the judgment points out what it considers to be the four axes of the case-law of the European Court of Human Rights, arguments on which I have already raised my objections above. What I would like to highlight at this point is that, after recognising in point (i) that European case-law states that the right to life does not include the right to die, in point (ii), regarding the statement that the right to respect for private life includes the right to decide how and when to end one's own life, it specifies, as could not be otherwise, "provided that the individual is able to decide freely and act accordingly". Indeed, in *Haas v. Switzerland*, the European Court of Human Rights placed particular emphasis on the individual being in a position to decide freely on the end of his or her life and to act accordingly.

Then, the judgment acknowledges in point (iii) that "this right is not absolute and must be weighed against competing interests, in particular the State's positive obligations of protection arising from the right to life, which require the protection of vulnerable individuals from actions that may endanger their lives".

The entire argumentation of the decision aimed at justifying the so-called right to self-determination of one's own death is based on the inexcusable requisite that such a decision is taken freely and consciously by a capable human being.

Also, when speaking of the correlative duty of the public authorities to allow assistance in dying by third parties and to provide the necessary means to do so, the requirement is reiterated that the capable person must decide freely and consciously to do so.

The case-law on the right to patient autonomy cited in the judgment itself is based on the requirement that the decision to undergo one or another medical or health treatment must be taken in a free, informed and responsible manner [CCJs 120/1990, PoL 8; 137/1990, PoL 6; 154/2002, PoL 9(b), and 37/2011, PoLs 3 to 7] and that "in order for this right to consent, to decide on any medical acts affecting a subject, to be freely exercised, it is essential that the patient be adequately informed in medical terms on therapeutic measures considered; only if he/she has such information may his/her consent be freely given, choosing from amongst the options available; he/she may also freely decide not to authorise the treatments or interventions proposed by the medical staff. In this way, both consent and information are two closely related rights, so much so that the exercise of one depends on adequately fulfilling the other [...]. Prior information, which has given rise to what has come to be called informed consent, can therefore be considered as a procedure or guarantee mechanism for the effectiveness of the principle of the autonomous free will of the patient".

Likewise, in the section on the "protection duties of the State in this context" [PoL 6(D)(b)], the judgment points out that "[t]he constitutional duty to protect the fundamental right to life against attacks by third parties is embodied in the State's obligation to ensure that the decision to end one's own life in situations of extreme suffering is taken and completed in accordance with the free and conscious will of a capable person, which requires the interaction of sufficient mechanisms to ensure that the information, thought, stable and foreign nature of such an important decision is informed".

Then, it affirms that "[i]t should also be noted that the existence of a genuinely, free and conscious will on the part of a capable person is the element which marks the boundary between the area of protection of the fundamental right to life and the fundamental right to self-determination in relation to death itself in euthanasic situations".

The judgment also recognises that "in the presence of legislation relating to euthanasic contexts, such a right accrues to persons who are in a particularly vulnerable situation due to the extreme suffering in which they find themselves, which could lead to create particular difficulties

in protecting themselves" and that "these circumstances determine the constitutional enforceability of a high level of protection of life. In order to prevent otherwise irreversible damage, it is incumbent on the lawmakers to be rigorous both in determining the factual assumptions and procedures for requesting aid in dying and in ensuring the corresponding and obligatory guarantees and controls, so that the individual is sufficiently protected from the risk of undue influence, manipulation and abuse by third parties".

On the other hand, the Law itself, in regulating the general procedure to receive the provision of aid to die, the person must fulfil the requirement of having in writing the information that exists about his or her medical process, the different alternatives and possibilities for action, including access to comprehensive palliative care within the common portfolio of services and the benefits that the person is entitled to in accordance with the rules of care for dependency. It also requires repeated applications, with a time lag of at least fifteen calendar days between applications, and that applications must be made voluntarily without any external pressure and that, after these requirements have been met, informed consent must be given prior to receiving the benefit.

The judgment examines these requirements and concludes that the procedural safeguards are sufficient to rule out the infringement of the proportionality canon by default which it considers applicable.

Based on the above, I consider that the regulation of euthanasia administered to people who are not in the full use of their faculties, cannot give their informed consent, or their free, voluntary and conscious consent to make the requests, with no other requirements than the responsible physician certifying the aforementioned *de facto* incompetency (referring, moreover, to what is established in the protocols to evaluate it) and having previously signed a prior instruction document, living wills, advance directives or legally recognised equivalent documents (without specifying what these legally recognised equivalent documents are), does not comply with the minimum guarantees to ensure that third parties do not abuse especially vulnerable people, and the duty to protect human life, which the State must safeguard, cannot either be understood to have been fulfilled.

First, it is noteworthy that there is not even a requirement that the *de facto* incompetency to file the requests and provide informed consent be irreversible. As stated in the OLRE, a state

of temporary incompetency would be sufficient to give consent, without the certainty of permanent incompetency. That omission in the law on the irreversibility of the state of unconsciousness is not overcome by the reference to future protocols of action, given that, regardless of the fact that they do not constitute a source of legal rules, they may be limited to the impossibility of giving consent, but not to the irreversibility of such a state.

On the other hand, it is obvious that the prior instruction document, living wills, advance directives or legally recognised equivalent documents referred to in the regulation, in the case regulated in Article 5(2), cannot reflect the free and current will of the person, at the crucial moment of the request for euthanasia, a request that will be made by a third party. They will only reflect, where appropriate, the will formulated at an earlier point in time, under circumstances which are not recorded and which may have changed.

It is possible that a significant time lapse may have elapsed between the granting of the prior instruction document or similar document and the moment when euthanasia is requested.

It is not even excluded that the document was granted when the person was not yet suffering from any of the illnesses that at a later time could justify the request for aid to die, so that when it was granted he or she would lack information about his or her medical process, his or her possible alternatives at the time when euthanasia could be considered and, of course, the patient would be unaware of his or her possibilities of access to palliative care and benefits to which he or she could be entitled, alternatives and availabilities that, due to advances in medical science or the passage of time, could have changed.

The law sets out a presumption of maintenance of the will to opt for euthanasia by the mere fact of not having revoked the prior instruction document, without taking into account the personal, emotional, affective, family or any other situation of the grantor that may be relevant and the possibility that they may have changed since the document was signed; this way, it establishes a presumption in favour of euthanasia and contrary to the right to life, which if not revoked, no matter the reason, they are maintained at the present time.

In addition to excluding that the patient has all the necessary information at the time when the request is made, the requirement of repetition of the request, a requirement that is

established to exclude that ill-considered requests or even requests mediated by external pressures may be submitted, also disappears.

It is not even guaranteed that the responsible physician, the consultant physician, the members of the commission or any practitioner will have the possibility to meet with the patient to corroborate that, at the time of granting the document, the grantor was well informed and in a state of full capacity and not subject to external pressures.

On the other hand, in the cases provided for in Article 5(2), the application for the provision of aid to die may be submitted to the doctor responsible by another person of legal age and fully capable, together with the prior instruction document, living will, advance wills or legally recognized equivalent documents, previously signed by the patient.

The person making the request is not required to be related to or connected with the patient; these persons would be best placed to have knowledge of relevant circumstances, such as the evolution of the patient from the time the living will was granted until the *de facto* loss of capacity occurred and up to the time the request is made. The competent person is only required to present a prior instruction document, without stating or proving how he or she had access to the document. It is not either envisaged that it should be incorporated in any public register or granted in such a way as to guarantee its authenticity.

It is paradoxical that for the granting of the informed consent provided for in Law 41/2002 of 14 November, the basic law regulating patient autonomy and the rights and obligations regarding clinical information and documentation, consent by representation is envisaged [Art. 9(3)] and in the event that the patient is not capable of making decisions, at the discretion of the physician responsible for the care, or when their physical or mental state does not allow them to take charge of their situation, if the patient does not have a legal representative, the consent shall be given by the persons linked to them for family or *de facto* reasons.

However, for the execution of an extremely serious act, such as euthanasia, no link with the patient is required, which is generally required for informed consent.

If there is no person who can apply on behalf of the patient, the treating physician may submit the application for euthanasia and he/she will have the power to access the documents contained in the registers of last wills and testaments.

The law only establishes as a requirement that the patient "has previously signed a prior instruction document, living will, advance wills or legally recognised equivalent documents".

A catalogue of various documents capable of producing the same effect is contemplated, named differently in the various autonomous regulations, with the possible forms of execution also being diverse. This causes that they do not offer the same guarantees of authenticity, nor do they serve in the same way to accredit the capacity of the grantor at the time of signing and, even less so, the necessary prior information or the freedom to give consent.

The documents listed also had a different content and purpose from those of the request for euthanasia, since they were limited to the choice between different medical treatments or refusal thereof, organ donation or the destination of the corpse after death.

In relation to the assessment of proportionality from the perspective of the prohibition of the non-existence of or insufficient protection, it is worth highlighting the lack of judicial review, a control which is contemplated in other cases of much less seriousness than euthanasia.

Thus, in Act 41/2002 on patient autonomy, in those cases in which consent must be given by the legal representative or the persons linked for family or *de facto* reasons in any of the cases described in sections 3 to 5 of Art. 9, it is stated that the decision must always be taken in the best interests for the patient's life or health, and it is established that those decisions that are contrary to these interests must be brought to the attention of the judicial authority, either directly or through a judicial authority. 9, it is stated that the decision must always be taken in consideration of the greatest benefit for the life or health of the patient and it is established that those decisions that are contrary to these interests must be brought to the attention of the judicial authority, directly or through the Public Prosecution Service, so that it may adopt the corresponding decision, unless it is not possible to obtain judicial authorisation for reasons of urgency, in which case the healthcare professionals will adopt the necessary measures to safeguard the life or health of the patient, protected by the causes of justification of compliance with a duty and state of necessity.

Also Law 15/2015, of 2 July, on voluntary jurisdiction, for the removal of organs from living donors, establishes in its Article 78, “Scope of application and competence”, section 1, that the rules of said chapter shall be applied to the files whose purpose is to establish the concurrence of the free, conscious and disinterested consent of the donor and other requirements for the removal and transplant of organs from a living donor by Law 30/1979 of 27 October 1979 on the removal and transplant of organs, and other regulations that develop it.

Paragraph 2 establishes that the judge of first instance of the locality where the removal or transplant is to be carried out, at the choice of the requester, shall be competent to hear these cases.

For its part, Art. 79, “Request and processing of the file”, section 1, requires that a medical certificate on the mental and physical health of the donor, issued in accordance with the provisions of the corresponding regulations, be attached, among other things.

Paragraph 2 provides for an appearance, to which the doctor who is to perform the removal, the doctor who signed the certificate referred to in the previous paragraph, the doctor responsible for the transplant or the one delegated by him or her and the person who is to give authorisation for the intervention, in accordance with the authorisation document for the removal of organs granted to the health centre in question or the one delegated by him or her, will be summoned.

Paragraph 3 states that the donor must give his or her express consent before the judge during the hearing, after hearing the explanations of the doctor who is to perform the removal and those of the other persons present. It goes on to stipulate that the judge may also request from them any explanations he or she deems appropriate as to the concurrence of the requirements demanded by law for the granting of consent.

Then, Article 80(1) provides that, if the court finds that the consent expressly given by the donor was not given freely, conscientiously and disinterested, or that the other conditions laid down by law are not satisfied, it is not to issue the transfer document of the organ.

Paragraph 2 of the provision concludes that, if this is not the case and if the legal requirements are deemed to have been met, a written document to transfer the organ will be drawn

up and signed by the interested party, the doctor who is to carry out the removal and the other assistants. If any of them doubts that the consent has been given expressly, freely, consciously and disinterestedly, they may object to the donation.

Finally, paragraph 3 sets out that the donor shall be provided with a copy of the transfer document, which shall state that the donor may revoke consent at any time prior to the operation.

None of these guarantees are established in the much more serious case of euthanasia.

In this case, given the supervening loss of capacity, it is impossible to withdraw from the "granting of consent" from the moment when the euthanasia process has reached an irreversible point. The process is carried out without judicial control and no other alternative guarantees are established, such as the intervention of the Public Prosecution Service, which in its Organic Statute is responsible for the defence of incompetent persons; not even the notarisation of the document is foreseen, which would allow for the certification of the capacity of the grantor and the control by the notary that the consent was given with sufficient information and in a conscious and free manner.

This reduction in guarantees also occurs in the case of the shortening of time limits that is contemplated in the law in the event that the responsible physician considers that the loss of the requester's capacity to grant informed consent is imminent. In this case, in addition to limiting the periods of reflection and dialogue with the doctor, it can be questioned whether the patient retained sufficient capacity to understand and decide freely when he or she submitted the initial request and received the mandatory prior information.

7. In relation to the challenge regarding the creation of the register of conscientious objectors, I would like to point out that the judgment states that the justification for the register is that health administrations can know which professionals are not, in principle, available to be directly involved in the provision of the benefit. However, as the judgment also acknowledges, the lack of registration does not condition the possibility of objection, given that the law only requires that conscientious objectors state this circumstance in advance and in writing. On the other hand, objection may depend on the specific case, and it cannot be ruled out that there are professionals who, in general terms, do not object to the application of the law and who, in specific cases, have reservations, either exclusively on conscientious grounds or because of

clinical considerations. Other cases may also arise in which an initial general registration makes it more difficult for the professional to take part in care when he or she considers that he or she must continue to care for the patient when dealing with the request for euthanasia, but without ultimately being obliged to provide the patient with assistance to die.

These circumstances may prevent the register from actually serving its intended purpose.

In addition, a disparity may arise in the regulation of the various autonomous communities, with the consequent different level of guarantee of ideological freedom in each one.

If we add to this the fact that, despite the provision for confidentiality, it cannot be ruled out that registration may cause harm to objectors, especially given the precarious employment situation of many professionals, and that this situation may condition their decision to object, we may conclude that, given the possible harm, the feasible impact on ideological freedom and the limited scope of the benefits that the system can guarantee, the measure could be considered not to be proportionate to the purpose it claims to serve.

8. The judgment makes a series of considerations that I agree with in order to rule ou the infringement of Articles 24, 53(2) and 106(1) SC, for having excluded the OLRE - as the appellant's declare - the necessary judicial control and guarantee with respect to the decisions that recognise the right to the provision of aid to die, an exclusion that would derive from the fact that the judicial control review has been expressly provided only for the rejecting decisions from the commission [Articles 10(5) and 18(a), fifth paragraph OLRE].

The judgment clarifies that the final decisions of the guarantee and valuation commissions recognising the right of access to the provision of aid to die and which open the way to its "implementation" (Article 11) cannot be excluded from judicial review without a manifest breach of the Constitution. This assertion is inferred from Articles 24 and 106 SC and the guarantees of procedural law.

I agree with that reasoning. However, despite the fact that, in effect, it was not necessary to regulate the contestability of the decisions from the guarantee and evaluation commission, the fact that the law has distinguished between accepted and rejected requests, providing that the latter are subject to judicial review, makes it necessary, in my opinion, that the interpretation

made by the rapporteur be included in the operative part as a conforming interpretation of the provision in question in order to maximise the guarantees in this area.

9. Paragraph 4 of Article 18(a) OLRE is challenged. This paragraph is about the decision of the guarantee and evaluation commission, which, in the words of the OLRE, "In the event that the decision is in favour of the request for the provision of aid to die, the competent Guarantee and Evaluation Commission shall require the management of the centre to provide within a maximum period of seven calendar days the requested benefit through another doctor at the centre or an external team of health professionals".

The judgment gives an interpretation of that provision that I also agree with. It points out that "[o]n the contrary, this fourth paragraph must be interpreted in the sense that the request to the centre's management to "provide the requested service through another doctor at the centre or an external team of health professionals" within a maximum period of seven calendar days strictly means that, once the complaint against the "refusal" of the responsible physician has been upheld or the appeal against the unfavourable report of the consultant physician has been accepted [Art. 8(4)], the legally established procedure (Arts. 8, 10 and concordant articles) must be resumed within that maximum period and completed in accordance with the Organic Law in all the procedures and actions that are still pending, if applicable, even with the intervention of professionals other than those who initially reported against the request, as the provision establishes. The OLRE does not impose, therefore, that the benefit be 'carried out', once it has been definitively recognised by the commission, within seven days, nor does it prevent full judicial protection - including its possible precautionary suspension - in accordance with the provisions of general legislation and constitutional case-law".

I also consider that, in order to maximise the system of guarantees of the law, this conforming interpretation should have been included in the operative part.

In the sense set out above, I respectfully formulate my dissenting opinion to the judgment handed down in the appeal of unconstitutionality 4057-2021.

Madrid, on the twenty-second day of March two thousand and twenty-three.