UNIVERSIDADE DA CORUÑA

FACULTY OF LAW

THE LEGAL TRANSCENDENCE OF PERSONAL LIFE-ENDING DECISIONS.

A TRASCENDENCIA LEGAL DA DECISIÓN PERSOAL DE MORRER.

LA TRASCENDENCIA LEGAL DE LA DECISIÓN PERSONAL DE MORIR.

DISSERTATION
BACHELOR OF LAWS
ACADEMIC YEAR 2020-2021

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SUMMARY:

ABBREVIATIONS

Art(s).	Article(s)
CJEU	Court of Justice of the European Union
CrimPL	Criminal Procedure Law
CivPL	Civil Procedure Law
DGT	Directorate General of Traffic
ECrtHR	European Court of Human Rights
E.g.	Exempli Gratia
ENSE	Spanish abbreviation for National Health Survey of Spain (*"Encuesta Nacional de Salud de España")*
EU	European Union
Ff.	Foliis (and following)
INE	Spanish abbreviation for National Institute of Statistics (*"Instituto Nacional de Estadística")*
OL	Organic Law
PC	Penal Code
RDL	Royal Legislative Decree
SC	Spanish Constitution
SCJ	Supreme Court Judgement
SPC	Spanish Penal Code
UN	United Nations
WHO	World Health Organisation
WMA	World Medica Association
WWII	II World War

FACTUAL BACKGROUND

Rose H. D. is a Spanish citizen of legal age. Several years ago, she suffered, together with her mother, a fatal car accident, when a vehicle driven by another Spanish citizen under the influence of alcohol and drugs entered the opposite lane and crashed frontally against their automobile. The latter died outright.

While her mom, Clare D. L., was taken out of the car conscious, awake and only suffered from injuries of considerable seriousness but temporary character, Rose had extremely severe wounds, including, at a first sight, cuts throughout the whole body, 2nd and 3rd degree burnings, broken bones and, according to the emergency physician who tried to save her life during the route to the nearest hospital, a "very deep, nasty and worrying injury where the neck meets the back", which had to be surgically intervened upon her arrival. Rose was completely unconscious, had to be reanimated several times and had lost an alarming amount of blood, which decreased her arterial pressure and left her in a very delicate condition to undergo a surgery. The intervention was, against all odds, successful.

Due to a systemic bacterial infection arising from the surgery, she had to be heavily sedated and induced to coma for two months. Once awake, she was diagnosed with a degenerative quadriplegia, as a consequence of an irreversible damage to her 7th cervical vertebra. Although she could still feel, but not move her arms, she would progressively loose this condition to time.

Antibiotics, pain-killers and blood thinners became part of Rose's everyday life: she was probed, dependant and chained to a bed. The accident crashed her personal, academic and professional dreams, being later diagnosed with post-traumatic stress, a major depressive disorder and social phobia. Nonetheless, no modification on her mental capacity to reason or understand could be found. Throughout the years and within multiple reports of the various psychiatrists and psychologists following her, she manifests a clear, unequivocal desire to put an end to her life, admitting to have asked her closest relatives to help her die gracefully. This desire would materialise in a judicial process in which Rose would seek to avoid any kind of criminal responsibility arising from her death, and more specifically, that may be incurred by the person assisting her to die.

Consequently, Rose follows the ordinary path of protection of fundamental rights before the administrative courts, stating that not an action, but an omission, and more specifically, the absence of a proper regulation regarding active euthanasia in long-term serious illnesses, violates the rights contained in articles 10 (regarding dignity and the free development of the personality of any individual) and 15 (with special focus on the prohibition of degrading and inhuman treatment) of the Spanish Constitution. The pretension is dismissed, arguing that, according to the current legal background, it is impossible to grant any kind of active help regarding assisted dying, as doing so would go against the actual configuration of the Spanish Criminal Code. The Administrative Section of the High Court of Galicia, as well as the Administrative Section of the Supreme Court of Spain dismiss the appeal and cassation procedure on the same basis.

The judicial fight arrived to the Spain's Constitutional Court, which accepted to know about the case and examine the potential violation of the articles mentioned above. Before the Court could make a decision on the case, Rose found her way to a graceful death with unknown assistance. The decease is immediately communicated to the constitutional authority, which

also hears the intention of Rose's mother, Clare D.L., to represent her daughter in the proceedings, according with the provisions contained in the departed's will. Furthermore, Clare argued that her *"locus standi"* was not only determined by her daughter's desire, but by several civil law provisions which placed her as heir in regards to rights and obligations. The Constitutional Court dismissed the procedural succession and archived the diligences regarding the case, considering that such rights were intrinsically linked to human personality and *"as stated by this Court's doctrine, personality expires with the moment of passing"*.

INTRODUCTION

The social and legal debate arising from the question *"how someone is supposed to die",* and more importantly, *"how to die gracefully"* did unquestionably have an exponential development over the last decades. However, human interrogatives on death are not modern-time progresses: Socrates [1], Plato and Aristotle already wondered about death and its transcendence within life back in 4th and the 5th centuries B.C., although such questions, as some tend to assure, are inherent to human nature. Ancient Greece is, without a glimpse of a doubt, the birthplace of the cornerstone of this thesis: euthanasia, and a modest etymological analysis will help the reader to understand the formation of quite an *"avant-garde"* conception with thousands of years of history.

Euthanasia (in ancient Greek, εὐθανασία) is formed by the prefix-morpheme "Eu" (εὐ), literally meaning well or easy, and thanatos (θἀνατος), meaning death. It is generally accepted among linguists that the word arose as a literal transcription from Roman times fulfilling the necessity of describing a behaviour, attitude or action that, even when already existing as a social reality, was not named in specific terms[2]. Its use became widespread in texts of the Latin era[3], although the Catholic Church's adamant condemn to suicide[4] would ostracize the idea from the social and political scenario for centuries. Thomas More, but more prominently, Francis Bacon, would contribute to the actual conception of euthanasia as, generally speaking, *"the/an action of the physician over the patient, including the possibility of anticipating death*[5]*"*. Despite a significant development, specially relevant in medical and scientific areas, until the end of the XIX century and the dawning of the XX, the term became closely related to the eugenic ideas of Karl Binding and Alfred Hoche, which would be later recycled by the German National-Socialist Regime with the aim of justifying racial selection, together with the extermination of those who were considered *"unfitting"*. This bonding impeded, for a considerable amount of time, to bring euthanasia back on the table.

Fortunately, this ill-fated tie with the horrors of the WWII was lost to time, and as society moved towards never-seen levels of freedom and development, the question over the self-disposition of life rose from its ashes. Brittany Mennard, Nathan Verhelst, Dianne Pretty, Debbie Purdy or Ramón Sampedro are the best example of the overrunning of such period. It is not merely about the particular circumstances of each case, nor their academic, legal, or political significance: their mere existence, the social and popular acknowledgement of their presence already enshrines the start of a new age in which the topic will be addressed in a completely different manner. In this context, further characterised by the more-than-remarkable scientific progress and innovation in all fields related to human sciences, the modern consideration of euthanasia is born.

For the purpose of this study, the introductory part of this essay will strictly focus on the legal definition, consideration and problematic of euthanasia in relation to the questions proposed

[1] Plato describes, in his famous *"Phaedo"* or *"On the Soul",* the pacific, calm and resigned behaviour with which Socrates deals with his own death. For some, this description constitutes the synthesis of the classical concept of euthanasia, as understood back in that time.

[2] Gaius Suetonius describes Emperor Augustus' death in very similar terms to that of Socrates, but mentioning, for the first time in history, the word *"euthanasia".*

[3] Seneca the Younger, Marcus Aurelius and some other relevant Roman figures mention the word in texts of significant transcendence.

[4] Or any practice involving the deliberate killing of a person, understanding life and death as God's exclusive power.

[5] Bacon, F., *"The Advancement of Learning",* 1605.

by the Case Study, although the issues, concerns and dilemmas that this topic evokes should always be treated as multidisciplinary and quite difficult to limit. The consideration of such topics is key to understand the legal transcendence, complexity and peculiarity of Rose's case, considering the popular claim asking for a change in assisted dying legislation in recent years. Such a change would allow many people, including Rose, to take over their own life and decide how to end it.

Euthanasia is, roughly speaking, the deliberate causation of death of a suffering patient for humanitarian reasons. There is a clear core definition which cannot be taken away without blurring the very essence of the procedure (allocated in the above-mentioned formulation), but determining the scope of the definition requires to establish a set of properties to which the legal world has no ultimate response: who should be considered a suffering patient? Who can cause that graceful death without incurring in responsibility? Can someone with an interest in the patient's death assure a humanitarian purpose of the action? The limitation of the topic is decisive for its successful operation, bearing in mind that a conception too broad could make abusive situations occur, while a restrictive one could leave some patients in need out of the process. The situation is such that the World Health Organisation (hereafter, WHO) itself has no straight definition of the procedure, although it mentions it in several documents[6]. Due to their long-standing cooperation[7], it seems like, whenever referring to euthanasia, the WHO firstly adopted the definition established in the 39th Assembly of the World Medical Association[8], now completely rewritten in the *"World Medical Association's* (hereafter, WMA) *Declaration on Euthanasia and Physician-Assisted Suicide[9]"*, stating that:

> *"Euthanasia is defined as a physician deliberately administering a lethal substance or carrying out an intervention to cause the death of a patient with decision-making capacity at the patient's own voluntary request".*

Furthermore, the WMA makes a necessary remark when defining assisted suicide, which is sometimes inappropriately used as a synonym of euthanasia:

> *"(physician-) assisted suicide refers to cases in which a physician enables a patient to end his or her own life by prescribing medical substances to bring about death".*

There is, nevertheless, another crucial concept, that even when not being included in the WMA's declaration, is socially accepted within the debate as a synonym of euthanasia. No academic or doctrinal discussion would, however, dare to make such an inaccurate balance. "Assisted dying" is quite a broad conception which refers to any help which is given to a person in the process to die. This aid does not have to include any kind of direct or indirect causation of death: palliative care, psychological assistance or mere companion can be considered to fall

[6] Technical Report nº804, regarding Pain Relief and Palliative Care in Cancer (8th April 1993, available in https://apps.who.int/iris/handle/10665/39524) was the starting point of a list of documents mentioning euthanasia, either to recommend it or not. Cancer was the first illness to which euthanasia was linked, although the latest documents tend to have a more general scope and extend their recommendations to other areas. Suicide Prevention documents sometimes mention euthanasia, as in "Preventing Suicide, a Resource for General Physicians" (2000, available in https://apps.who.int/iris/handle/10665/67165), although the reference is so vague that it only enshrines the moral difficulty to assess and implement euthanasia and assisted dying in some jurisdictions.

[7] The WHO and the World Medical Association have a well-established relationship of cooperation and mutual help in certain scientific fields. The Joint United Nations Programme on HIV/AIDS (UNAIDS) is the best example of that hand-in-hand aggregate effort.

[8] WMA Declaration on Euthanasia, Madrid, Spain, October 1987 (not in force).

[9] WMA Declaration on Euthanasia and Physician-Assisted Suicide, 70th General Assembly, Tbilisi, Georgia, October 2020. Available in https://www.wma.net/policies-post/declaration-on-euthanasia-and-physician-assisted-suicide/

within the scope of assisted dying, as enshrined by numerous documents published by WHO[10]. Even so, both the WHO and the WMA fail to provide with a specific classification of the different types of dying processes included under the scope of euthanasia. The most attractive classification within the legal sphere focuses on the relevant conduct by the third party causing the death in penal law terms, or in other words, the euthanasic conduct in relation to the person who is exercising it, in the following manner:

1. Passive Euthanasia is used to refer to a conduct in which, either by an action or an omission, the relevant person in charge of the life-sustaining treatments prolonging the life (or the agony) of the patient stops making or decides not to make use of those, letting nature follow its path without any procedure addressed to perpetuate life[11].

2. Active Euthanasia implies the causation of death up to some extent. The foreseeability of death, together with the casual link which is established between the action of the third party and the consequence itself determines the following classification:

    a. Active, direct euthanasia, traceable as the most widespread conception of the word, consists of the administration, prescription, supervision or execution of any conduct directed to cause the petitioner's death, knowing that the action, whatever it is, will undoubtedly lead to a decease.
    b. Active, indirect euthanasia refers to a behaviour intended to reduce the state of pain and suffering of the patient, sedating the latter, knowing that, even when not causing death directly, such measures will shorten and affect the person's life expectancy. Commonly known as *"palliative care"*, these procedures improve the quality of life of the patient, but reduce its extension.

3. Genuine Euthanasia: substantially created by Professor Romeo Casabona to describe any measure intended to achieve the objective of a *"well-lived death"*. In his own words *"genuine euthanasia must constitute an assistance to die, not a measure intended to cause death itself"*, coining a formulation similar to that of *"assisted dying"*, but of a more limited influence[12].

Accordingly, euthanasia is not only a complicated matter from the moral perspective, its mere formulation already generates polemic in the different disciplines which are affected by it. In the national scope, the situation was not so different: Law 41/2002[13] does not exclusively deal with dying procedures, but also with some transcendental provisions regarding medical consent, as well as the creation of a legal instrument, the "advance directive documents[14]", thought to allow the patient to decide on certain matters in case of arriving to a situation in which he/she is not able to validly consent under the requirements of Law 41/2002 and Law 14/1986[15]. Furthermore, the vast majority of the Autonomous Communities[16] have passed laws regarding the regulation of palliative care and assisted dying in their respective territories[17], following

[10] While this Organisation is quite reluctant to mention euthanasia in its documents, it has a vast, well-developed repository of sources regarding palliative care for terminally ill or suffering patients, including children. WHO, *"Integrating Palliative Care and Symptom Relief into Paediatrics"*, 2018. Available in https://apps.who.int/iris/handle/10665/274561

[11] The traditional deontological duty within Medicine was considered to be the preservation of life. Nevertheless, more and more authors assure that the importance of life has been greatly replaced by the concept of quality of life, understanding death as a moment within life in which is necessary to guarantee certain minimum standards in order to avoid needless pain and suffering to the patient.

[12] It is unclear if palliative care should be included within Casabona's conception of genuine euthanasia, bearing in mind that the application of sedative or lenient procedures is scientifically proven to reduce the patient's life expectancy, and therefore, the predictability of death is out of question.

[13] Law 41/2002 of the 14th November, Basic Regulatory of the Autonomy of the Patient and Rights and Duties in regards to Information and Clinical Documentation. ELI: https://www.boe.es/eli/es/l/2002/11/14/41/con

[14] Section 11, ibid. 13.

[15] Law 14/1986 of the 25th April, General of Health. ELI: https://www.boe.es/eli/es/l/1986/04/25/14/con

[16] With the exceptions of Ceuta, Melilla, Castilla La Mancha, Extremadura, la Rioja and Aragón.

[17] Cantabria does not have a law itself, but a Programme to implement Palliative Care.

the National Plan for Palliative Care[18] that established a minimum threshold from which each region developed its own strategy[19]. More recently, Organic Law 3/2021[20] turned Spain into the 5th country around the globe to expressly regulate euthanasia and physician-assisted dying. Although not yet in force, as it is expected to become binding by the 25th of June of this very same year, it already implies a victory to all those associations that have fought over the last decades to regulate it in our country[21], in the name of thousands of patients that had to draw on exile, clandestinity or illegality as to achieve a comprehensible aim that is, as it will be explained, undoubtedly within the limits of the national and international legal framework.

Stating that euthanasia makes the traditional configuration of subjective human rights shake from its ground might sounds slightly drastic. Notwithstanding, no other legal, ethical and social dilemma has made so many rights clash against each other. Living in a State under the rule of Law, as stated in art. 1(1) of the Spanish Constitution, and therefore bound to respect certain inherent human rights, might lead some to think that, in accordance with that provision, the right to life, crystallised in art. 15 of the same legal text, should always be preserved above all the other rights. In fact, the Spanish Constitutional Court has pointed out this general duty of the State to preserve and promote the right to life in a vast number of cases, in which Judgements 120/1990[22] and 137/1990[23] are worthy of mention. However, thinking that any of the fundamental rights contained in the Constitution is unlimited would be a mistake, as previously stated by the same Court in its Judgements 11/1981[24] and 2/1982[25]. Therefore, it is impossible to assure that the right to life, as settled down in the Spanish Constitution, is an absolute, unlimited grant: if it was, there would be no debate regarding euthanasia. The Universal Declaration of Human Rights (hereafter, UDHR) also recognizes the right to life in its article 3, but in a different way: while in the national scope it is accepted that life is the necessary basis for other rights to arise, the argumentation that is made within the UDHR for the existence of such rights is not life, but human dignity. It is impossible to prevent any jurist's mind from trying to establish a certain inner hierarchy. Yet, the question might not be to choose

[18] Approved by Plenum of the Interterritorial Congress of the National Healthcare System, celebrated the 18th December 2000. Available in https://www.mscbs.gob.es/organizacion/sns/planCalidadSNS/pdf/excelencia/cuidadospaliativos-diabetes/CUIDADOS_PALIATIVOS/opsc_est7.pdf.pdf . The text was enacted following Recommendation 1418 fof the Council of Europe (25th June 1999), for the Protection of the Human Rights and Dignity of the Terminally Ill and the Dying. Available in http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=16722&lang=en

[19] In this regard, it is worth mentioning the Law 5/2015 of the 26th of June, regarding Rights and Guarantees of the Dignity of the Terminally Ill, of the Autonomous Community of Galicia, which will be applicable to the case. ELI: https://www.boe.es/eli/es/l/2015/04/27/5/con

[20] Organic Law 3/2021 of the 24th March, on the Regulation of Euthanasia, ELI: https://www.boe.es/eli/es/l/2021/04/12/3

[21] Association *"Derecho a Morir Dignamente"*, in a very similar way to that of its famous analogues *"Dignitas"*, in Switzerland and Germany, and *"Dignity in Dying"* in the UK, pushed the whole legal system and its operators to legalise such processes and respect the patient's desire to find a peaceful death.

[22] Judgement 120/1990 of the 27th June, Constitutional Court of Spain, Amparo Appeal nº. 443/1990, ECLI:ES:TC:1990:120.

[23] Judgement 137/1990 of the 19th July, Constitutional Court of Spain, Amparo Appeal nº. 397/1990, ECLI:ES:TC:1990:137.

[24] Judgement 11/1981 of the 8th April, Constitutional Court of Spain, Unconstitutionality Appeal 192/1980, ECLI:ES:TC:1981:11.

[25] Judgement 2/1982, of the 29th February, Constitutional Court of Spain, Amparo Appeal nº 41/1981, ECLI:ES:TC:1982:2.

one over the other[26], but to shift the main focus of attention depending on society's needs in different times and spaces.

The present essay, for the purpose of deeply examinining, solving and thoroughly answering the questions proposed by the selected Case Study, will additionally deal with the following matters:

1. The relevance, legal consideration and potential outcomes of euthanasia as a social and legal reality in the national and international scope.
2. The transcendence of a person's decision or consent to die, with special mention to the advanced directive documents of Law 41/2002 and their operation in euthanasic circumstances.
3. Comparative solutions proposed by other jurisdictions to the *"well-dying"* problem.
4. The influence of the factors explained above in Rose's life, death, judicial journey and, ultimately, the outcome of the story.

[26] The term *"human dignity*" did not appear in the original writing of the European Convention on Human Rights, it was adopted by Protocol 13 (2002) as to justify the abolition of death penalty.

QUESTIONS

1. **Characterise from the criminal law point of view the facts committed by the Spanish citizen which led to the accident. Determine the arising penal and/or civil responsibility, indicating the competent Court to hear and solve the case, as well as the subsequent punishment.**

For the purpose of solving the conundrums which are included within this question, the present section has been divided into 4 subsections in accordance with the subject matter which is being treated therein.

1.1. Bodily Harm as a Criminal Offence in the Spanish Penal Code.

The expression *"bodily harm"* (in Spanish, *"lesiones"*) serves as headline of Title III of Book II of the Spanish Penal Code[27]. It enshrins not only the importance, which is given to the protected value underneath this group of offences, but also the frequency with which crimes of such nature are perpetrated. According to National Institute of Statistics (hereafter, INE), injuries were the third most frequent type of illegal behaviours committed during 2019 (69.437 reported offences[28]), right after crimes against wealth and the socioeconomic order (the undisputable winner, with 141.686 offences) and crimes against collective security (103.257). It is clear that the importance which has been progressively given by human societies to integrity, both in its physical and psychological way, together with the assiduousness with which this value is harmed, diminished or disregarded[29], has also encouraged the legislator to make major changes during the not-so-long life of our Penal Code. The ostracism of misdemeanours (very minor offences) implemented by Organic Law 1/2015[30] , together with the rigid regime established in between serious and minor injuries[31], left some negligent behaviours scot-free depending on the seriousness of the infraction of the duty of care[32]. Thus, victims of reckless conducts saw their demands dismissed in the criminal way due to the mild character of the imprudent behaviour itself, regardless the seriousness of the unlawful result. The deflection of such pretensions to the civil way in the vast majority of cases[33] did not offer an appropriate legal response, and therefore, Organic Law 2/2019[34] was issued as an attempt

[27] Organic Law 10/1995 of the 23rd November, of the Penal Code (hereinafter, PC). ELI: https://www.boe.es/eli/es/lo/1995/11/23/10/con

[28] Chart and data available in https://www.ine.es/jaxiT3/Datos.htm?t=25997#!tabs-grafico

[29] Throughout the past six years, the number of reported offences related to injuries has experienced a significant rise, doubling its value in certain cases (only 33.767 crimes were reported back in 2013). As some authors indicate, this sustained expansion might not be due to an empirical increase of those behaviors, but to a greater rate of complaint when facing such situations.

[30] Organic Law 1/2015 of the 30th of March, by which Organic Law 10/1995 of the 23rd of November, of the Penal Code, is modified. ELI: https://www.boe.es/eli/es/lo/2015/03/30/1

[31] Point XXXI of the Preamble of Organic Law 1/2015 does not only eliminate injuries as a fault, but also establishes a categorical difference in between "serious injuries", crystallised in arts. 147.1, 148, 149 and 150 of the Penal Code, and "minor injuries", enshrined in arts. 147.2 and 3 of the same document.

[32] J.M. Menéndez, C. Nicolás, *"Harder Punishment for Imprudence"*, Journal of the General Directorate of Traffic (DGT), 2nd April 2019, available in: https://revista.dgt.es/es/reportajes/2019/04ABRIL/0402Reforma-Codigo-Penal-mas-dureza-imprudencias.shtml

[33] Ibid 32.

[34] Organic Law 2/2019 of the 1st March, modifying Organic Law 10/1995 of the 23rd November, of the Penal Code, regarding imprudence in driving motor vehicles and scooters and sanction for abandonment the accident site.

to palliate the undesired negative effects[35] of OL. 1/2015. By extension, several provisions of the Penal Code were modified as to ponder imprudences that, either because of the lack of transcendence of the behaviour or the legal irrelevance of the breach of due diligence, were not criminally considered before. All of these factors will play a significant role within the legal characterisation of Rose's case. Once this more than necessary basis has been laid down, it is time to examine in more depth the legal concept of bodily harm, its regulation within the Spanish Penal Code and its potential application to the case.

The core definition of bodily harm[36], as a pure criminal term, appears in art. 147(1) of the Penal Code, establishing a minimum definition from which other types of injuries, and more specifically, aggravated and privileged kinds of woundings, will be built around. Consequently, the criminal definition of injuries within the Spanish legal framework falls within the words written hereafter:

> *"Whoever, by any means or procedure, causes another an injury that detracts from his bodily integrity or his physical and mental health, shall be convicted of the offence of grievous bodily harm, with a sentence of imprisonment of three months to three years, or fine of six to twelve months, whenever the injury objectively requires medical or surgical treatment for health purposes, in addition to qualified first aid. Simple qualified surveillance or monitoring shall not be deemed medical treatment"*[37].

However, this definition leaves quite some room for interpretation as to what should be considered an "injury" falling under the scope of the article. The vast jurisprudence of the Supreme Court on this matter has fortunately provided with a set of empirical examples that further specifies the strictly legal definition, stating that:

> *"the concept of injury must be appreciated whenever there is a harm to the bodily substance, a disruption on the normal functioning of the body, a modification on the shape or appearance of some of its parts, as well as the incitement of physical ailments of a certain entity, such as fear or disgust, that affect the central nervous system"*[38].

Therefore, and despite the pure physical nature of the name of the offence (commonly associated to direct, corporal violations of the victim's substantial integrity), a bodily harm will also include mental and psychological detriments, as well as other types of behaviours that, even when not directly exercised over the sufferer, have a physical manifestation on the body of the victim. The non-consented administration of toxic or psychotropic substances or the psychological debasement[39] arising from a violent situation are the best examples to illustrate the historical and judicial development of the offence, that has clearly grown in a way that

[35] Organic Law 1/2015 was addressed to comply with the legislative "minor intervention" principle. SCJ of the 13th June 2000 (ECLI:ES:TS:2000:8451) already indicated, in its 2º ground and even before the adoption of the reform, that such principle was addressed to the legislator, not to the judge, and therefore, the non-intervention principle should not be used as an instrument to justify nor challenge any kind of judicial determination. Although it might be influenced by it, *"the principles of legality and in dubio pro libertare will guide the judge's decision and, within the limits of the law, he shall decide".*

[36] The official English translation of the Spanish Penal Code, provided by the General Technical Secretariat of the Ministry of Justice in 2013, uses the terms *"bodily harm"* and *"injuries"* indistinctly, as pure synonyms, and so will the present thesis. Available in: https://www.legislationline.org/download/id/6443/file/Spain_CC_am2013_en.pdf

[37] Some parts of the translation have been adapted to comply with the wording in force of the article, after the modifications implemented by OL 1/2015.

[38] This rationale was upheld by the same Court in its Judgements 376/2003, of the 10th March, and 1400/2005, of the 23rd November.

[39] The High Court has even appreciated psychological harm as independent, autonomous offences with its own differing sustantivity from the principal crime being heard, in cases such as Judgement 167/2012 of the 1st March, ECLI:ES:TS.2012:1796.

outstrips the traditional enlightened conception in which bodily harm was vested[40]. In fact, this tendency to a more generic approach of harm has encouraged legal operators to interpret the conception of injury as protecting individuals even from the aesthetic consequences deriving from violent occurrences. Regretfully, this progressive phenomenon also presents its own drawbacks: the enlargement of the criminal figure to behaviours alienated from the physical sphere complicates the establishment of the causal link between the action, the actor and the result, which is needed to allocate responsibility under the standards of the theory of objective imputation, and for that reason, determining guilt can become (even) harder in such situations. Being aware of this issue, both legislator and jurisprudence have made a comprehensible attempt as to establish a close set of *sine qua non* requirements that must be present ito appreciate bodily harm:

- The presence of a harm, impairment, detriment or deterioration on the victim, imputable to the actor, even without the concurrence of physical power.
- Qualified first aid: encompassing the acts of diagnosis, soothing measures and healing procedures that require minimum sanitary intervention, with or without the need of additional monitoring. This kind of assistance is addressed to obtain an initial treatment promoting a fast rectification of a *"prima facie"* non-serious harm: the cleaning of an open wound or the prescription of pain-killers fall into this spectrum.
- Medical or surgical treatment: going beyond the scope of qualified first aid, it refers to a more exhaustive arranging of a healing formula that might include, although not necessarily, a surgical intervention. The use of steri-stripes or analogous adhesive procedures[41] might well be the most illustrative example of such treatments, characterised by their longer endurance in time[42] and empirical equivalence to certain interventions (e.g. stitching). As for surgical interventions themselves, Judgement 732/2014 of the Supreme Court[43] does not hesitate to state that such procedures, no matter major or minor, do not include the diagnosis, preparation, exploration and recovery of the patient, which would then fall within the section mentioned above. In a similar direction, Judgement 58/2015[44] of the same Court delves into the radical difference between such treatments and medical surveillance that, as pointed out before, falls mainly under the scope of qualified first aid. Regardless whether surgical or medical treatment are needed, the main issue that will trigger any Court's acquiescence to acknowledge the existence of such treatments, and by extension, the recognisement of a bodily harm, is the objective need of the treatment itself as to accomplish the healing of the injury. In this regard, Judgement 546/2014[45] of the Supreme Court constitutes the absolute cornerstone, when proclaiming that:

> *"the necessity of a medical treatment or intervention which is referred to by art. 147, to be summed up to qualitative first aid, must respond to grounds deriving from the nature and the characteristics of the harm itself in relation to the criteria that the medical science considers applicable in analogous cases. If using those criteria, medical and/or surgical treatments are considered to be necessary after qualified first aid, a bodily harm offence must be recognised (...) with independence of what has happened in the case being heard, as the aggrieved might have preferred to attempt healing without such interventions, or even attending other individuals which are not professionally qualified for offering such assistance. (...) Leaving the observation of bodily harm to the factual existence of medical or surgical treatment would be*

[40] E. Echeburúa, *"How to Ponder Psychological Harm and Emotional Aftermaths in Victims of Violent Offences"*, Clinic, Legal and Forensic Psychopathology (2005), Vol. 5, p. 60. Available in: https://www.masterforense.com/pdf/2005/2005art3.pdf

[41] Intended to accelerate the healing procedure. There is a whole jurisprudential line of the Supreme Court emphasazing the nearly surgical character of adhesive, approximative and closing procedures that do not require surgical intervention, starting with Judgement 1441/1999 of the 18th October, and maintained throughout Judgement 1481/2001 and, more recently, Judgement 519/2016 of the 15th June, ECLI:ES:TS:2016:2898.

[42] Immobilization with plasters or slings is also generally considered to be medical treatment due to the clear endurance of the procedure in pursuit of a fast and succesful healing, being such procedures objectively required in light of the nature of the harm, as enshrined in Judgements 1392/1997 of the 19th November and 432/1999 of the 22nd March of the Supreme Court of Spain.

[43] Judgement 732/2014 of the 5th November, Supreme Court of Spain, ECLI:ES:TS:2014:4453.

[44] Judgement 58/2015 of the 10th February, Supreme Court of Spain, ECLI: ES:TS:2015:418

[45] Judgement 4083/2014 of the 9th July, Supreme Court of Spain, ECLI:ES:TS:2014:4083.

> *giving the victim the power to choose whether the challenged behaviour is an offence or a misdemeanour'*[46].

It might appear redundant to repeat something that has already been brilliantly exposed in the decision above, but its practical transcendence will justify some further digging into the question. As the quote points out, the medical treatment or intervention must be objectively required, extending its effects in a double sense. Firstly, it is not enough for the appreciation of bodily harm to go to a physician and seek treatment, nor it is acceptable to persuade a professional to perform such actions over the injury in order to proclaim bodily harm. Secondly, it is absolutely irrelevant if, as the case may be, the victim decided to obviate the treatment, to choose another or simply attended other professionals not specifically qualified in the health sphere. The objective character of the treatment makes any subjective feature of the factual reality irrelevant, as those cares or procedures that have taken place must rely on what's diligent, foreseeable and reasonable according to the long-standing tradition and deontological rules by which Medicine and its professionals are governed[47]. Accordingly, whenever a jurist wonders if a certain medical behavior should fall into this scope, he will search, at an early stage, for the intervention which is foreseeable according to the applicable deontological rules and, if any doubt still arises, the use of precedents and the ponderation of analogous situations will light up the way. The level of objectivity which has been implemented is such that, as surprising as it may seem, it is absolutely irrelevant whether the physicians, nurses and practitioners who gave the victim the qualified first aid are the same ones who actually perform the prescribed treatment and/or surgery: as all of them are ruled by the same set of deontological principles, the law understands that, leaving personal differences apart, a diligent action should always go in the same or a similar direction.

Withal, real life tends to push, challenge and tighten the theory, and as it could not be other way, all the requirements described above still propose pragmatical complexities. For that very reason, the legislator, within the deep criminal reform inherent to OL 1/2015, decided to turn the old bodily harm misdemeanours into privileged types of injuries, criminally justifying a lower punishment in the lack of fulfilment of some of the requisites[48] of the basic type of art. 147(1)[49]. This slight tip of the balance towards the criminal regulation of any activity involving bodily harm enshrines the protectionist character of the law in regards to the preservation of physical and moral integrity[50] or, as some authors consider more appropriate to this day, the general wellbeing of any individual. As a matter of fact, it is difficult (and up to critique) to assure that the objective conception of the bodily harm offence responds strictly to that of a result crime, taking into account that, even if with a lesser penalty, conducts which are prone to cause injuries are punished under subsection 3 of art. 147. This provision does not require an specific harm or result for the crime to be appreciated.

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[46] The Judgement was passed before the reform of OL 1/2015, and therefore, still allows for the difference between the basic offence of bodily harm and the misdemeanour.

[47] The Deontological Code, published by the General Council of Official Colleges of Doctors in 2011, contains the basic regulations regarding medical ethics which are applicable to/by (and expected from) any qualified professional. Available in: https://www.cgcom.es/sites/default/files/codigo_deontologia_medica.pdf

[48] Article 147.2 of Organic Law 1/1995, of the Penal Code.

[49] Judgement 463/2014 of the 28th May, Supreme Court of Spain, ECLI:ES:TS:2014:2264, is the best illustration of quite a common situation: a behaviour causing an injury, needing qualified first aid but without complying with the requirements of medical or surgical treatment, and therefore, punishable under subsection 2 (privileged offence), but not subsection 1 (basic offence).

[50] Undoubtedly derived from the constitutional mandate of art. 15 of the Spanish Constitution.

Even so, in relation to the present case study, we should mention that, in consideration of the seriousness of the facts and its consequences, privileged offences can be of very little help in Rose's situation. In contrast with those more benevolently punished crimes, arts. 149 and 150 embody the aggravated kinds of woundings erected over the basic type of art. 147(1). Despite the existence of a native-derivative link in between the different types of injuries and the basic kind, it is clear that, as it was underscored within the paragraph dedicated to privileged types, the mere existence of a classification enshrines the existence of some critical differences that will make such qualification possible. The presence of qualified first aid followed by medical or surgical treatment continues to be the bedrock to appreciate bodily harm. Even so, aggravated types, as it will be explained hereafter, are characterised by the concurrence of a more specific or serious result. The injuries appreciated under arts. 149 and 150 are clearly defined and provided for legally, as being considered the most harmful and unlawful versions of the offence. Formally divided in very serious (art. 149) and serious (art. 150), both of the provisions describe, in quite a medical jargon, a series of alterations, malfunctions, deformities or damages to the corporal and/or psychic substance of the victim, being the result of flagrant violations of the most fundamental rules of cohabitation in society. Hence, they should be proportionally punished in accordance with the criminal disapproval of the conduct, weighing up the severity of the outcome.

Art. 149 of the Spanish Penal Code will be, without a glimpse of a doubt, the most significant provision in order to characterise Rose´s legal position after the accident. It is entirely and exclusively dedicated to extremely serious injuries, some of which can even anticipate death or significantly deteriorate quality of life, state of mind and personal independence. The article is further divided into two subsections. Only the first section, of a more extensive coverage, will be analysed in the present essay. The second provision, referring to genital mutilation, was introduced by OL 11/2003[51], and although presenting its own undeniable relevance, it will not transcend in Rose's case. Without further ado, art. 149(1) recites the following:

> *"Whoever causes to another person, by any means or procedure, to forfeit or lose the use of a major organ or limb, or a sense, or sexual impotence, sterility, serious deformity or to suffer a serious physical or mental illness, shall be punished with a sentence of imprisonment from six to twelve years".*

Thus, the literal wording of the article encompasses , to say the least, 4 different groups of extremely severe injuries which have been treated and developed by jurisprudence in a separate way among them, despite some of them being bound together for academic and professional reasons:

- Forfeit or lose of the use of a major organ, limb, or sense: the conduct which is being penalized here includes the amputation or absolute disablement of major organs, limbs or senses, or in other words, the irreversible loss of the inherent functional capacity which is attributable to the affected region. The consideration of "major" has been greatly debated and still continues to put judges in a delicate situation: the lose of an arm, hand, tongue, the auricular pavilion, nose and even the hymen has been already considered as extremely serious bodily harms. Nevertheless, the existence of adversarial judgements on certain body parts[52], further complicate the uniform application of law in this area. The position of the High Court in regards to the lose of a sense is worthy of mention: while some functional deprivations are subsumed by the major consideration of the organs which exercise such sensorial roles (as it is the

[51] Organic Law 11/2003 of the 29th September, of specific measures regarding citizen security, domestic violence and social integration of foreigners, introduced the second section of art. 149, being aware that (female) genital mutilation still remained (and remains) to be a cultural and religious tradition for some people, despite constituting a legally unjustifiable violation of a person's corporal substance. ELI: https://www.boe.es/eli/es/lo/2003/09/29/11

[52] The spleen has been considered both as principal and non principal organ in different Judgements, with no clear explanation to argument such distinction.

case with sight and hearing), the Court has been quite reluctant to acknowledge other types of sensory losses[53].

- Sexual impotence or sterility: firstly, sexual impotence refers to the incapacity to perform the sexual act, regardless the sex. When referring to sterility, both law and jurisprudence understand that it entails the complete deprivation of the capacity to procreate naturally, without mediating assisted-reproduction procedures or treatments.
- Serious deformity: constitutes the area of greatest judicial development of the article. At an early stage, serious deformity was considered in regards to the relation of the victim with others, and the transcendence that the harm could have in such involvement. This initial position is corroborated in the earliest legal definition of deformity, understanding it includes:

  > *"All kinds of physical irregularities of a visible and permanent nature that entail the defacement or ostensible hideousness to the plain eye, as well as those that include a corporal modification from which negative social and convivial effects can be derived"*

  Therefore, deformity will be appreciated whenever the entity and seriousness of the result exceed such definition, as stated by Judgement 396/2002[54] of the High Court. Nowadays, the Court has moved to a more *"state-of-the-arts"* understanding of deformity, which shifts the main focus of attention of the traditional term, allocated in the social and relational effects of the harm, to the consequences and personal transcendence that the disfigurement has for the victim itself, taking into account the consideration that the aggrieved has over his/her own body.
- Serious physical or mental illness: judicial operators understand that the seriousness of both psychic of physic ailments must be assessed according to the risk, the duration and potential reversibility[55], the inherent limitations which are derived from it and the severity of the treatment which is objectively needed.

In the author's view, the presence of a harm to Rose's bodily substance is undeniable. In fact, the exhaustive character of art. 149 in regards to extremely serious injuries is not sufficient to encompass the irreversible harm which was caused to her. In line with the entity and the seriousness of the injuries, it is not considered appropriate to analyse art. 150 of the Spanish Penal Code, which refers to the lose or forfeit of a non major limb, organ or sense. Tetraplegia is an irreversible condition that affects not only one, but a plurality of organs, limbs and senses, all of which should and actually are considered major in relation to the absolute lose of their inherent functionality. First qualified assistance was not only necessary, but performed *"in situ"* due to the jeopardy of Rose's state. Both medical and surgical treatment were also needed. Indeed, the several reanimations which were required to keep our protagonist alive on the way to the hospital could be classified as medical treatment, as no human would dare to doubt the objective necessity of such procedures to comply with the traditional deontological duty of Medicine: the preservation of life. The same rationale should be applied to the surgery which was executed upon her arrival, as if not for the procedure, Rose would be undoubtedly dead.

There is, nonetheless, one subjective element of indisputable transcendence that has not been analysed yet: the culpability of the actor. Until now, all the relevant provisions which have been described refer and punish active, desired and intentional behaviors, featuring a clear foreseeability of the result and the unconditional harmful desire of the perpetrator. These circumstances are, however, not met in Rose's case. In strict criminal theory, a person's guilt

[53] In Judgement 80/2015 of the 6th February, Supreme Court of Spain, ECLI:ES:TS:2015:543, regarding the complete lose of touch in the hands, the Court only appreciated the forfeit as serious because of the victim's blindness condition, understanding that the sense of touch was further developed and necessary to be able to act independently.

[54] Judgement 396/2002 of the 1st March, Supreme Court of Spain, *"aftermaths should have enough quantitative and/or qualitative entity to significantly modify pejoratively the victim's appearance"*.

[55] Judgement 242/2013 of the 1st April, Supreme Court of Spain, ECLI:ES:TS:2013:1575, embodies the Court's position regarding the possibility or actual revocation of the illness, stating that the chronification of the condition is a highly relevant factor to appreciate the seriousness of the harm.

must be regarded from different perspectives depending on the concurrence of the following subjective elements:

- Intellectual element, which refers to the capacity of the author to understand the outcomes of his behaviour or the values which are at stake when consciously deciding to disregard legality.
- Volitive element, pertaining to the actual desire of the offender to cause the unlawful result.

It does not transcend if the causative agent of the accident had the mental capacity to understand the consequences of the intake of toxic substances and its effects on driving. It is also not specified whether he had a valid driving license or was controlling a vehicle of his own. Nevertheless, it seems reasonable to assume that the offender did have the capacity of understanding the potential implications of his behaviour, as the act of driving already requires a certain level of intellectual awareness, eradicating the possibility of arguing any kind of lack of capacity or understanding. Accordingly, the existence of a valid license and the ownership of the car will only constitute satellite elements which will be part of a bigger scheme, in which the focal point will be straightly fixed in the harm being caused. Furthermore, it is also logical to understand that, while considering the intake of drugs, the author could have had contemplated the existence of a potential risk and even acknowledge the unlawful character of his conduct[56]. Even so, it becomes harder to assert whether, under the influence of such drugs, he could be aware of the violation of the duty of care which is inherent to any person driving a vehicle in such circumstances. Whatever the case may be, there is one certain fact to which this thesis should cling: it is unthinkable to believe that the author desired the final outcome or contemplated it as a possible result of his behavior, taking into account that such attitude led to his decease. Hence, the crime being analysed lacks the clear intentional character which is needed to appreciate arts. 147(1), 149 or 150.

It will be necessary to jump back to the very first pages of the Spanish Penal Code in order to throw some light over the culpability of the actor. Art. 5 of the Spanish Penal Code[57], commonly used to enshrine the inexistence of a penalty without intention or negligence, consecrates one of the maximum epitomes of the application of the principle of legality into criminal law. In this particular instance, the legal recognisement of two types of authorship opens the door to the regulation of offences which are not desired or intended by the perpetrator. Article 10 of the same legal text[58] moves towards the same direction. Accordingly, together with the regulation of intentional offences, the Spanish Penal Code also regulates the negligent version of certain types of offences[59]. Generally speaking, imprudences are academically considered to be crimes of result, and therefore, the mere performance of an imprudent behaviour will not give rise to penal liability: to appreciate negligence, it must be concreted in the disapproved, unlawful result which is attached to the description contained in the Code and, on the flip side, this result must be the unequivocal outcome of the negligent conduct being challenged.

Last, but not least, it is necessary to mention, even if briefly, the possibility of considering Rose´s depression as an independent offence under the 4th element of art. 149(1) of the Spanish

[56] Constituting a voluntary *"actio libera in causa",* and consequently ostracising the possibility of arguing the inimputability of the subject.
[57] *"There is no penalty without intention or negligence".*
[58] *"Offences are intended or negligent actions or omissions punished by law",* another introduction of the legality principle into the most remarkable regulatory document of criminal law in Spain.
[59] Not all the crimes punished in the Penal Code include a prevision condemning the imprudent type. It is critical to mention that all those imprudences which are not expressly regulated within the Code are exempt of criminal responsibility.

Penal Code, dedicated to serious mental or physical illnesses. The first thing to note down here is the medical consideration of depression as a severe medical disorder, acknowledged by WHO as the most relevant cause of disability around the globe[60]. National authorities are also aware of the issue, with public documents such as the National Health Survey of Spain of 2017 [61] revealing an affection rate that should settle the topic in the center of all measures regarding the future development of the National Healthcare System. The already mentioned 4th component is expected to protect both physical and psychological illnesses in the same way. Nonetheless, the key matter for any Court to include depression within the scope of this provision of the Spanish Penal Code trascends the mere recognisement of depression as a severe disorder: Against this background, in the author's view / we considerat that Rose should be able to prove the separate, self-standing and autonomous entity of such result in regards to the physical injuries, and due to the progressive development of the mental affection and the undeniable link existing between those two, such craving is very likely to be dismissed.

1.1.1. Serious Imprudent Injuries of art. 152(1) in light of art. 379 of the Spanish Penal Code.

Art. 152, entirely dedicated to the negligent version of bodily harm, is formally divided into two subsections. This substantial division is legally motivated by the same rationale which is generally followed to determine the seriousness of any reckless behavior: the infraction of the duty of care[62]. The conception of duty of care is closely related to that of the classical standards of diligence or prudence which have been extensively use in law since Roman times. In fact, the idea of duty of care does not differ enormously from the archetypes which are used within the Civil Code (hereafter, CC)[63] to serve as a guide of conduct, namely: articles referring to the administration of the goods of others commonly appeal to the fiduciary duty of "acting as a reasonable, good, prudent or diligent family man[64]" when making everything on a person's hand to avoid the production of a harm. Coming back to criminal law, it turns out that the legal rationale behind the idea of duty of care is not that different: firstly, there is a code of conduct, an expected behavior, a proper attitude which is objectively required and arises from the existence of a duty owed, in this case, to society as a whole. This reasonable behavior is expected from anyone accepting the risk of performing certain mundane activities that, despite their day-to-day character, have a great potential to cause harm. Driving is, hands down, one of those conducts. Whenever performing such actions, a risk is created, but law tends to work under a fiction in which the concept of duty of care should, at least in theory, eliminate the risk and facilitate the administration of justice[65]. Withal, if someone decides to breach that expected

[60] WHO, *"Depression",* Fact Sheets, updated the 30th January 2020, available in: https://www.who.int/news-room/fact-sheets/detail/depression

[61] Abbreviated ENSE in Spanish, available in: https://www.mscbs.gob.es/estadEstudios/estadisticas/encuestaNacional/encuestaNac2017/SALUD_MENTAL.pdf

[62] J.Pérez Tirado, *"The reform of the Penal Code by OL 2/2019 regarding imprudence in driving motor vehicles and scooters and sanction for abandonment the accident site: a social movement claiming for Justice"*, Traffic Law, LEFEBVRE, available in: https://elderecho.com/la-reforma-del-codigo-penal-por-lo-2-2019-en-materia-de-imprudencia-en-la-conduccion-de-vehiculos-a-motor-o-ciclomotor-y-sancion-del-abandono-del-lugar-del-accidente-un-movimiento-social-en-busca-de

[63] Royal Decree of the 24th July 1889, by which the Civil Code is published, ELI: https://www.boe.es/eli/es/rd/1889/07/24/(1)/con

[64] Article 1903 of the CC, in its very last paragraph, clearly indicates that *"the responsability that is dealt with in this article will cease to be whenever the persons mentioned above are able to prove that they used all the diligence of a good family man to prevent the production of the harm".*

[65] This fiction is thought to facilitate the comprehension of a very complex legal rational to the average citizen, which can be simplified to *"If you make everything that is expected or required (being diligent, prudent, careful) from you, you won't incur in criminal liability".*

conduct and provokes an unlawful result protected under criminal law, he falls outside the protection which is given by the standards of diligence and, therefore, must be liable for that breach. Accordingly, assessing the seriousness of any negligence encompasses the consideration of the foreseeability of the potential risk which has been created by the violation and its inherent lack of diligence, in relation to the specific duty of care that was owed by the perpetrator[66]. This argumentation is upheld by Judgement 335/1982 [67]of the Supreme Court of Spain, describing the signature features of any negligent action or omission.

Serious, imprudent bodily harms follow that scheme as to allocate criminal responsibility whenever the offender, following a conduct which goes against such standards, specifies the behavior in the perpetration of the unlawful result being protected by the penal provision in question. On this occasion, the result which is being punished under art. 152 of the Penal Code is the undesired causation of bodily harms. As mentioned earlier, the article is divided in two sections depending on the seriousness of the negligence[68], and for reasons which will be discovered hereafter, the present thesis will only focus on part 1 of the article.

Article 152(1) of the Spanish Penal Code states the following:

> *"Whoever causes any of the injuries foreseen in the preceding articles due to serious negligence shall be punished:*
>
> 1. *With a sentence of imprisonment from three to six months or a fine from six to eighteen months, in the case of the injuries described in article 147(1).*
> 2. *With a sentence of imprisonment of one to three years, in the case of the injuries described in article 149.*
> 3. *With a sentence of imprisonment of six months to two years, in the case of the injuries described in article 150.*
>
> *When the acts referred to in this article have been committed using a motor vehicle or scooter, the punishment of deprivation of the right to drive motor vehicles and mopeds for a term of one to four years shall also be imposed. For the purpose of the present article, driving in concurrence of any of the circumstances provided for in article 379 will determine the serious nature of the negligence, as long as such concurrence had determined the the production of the result".*

And on its part, art. 379 recites:

> *"1. Whoever drives a motor vehicle or a moped at a speed that exceeds the speed permitted by law by sixty kilometres per hour in urban streets, or by eighty kilometres per hour on non-urban roads, shall be punished with a sentence of imprisonment from three to six months, or with that of a fine from six to twelve months, or with that of community service from thirty one to ninety days and, in all cases, with that of deprivation of the right to drive motor vehicles and mopeds for a term exceeding one and up to four years.*
> *2. The same penalties shall be applied to whoever drives a motor vehicle or moped under the influence of toxic drugs, narcotics, psychotropic substances or alcoholic beverages. In all cases, whoever drives*

[66] Judgement 211/2007 of the 15th March, Supreme Court of Spain settles this seriousness test, despite being already being in use for quite a long time.

[67] Judgement 335/1982 of the 13rd March, Supreme Court of Spain, stating the integrating elements of negligence that must be distinguished:

- An unintentional human action or omission.
- An objective duty of care, bearing in mind "*that distraction and/or mere neglect themselves constitute the core element of guilt within the imprudent type and affect its components (…) as the subject should have had foreseen the consequences of his conduct".*
- The harm of a third party's legal interest.
- A causality link in between the voluntary action or omission and the harmful result.

[68] Serious Negligence (art. 152.1) or less serious negligence (art. 152.2). A bodily harm resulting from a minor negligence will not be criminally considered.

with a rate of alcohol in expired aire exceeding 0.60 miligram per litre, or a rate of alcohol in the blood exceeding 1.2 grams per litre, shall be sentenced to those penalties".

The pragmatical consequences for the present analysis are crystal clear: the person causing the accident should be accused of an offence of serious, negligent bodily harm of art. 152(1) of the Penal Code, arising from Rose's injuries, which must be framed within the result described in art. 149, regarding very serious injuries. Section 2 of art. 152 is completely irrelevant to the case as the concurrence of the circumstances of art. 379 (driving under the influence of both alcohol and drugs) of the same document force the consideration of both harmful results, that of Rose and that of her mom, as serious negligences. Clare's injuries will be imputable to the offender in case they comply with art. 147(1): objectively requiring qualified first aid and medical or surgical treatment. If any of those two requirements is not met, Clare's injuries' will be scot-free, as woundings contemplated in art. 147(2) (without the need of medical or surgical treatment) are not punishable in their imprudent version.

As bitter as it may be, the legal reality prior to OL 2/2019, although not altering Rose's legal standing[69], would substantially change Clare's. With the adoption of OL 1/2015 and the decriminalisation of imprudent misdemeanours, some imprudences, even when constituting serious or very serious administrative infractions under arts. 76 and 77 of Legislative Decree 6/2015[70], were not appreciated to be of enough entity as to standardise the administrative qualification to its criminal consideration. Consequently, serious injuries committed while performing an administratively severe infraction were judicially characterised as less severe or minor offences, and therefore left unpunished. The situation was so critical that, already obviating the popular movement of multiple associations of victims asking for a reform of an unquestionable mistake, the Annual Report of the Public Prosecution's Office enshrined the bleeding and unstable condition of the operation of law regarding road safety when expressing that:

"it is alarming to see how the Investigative Courts dismiss pretensions (…) even when there are solid grounds that point out a serious negligence, such as in collisions with pedestrians, without proceeding to a minimum investigation bringing some light as to the pure legal severity of the negligence being heard"[71].

To lay all cards on the table, it must be said that OL 1/2015 was promoted and upheld by the Public Prosecution's Office, as understanding that it was necessary to move minor offences of irrelevant criminal transcendence to other fields of law in order to accomplish a more efficient functioning of the penal courts. Nevertheless, the pragmatical inapplicability of less severe, imprudent injuries of art. 152(2), together with a general malpractice on the criminal consideration of negligences that, even without constituting an outraging breach of the duty of care, had catastrophic results for the victim in question, condemned this unfortunate attempt of reform to exile. These facts will even become ironic to the the reader when realising that some of the provisions of OL 1/2015 directly contravened the Office's position, as stated in some of its circulars[72].

[69] Serious, imprudent bodily harms were already punished by the original wording of OL 10/1995 of the 23rd November, of the Penal Code.
[70] Implementing the consolidated version of the Law on Traffic, Circulation of Motor Vehicles and Road Safety
[71] Annual Report of the Public Prosecution's Office of 2017, Chapter III, Point V, Road Safety. Available in: https://www.fiscal.es/memorias/memoria2017/FISCALIA_SITE/capitulo_III/cap_III_5.html
[72] Circular 2/2011 of the 17th November, on criteria for uniform, specialised performance of the Prosecution Service on Road Safety, FIS-C-2011-00010 , contained provisions which actually supported the creation and

1.2. Civil consideration of the facts.

The obligation to repair a harm derived from the commission of a criminal offence is not *"alien"* to the Spanish Penal Code: it dedicates the integrity of Title V to the explanation of the potential civil responsibility that may arise from the commission of a wrongful conduct. Article 109 subsection 1 formally proclaims, for the first time within the document, the obligation to ammend any damage which is considered inherent to the performance of an offence[73]. This responsibility will be further determined as restitution, reparation or compensation[74] in accordance with arts. 111 ff. However, no mention is made in relation to the guilt of the offender. Quite surprisingly, article 1902 of the Civil Code[75] refers to the possibility of an unintentional action or omission giving rise to civil responsibility, paving the way to a potential claim for damages against an offender that did not desire nor behold the final outcome of his reckless conduct. In a more suitable way to the case being analysed, art. 382 of the Penal Code refers to the express punishment of any arising civil liability when committing an offence under the circumstances which are provided for in arts. 379, 380 and 381. In virtue of everything that has been exposed, it is evident that the perpetrator of the accident leading to Rose's condition will undoubtedly have to respond for the harms and injuries which were caused by his negligence while driving under the concurring circumstances of art. 379.

The key question here, as the Regulation of the Compulsory Civil Responsibility Insurance in the Circulation of Motor Vehicles[76] indicates, will be the consideration of the collision as a *"traffic event"* under the legal and jurisprudential requirements[77]. On this consideration depends the use of all the instruments which have been enacted by the legislator to protect traffic victims, which include a very specific, objective and legally levied formula to calculate the potential compensation that can be claimed in concept of damages according to the physical or psychological harm which is imputable to the catastrophic event.

Back in the academic field, *"traffic event"* has been traditionally defined as an *"eventual incident produced while driving in which some subjects of circulation interact in a way that causes death or injuries to people or damages to objects"*[78]. Article 100 of Law 50/1980, of the Insurance Contract[79] deals with a very similar definition when stating that *"it is understood as accident any bodily harm deriving from a violent, unexpected and external cause which is*

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effective application of the less severe kind of negligent bodily harms, and promoted the punishment of those imprudences that had serious negative results for the victim. The only support which is given to the disappearance of the old misdemeanours, of a strict procedural and theoretical nature, lies on the lack of criminal transcendence of either the behavior or the result of some of those minor offences, and as stated by the Prosecution Service at a later stage, *"no action having considerable negative results as a consequence of a criminally projected behaviour should be left unpunished".*

[73] Article 109.1 of the Penal Code: *"The execution of an action described by law as an offence forces to compensate or restitute the subsequent harms and damages in the terms provided by law".*

[74] Article 110 of the Penal Code establishes the three possible ways to compensate the harm.

[75] *"Whoever, by action or omission, harms another, mediating guilt or negligence, will be compelled to repair the harm".*

[76] Royal Decree 1507/2008 of the 12th September, approving the Regulation of the Compulsory Civil Responsibility Insurance in the Circulation of Vehicles, ELI: https://www.boe.es/eli/es/rd/2008/09/12/1507

[77] Judgement 556/2015 of the 19th November, Supreme Court of Spain, quoting the Judgement of the 4th September of 2014 of the Court of Justice of the EU, understands that *"any normal and expectable use of the vehicle should be considered to fall within the concept of traffic event, even when there is no physical movement involved".* Available in: https://curia.europa.eu/juris/document/document.jsf?docid=157341&doclang=ES

[78] J.S. Baker, L. B. Frickr, *"Traffic accidents investigation manual",* 1986, Ed. Northwestern University Traffic Institute, implemented in 1970 by the Directorate General of Traffic (DGT).

[79] Law 50/1980 of the 8th October, of the Insurance Contract, ELI: https://www.boe.es/eli/es/l/1980/10/08/50/con

unrelated to the intentionality of the policyholder, producing a temporal or permanent incapacity or even death". From the combination of both of the definitions, subsequent laws have elaborated a "numerus clausus" set of requirements which must be appreciated to consider a random event of the circulation as an accident:

- The material element of the accident, which must be allocated to a subject encompassed within the definition of vehicle which is given under Annex I of Royal Legislative Decree 339/1990[80]: *"any device which is able to circulate on the ways and fields described by art. 2 section 1 of Royal Decree 1507/2008"*
- The space element of the accident, framed in the definition of art. 2 section 1 of Royal Decree 1507/2008: *"(...) including garages or parkings, public and private ways which are suitable for circulation, urban and non-urban, as well as those that, without being enabled as such, are commonly used by the public"*. This definition is considered to be quite broad, as it includes any road with the exception of those to which the access is factually impossible[81]

Once the foreclosures of art. 2 subsection 2 of the Regulation[82] have been examined, and bearing in mind the express reference which is made in art. 2 subsection 3 of the same text, assuring that *"the use of a motor vehicle in any of the other ways described by the Penal Code as offences against road safety, including the premise of art. 382, will be held as traffic events"*, there is no room for doubts: Rose should and will be able to claim damages in accordance with the predetermined legal framework which will be explained hereafter.

RLD 8/2004[83] proposed an objective system of tables and scores in which the injuries arising from a car accident were assigned an specific rating according to their seriousness[84]. This punctuation was translated into an economic compensation by a later table, which modified the pecuniary redress depending on the age of the victim[85]. Nevertheless, this system was severely criticized, as it failed to provide with an adequate compensation which could foresee the future medical expenditures and factual needs arising from the harm. Law 35/2015 [86] made a praiseworthy attempt in order to modify this unfair situation, that did not have in mind all the expenses and/or loss of profit that could be derived from the injury itself, not just to the victim suffering from it, but also to the people which are left in charge to safeguard his interests: it incremented, on average, a 35% of the monetary compensation which would have been granted under the previous evaluation system, and furthermore, introduced a wide range of provisions that allowed to claim not only the present harm at the time of the consideration of the case, but also the possible future needs deriving from those sequels. Certainly, this law opened the door for many victims, that from 2016 on, could actually claim harms, injuries and argue necessities that were not included in the previous system.

[80] Royal Legislative Decree 339/1990 of the 2nd March, passing the consolidated version of the Law on Traffic, Circulation of Motor Vehicles and Road Safety, ELI: https://www.boe.es/eli/es/rdlg/1990/03/02/339/con . Not in force, although subsection 3 of art. 1 of Royal Decree 1507/2008 adopts the concepts contained in Annex I of the text.

[81] M. A. de Dios, *"Some questions on Civil Responsibility of the Vehicle: the concept of Accident or Traffic Event and Motor Vehicle as the Main Elements of th System"*, Universidad de Salamanca.

[82] Of Compulsory Civil Responsiblity Insurance in the Circulation of Motor Vehicles, ibid 79.

[83] Royal Legislative Decree 8/2004 of the 29th October, passing the consolidated text of the Law on Civil Responsibility and Insurance in the Circulation of Motor Vehicles, ELI: https://www.boe.es/eli/es/rdlg/2004/10/29/8/con

[84] Table 2.A.1 or Medical Table, ibid 86.

[85] Table 2.A.2 or Economic Table, ibid 86.

[86] Law 35/2015 of the 22nd September, reforming the method for evaluating personal damages caused in traffic accidents, ELI: https://www.boe.es/eli/es/l/2015/09/22/35

1.2.1. Potential Claim for Damages under Law 35/2015.

As the wording of the case indicates that the accident happened "several years ago", it is reasonable to state that, if this period did not exceed 5 years, Law 35/2015 could be applicable. According to the system which was explained above, the possible claim for damages that the perpetrator could be facing is the following:

- In concept of anatomic-functional aftermaths of table 2.A.1, the injury of tetraplegia from C5 to C6 (01003), bearing in mind that Rose can feel the arms, but not move them[87]. The punctuation which is given to this injury goes from 96 to 98 points, and in light of table 2.A.2 and Rose's age, the corresponding compensation would fall in between 340.000 and 367.000 euros (ages from 1 to 25 years).
- In regards to personal particular damages included in table 2.B:
    - The particular damage of section 3, referring to the lose of quality of life derived from the physical aftermaths, and being unquestionably qualified as serious or very serious. The compensation will vary from 40.000 to 150.000 euros
    - The particular damage of section 4, regarding the lose of quality of life of relatives of the badly injured, from 30.000 to 145.000 euros.
    - The particular damage of art. 105, referring to moral aftermaths, up to 97.000 euros.
    - The restitution of any expenditure incurred in as a consequence of the injuries, including sanitary assistance or surgical procedures.
- As for the emerging harm[88] which could be appreciated, the following circumstances should be mentioned:
    - In light of table 2.C.1, up to 12.000 euros a year in concept of future medical assistance. Nonetheless, this compensation will not be perceived by Rose, but by the competent public health service in accordance with the law and the possible applicable covenants in the matter[89].
    - Up to 9.500 euros a year for the necessary rehabilitation in cases of tetraplegia[90].
    - Deriving from the indisputable lose of personal autonomy:
        - Up to 150.000 to adequate the house, in virtue of art. 118.1.
        - The need of a third person's assistance: according to table 2.C.2 and art. 123, the hours which should be compensated for people suffering from the tetraplegia of code 01003 go from 11 to 12 hours. Table 2.C.3 imposses a pecuniary compensation which will fall in between and 620.000 and 800.000 euros, depending on Rose's age at the time of the accident (estimated from 13 to 25 years, as to be of legal age nowadays).

Hence, the result of a simple numerical calculation determines that the civil responsibility that the offender could be facing, and that Rose should receive as a consequence of her injuries, will go from circa 1.030.000 to practically 1.800.000 euros, without counting the maximum of 12.000 euros a year which will be transferred to the competent health service in concept of future medical assistance nor the costs that could have arose from the sanitary or surgical assistance which was needed to keep Rose alive. This amount can be partially or fully substituted, either by request of the parties to the judge or through mediation[91], for a life annuity[92]. To conclude, it is necessary to indicate that, if the previous score and table system ought to have been applied, most of the basic pecuniary rates would have been greatly diminished[93].

[87] Despite having the damage in C7, and bearing in mind the degenerative condition of the ailment.
[88] Table 2.C., ibid 86.
[89] Art 114, ibid 86.
[90] Art. 116.4, ibid 86.
[91] Following the mediation procedures established by Law 5/2012 of the 6th July, of Mediation in Civil and Commercial Matters, ELI: https://www.boe.es/eli/es/l/2012/07/06/5
[92] Art. 41, ibid 86.
[93] The old top for the injury of tetraplegia, according to the age which was used for calculation purposes, would be 340.000 euros, the exact amount allocated to the new minimum threshold.

1.3. Jurisdiction to hear from the case.

The Law of Criminal Procedure [94] contemplates the birth of both criminal and civil responsibility as a consequence of a single unlawful conduct: art. 100 CrimPL states that *"a penal action arises from every offence or misdemeanour, and a civil action can also arise to restore the object, repair the harm or compensate the damages caused by the punished behavior"*. Such actions, civil and criminal, *"may be exercised jointly or separately",* although the initiation of a separate civil procedure will not be possible until the criminal action has been ascertained through a definitive judgement. To exercise the civil action on a separate procedure, the claimant *"must give up or expressly put apart such action as to be able to exercise it once the criminal trial is over[95]"*. The reader might be already tempted to assure that, in accordance with the legal frame settled above, it is for the Investigative Courts and, at a later stage, for the Penal Courts, to hear from both actions.

Even so, reality turns out to be more difficult than that: article 115 of CrimPL states, in a similar manner to article 130(1) of the Penal Code, *that "penal responsibility ends with the decease of the offender"*. That is not to say that the offence does not exist anymore, but for mere pragmatical reasons, the subsequent punishment won't be imposed, following the criminal personality principle. As diligences cannot be open in regards to a person which is already dead[96], the criminal way is completely inefficient for the case being analysed.

Nevertheless, the same art. 115 of CrimPL later recites that *"(...) the civil action subsits towards his heirs and successors, being exclusively exercisable before the civil jurisdiction and in the civil way"*. In light of articles 45[97] and 52(9)[98] of the Law of Civil Procedure[99], it must be stated that the competent Court to hear the case will be the First Instance Court of the judicial district in which the accident took place. The subsequent civil action will not be addressed to the perpetrator of the negligence, but to his heirs[100], that despite not mediating in the production of the result, may agree to the ill-fated heritage left by the actor[101] when accepting his legacy. Even if repudiating the succession (both rights and duties) in virtue of art. 1008 of the Civil Code, or simply not manifesting on the matter, art. 1005 of the same text would vest Clare with the possibility of *"(...) asking the Notary Public to communicate the heirs a term of 30 clear days to either accept the legacy expressly or, in the case they do not manifest their will, accept it presumptively"*, finding new subsidiary heirs and successors or forcing the actual ones to make a decision. If those wouldn't be known or would refuse to appear in the civil proceedings, the process would still go on, declaring the defendant *"in absentia"* in accordance with art. 16 of the CivPL.

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[94] Royal Decree of the 14th September 1882, by which the Criminal Procedure Law is approved, ELI: https://www.boe.es/eli/es/rd/1882/09/14/(1)/con

[95] Article 112, ibid 94.

[96] And if they would be open, art. 637.3, ibid 94, would force the judge to immediately dismiss proceedings.

[97] *"it is for the Courts of First Instance to hear (...) all the civil matters that, by express legal provision, are not attributed to other courts",*ibid 99.

[98] *"whenever a compensation for the damages arising from a traffic accident is being claimed, the competent court will be that of where the events took place",* ibid 99.

[99] Law 1/2000 of the 7th January, of Civil Procedure, ELI: https://www.boe.es/eli/es/l/2000/01/07/1/con

[100] In accordance with his will or the applicable norms of the Civil Code (arts. 913, 915 ff).

[101] Judgement 230/2014 of the 7th May, Supreme Court of Spain, ECLI: ES:TS:2014:1769.

1.4. Punishment.

Being the potential claim for damages already explained in part 1.2.1. of this dissertation, the present section will exclusively analyse the criminal punishment which would be applicable to the commission of the conduct and the perpetration of the results described in the case study.

Thus, Rose's injuries must be punished as serious, negligent injuries under art. 152(1)(2º) of the Penal Code, with a sentence of imprisonment from one to three years, together with the deprivation from the use of motor vehicles and mopeds for a term of one to four years, as consequence of the circumstances of art. 379.

The author considers that if Clare's woundings would ever get to be appreciated, they would be punished under art. 152(1)(1º), as being the outcome of a negligent result linked to the type referred to in art. 147(1). In such case, the norms of art. 77 of the Penal Code would have a role to play in the determination of the punishment: *"(…) in the event that a single act constitutes two or more offences, (…) the punishment will be allocated in the superior half of the most serious infraction".* The link of the harmful results with the negligent conduct is out of question, specially if realising that both of them are of the same nature. As a result, the concurrence of offences will derive in the sentence of imprisonment from two years and one day to three years, with the application of the deprivation from the use of motor vehicles and mopeds for a term of two years, six months and one day to four years, as the circumstances of art. 379 are present in both cases.

Furthermore, the Judge deciding the case would have to *"impose, according to the seriousness of the offence, at least one of the following:*

- *Decommissioning or disqualification from public service or office.*
- *Special disqualification for the exercise of passive suffrage.*
- *Special disqualification for the exercise of an office, public charge, profession, craft, industry, trade, exercise of parental responsibility, guardianship, fostering, care or any other right, deprivation of the parental responsibility, if any of those would have had a link with the offence, which must be expressly established within the Judgement[102]".*

The duration of such accessory penalties will last from 1 to 10 years after the moment in which the imprisonment sentence is fulfilled according to the severe consideration of the imprudence. In virtue of art. 57(1) of the Spanish Penal Code, the Judge could also determine some of the measures of art. 48. Nonetheless, the negligent character of the analysed conduct makes it difficult to justify the enforcement of such procedures, as there is no real intention to harm the victim, and therefore, their imposition would constitute an unproportionate and inappropriate limitation of the rights of the reckless autor with no legal effective substantiation on the protection of the victim.

2. Analysis of the possibility of allocating responsibility on a subject which is dead before the start of the necessary diligences, and consequently, hold him accountable *"post mortem"* for the committed behaviors. How, in which cases and which types of responsibility can be transferred to others?

[102] Article 56 PC.

As already foreseen by the grounds used to argument the two previous sections of Question 1 of the case study, none of the responsibilities, criminal or civil, can be allocated to a subject, which is considered to be dead under the requirements of Annex 1 of Royal Decree 1723/2012[103]. When stating *"the latter died outright",* the own wording of the case study excludes the appreciation of any of those. Withal, it is necessary to make some observations, even if only addressed to further concretise what was already exposed.

Art. 115 CrimPL embraces the extinction of civil personality of art. 32 CC, already providing for subsidiary responsibility allocated in the heirs of the perpetrator. The successors of this *"peculiar type"* of inheritance will be determined, if possible, according to the offender's own will. If facing an *"abintestato"* situation, the general norms regarding succession and legacy (arts. 913, 915 ff.) contained in the Civil Code will determine who the subsidiary responsible is. In both cases, the current legal framework relies on a vast and well thought range of actions, procedures and rights which allow the victim, in this case, Rose, to enforce the civil liability against the appropriate successor. The quality of this legal machinery was already enshrined by the High Court of Spain in, among others, Judgement 360/2013[104], of certain resemblance to the facts being examined. In addition, it is important to note down that art. 117 PC refers to the subsidiary responsibility which is due by certain insurance companies to their policyholders when facing civil responsibility. This duty to respond in behalf of its clients will go up until the limit which is established in the policy or, in the absence of such, to the legal standard settled down by art. 4 subsection 2 of the RDL 8/2004[105], adapting those amounts to the European requirements[106]. This would open a brand new door: the option of the car insurance having to respond in behalf of the offender. To start, the insurance company must cope with all the arising civil responsibility of any traffic incidence which is encompassed by the already known concept of circulation, unless the policy states the opposite. However, this initial payment which would have to be made by the insurer to Rose will fall within the scope of art. 10 subsection a) of the same text, recognising the company's *"right of recourse",* in virtue of which, *"driving under the influence of alcoholic beverages, toxic drugs, narcotics or psychotropic substances"*, it would be able to claim the upfront payment to the legal heirs of the perpetrator, under the exact same grounds which were explained in regards to inheritance and subsidiary transmission of responsibility.

The situation becomes even harder, if possible, when bringing to the table the idea of allocating penal responsibility to a deceased. Arts. 100 and 115 CrimPL, together with art. 130(1º) PC ostrasize such possibility at its mere consideration. However, it is of remarkable interest to legally wonder about the *"raison d'être"* underneath the existence of such precepts. Guilt, prosecution, indictment, they all are phases of the procedural stage of any criminal trial or investigation, which depend on a very fine line that ties the punished behavior, the unlawful result and the humane actor: the causal link. The identification of the perpetrator and later objective demonstration of the commission of the behaviour which is being imputed is the traditional and theoretical presumption which is needed to allocate criminal responsibility. This

[103] Royal Decree 1723/2012 of the 28th December, by which activities of collection, clinic use and territorial coordination of the human organs intended for transplants are regulated, establishing quality and security requisites, ELI: https://www.boe.es/eli/es/l/1979/10/27/30/con

[104] Judgement 360/2013 of the 1st April, Supreme Court of Spain, ECLI:ES:TS:2013:2252, also dealing with very serious, negligent bodily harm of art. 152.1 PC and the subsidiary responsiblity of certain subjects and entities, in this case, the Administration for the Execution of Criminal Sanctions (Prison Administration).

[105] Ibid 83.

[106] And more specifically, to the exigencies of Council Directive 84/5/CEE of the 30th December 1984, on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, ELI: http://data.europa.eu/eli/dir/1984/5/oj

principle, academically known as "penal personality" or "personal responsibility[107]", upholds the legality principle and introduces the legal certainty which is needed in a field such as criminal law, bearing in mind the "exceptional court" tradition and lack of judicial independence which was inherent in the pre-democratic Spain. Admitting the transmission of penal responsibility to a subject which is *"alien"* to both the behavior and the result would go against the very grounds of this principle, making all the foundations of our current criminal regulation shake and most likely break.

3. Describe in criminal law terms the help Rose is asking for, bearing in mind her personal circumstances, and determine the resulting punishment that may be imposed once the perpetrator is known. What would happen if the author is found 20 years after the case is closed?

Wondering about the possibility of offering the necessary aid and support that is needed by someone who cannot factually provoke his own death is wondering about assisted suicide. Assisted suicide is acknowledged by the Penal Code in its article 143, and actually establishes a significant difference in its punishment depending on the kind of help which is offered. Admittedly, this provision makes an exhaustive description of 3 different cooperative conducts in its sections 1, 2 and 3, which can be later modified by the circumstances settled in section 4. This last section embodies what has been academically considered as euthanasia, proving that, far from being a mere conduct related to death, it has more to do with the concurrence of very specific circumstances in both the suffering patient, the killing behavior and its executor[108]. These auxiliary conducts are described by the article in the following terms:

1. *"Whoever induces another to commit suicide will be sentenced to imprisonment from four to eight years.*
2. *Imprisonment from two to five years shall be imposed to whoever cooperates through necessary means to the suicide of another.*
3. *Imprisonment from six to ten years shall be imposed if such cooperation would arrive to the execution of death itself."*

Without limiting the foregoing, section 1 of the article will have no pragmatical relevance for the purposes of this study, as the wording of section 4 excludes the application of its attenuating effects whenever such aid is merely psychological. On the other hand, the examination of sections 2 and 3 turns essential before proceeding to the explanation of the circumstances included in section 4.

Under section 2, often named *"necessary cooperation to suicide"*, the described behavior includes any support which is asked for and objectively required for the commission of suicide, regardless this conduct implies an active, direct action on the victim or not. One of the best illustrators of this category would be the prescription, collection or facilitation of certain drugs or substances allowing the person to reach his aims. Therefore, the action in question should not directly lead to the causation of death, but undoubtedly free the way, and, as jurisprudence

[107] A. C. Riezu, *"The Constitutional Principle of Personal Responsibility for One's Action. Quantitative Manifestations",* ACPCP, Vol. LXII, 2009, p. 214/215. Available in: https://www.boe.es/publicaciones/anuarios_derecho/abrir_pdf.php?id=ANU-P-2009-10021100252_ANUARIO_DE_DERECHO

[108] M. M. Gómez, J. L. A. Tejuca, *"Judicial Consideration of the Problem of Euthanasia",* La Ley Gazette, Vol. 3, 1992, p. 861 ff. Available in: https://dialnet.unirioja.es/servlet/articulo?codigo=73944

requires, *"enable and determine the production of the suicide (...) as without that support, the suicide would not have happened"*.

Section 3, academically known as *"executive cooperation to suicide"* or *"homicide-suicide"*, encompasses the causation of someone's death at his request by a conduct which implies, up to some extent, the execution of a direct, active and determined act objectively prone to cause the decease of the requester. The only difference which can be appreciated in such case with a pure homicide is the desire and consent of the person being killed. Accordingly, this precept is used for the punishment of those conducts that do not comply with the requirements of section 4, as it will be explained later on. Nevertheless, it is important to note down that the difference for punishing an offence under section 3 or section 4 is not material, it does not lie in the behavior itself, but merely circumstantial[109]: it depends on the appreciation of a set of requirements that, in certain cases, have a considerable room for interpretation. Judgement 47/2002[110] points out this difference when assessing the validity of the consent which was given by the requester. That being said, section 4 of article 143 of the Penal Code reads as follows:

"Whoever causes or actively cooperates with necessary and direct behaviors to the death of a person suffering a severe, chronic and disabling ailment that would undoubtedly cause his death or a serious, irreversible condition causing constant and unbearable physical or psychological pain, by express, genuine and unequivocal consent of the latter, will be punished with a sentence one or two degrees under the punishments contemplated by sections 2 and 3 of the present article".

In accordance with the wording of the section, the attenuating effect which is inherent to its application will only be deployed if:

- There is unequivocal and express authorisation of the patient to cause his death. Apart from the consideration that derives from the express character of the consent, it must be expressed in a conscious and reflective way, hardening the path for those who, because of their condition or development, are not legally authorized to give valid consent under the requirements of the Civil Code[111], and more specifically, the General Law of Health[112] and the Basic Regulatory Law of the Autonomy of the Patient[113], which refer to the consent which can be granted over someone's own life and body. In this context, doctrine wonders whether *"living wills"* or *"advanced directive documents"* of Law 41/2002 can authorise euthanasic conducts and serve as valid consent for the purpose of this section. Generally speaking, it is held that if such documents are to be taken into account, the person granting the authorisation should always have the control of such consent until the very last moment, ostracizing the possibility of giving instructions for cases in which the grantor is deprived of consciousness.
- The patient suffers permanent and unbearable ailments which either anticipate death or significantly deteriorate his quality of life. The present requirement is strongly

[109] M. D. y García Conlledo, S. B. Burusco, *"Participation in Suicide and Euthanasia, an outline of its penal consideration in Spain"*, RNFP, Vol. 8, nº 79, 2012, p. 127. Available in: https://dialnet.unirioja.es/servlet/articulo?codigo=4136981

[110] Judgement 47/2002 of the 2nd February, Provincial Court of Almería, regarding the executive help given by the accused to an immigrant who requested his death due to the harshness of his personal situation.

[111] Arts. 199 ff.

[112] Law 14/1986, General of Health, ibid 15.

[113] Law 41/2002, Basic Regulatory of the Autonomy of the Patient and Rights and Duties in regards to Information and Clinical Documentation, ibid 13.

influenced by the development of human sciences, that have proven to be able to find treatments for mostly any possible illness that may be suffered. There is no objective requirement which forces the victim to run out of all the available scientific remedies in order to appreciate section 4. Nevertheless, the illness in question must have enough entity to either provoke an unbearable state of pain, to which there is no possible amelioration, or directly anticipate the moment of death. In both cases, the quality of life of the sufferer must be significantly diminished due to those sufferings. Thus, the severe affectation of the quality of life of the victim, in one way or the other, does constitute a requisite to appreciate this section, as enshrined by Judgement 85/2016[114], considering the section inapplicable due to the lack of seriousness and objective availability of a simple treatment for the illness of the requester.

- The executor cooperates with the necessary behaviors of section 2 or directly causes death under the requisites of section 3. The exclusive application to those sections responds to a pure pragmatical reason: whenever euthanasia is appreciated, it must be referred to a factual, human and physical impossibility to commit suicide, not just the fear or reticence to proceed to the killing once the decision has been taken. When considering such elements, dying with dignity should always refer to the peace and calmness that the method chosen by the patient provides him in the moment of death, and despite the available means may undoubtedly influence the requester, fear should never be the basis in which the patient motivates his request to die or his reasons to live.

Deciding on matters that have such a stong indisputable bond with death makes the debate of the self disponibility of life arise. The first thing that must be mentioned here is that the maximum act of self disposition of life, suicide, or better said, attempting suicide, is not punished under Spanish criminal law[115]. The Constitutional Court has reiterated in several judgements that the lack of criminal comdemn to suicide refers to reasons of pure criminal policy, being held as a manifestation of the rights to individual freedom and free development of the personality, more than the expression of the self disposition of the right to life itself. Most academic opinions move into that direction: professor Zugaldia Espinar states that *"freedom itself depends on a series of logical prius (…), without life, there is no freedom, and freedom, without fairness and justice, would be pure utopia"*, upholding the argumentation which was set in stone by the Constitutional Court in its Judgement 53/1985[116]: *"life must be considered as a substratum for the rest of the rights, as a noun that the latter qualify".* Nonetheless, those ideas should not be regarded as an absolute negative to ponder euthanasia. When referring to the superior values of the Spanish legal system, art. 1.1 of the Constitution somehow forgets to mention life among freedom, justice, fairness and political pluralism. The existence of not only Judgement 53/1985, but also the opinions under the scope of Professor Zugaldia's simply reminds all the legal operators that, despite not being consecrated as a supreme value, this constitutional consideration is not expressly needed: ultimately, the predetermined legal framework settled by the Constitution is a human invention which is superposed to the mere existence of the human being and, therefore, the prevalence of life does not have to be further declared[117]. As a matter of fact, the impunity of suicide already enshrines

[114] Judgement 578/2016 of the 19th April, Provincial Court of Zaragoza, ECLI:ES:APZ:2016:578.

[115] Even if it would be, suicide itself could never be punished, as criminal responsibility disappears with the death of the presumed offender in the terms explained before. Whenever talking about punishing suicide, it must be understood that such penalty falls over the attempt of committing suicide.

[116] Judgement 53/1985 of the 11th April, Constitutional Court of Spain, ECLI:ES:TS:1985:53.

[117] M. M. Gómez, J. L. A. Tejuca, *"Judicial Consideration of the Problem of Euthanasia",* La Ley Gazette, Vol. 3, 1992, p. 861 ff.

a certain balancing of the right to life and the respect which is due to human dignity (Zugaldia Espinar), and therefore, it is impossible to ascertain anything else but the mere prevalence of life, as no right should be considered to have an unlimited application[118]. The regulation of the state of necessity[119], self-defence[120], or the legitimate exercise of a right, charge or position[121] on criminal terms reinforces the limited character of the right to life, even if less-limited than some others. Accordingly, whenever the sacrality of life and the principle of quality of life collide, two questions should be answered.

- Is the right to life an absolute value?
- Is life an available right?

The consideration of both of those questions has undoubtedly determined the current configuration and pragmatical consequences of section 4 of art. 143 PC: the attenuation which is granted by it is the result of understanding that quality of life is a factor to be taken into account when facing an euthanasic situation. The seriousness of the disease suffered by the requester will majorly determine this consideration, although other factors, such as the humanitarian reasons of the physical perpetrator or the consent which is given will shape the final legal outcome.

As Rose cannot move, all the conducts related to any help to die will be classified under the basic definition of art. 143(3) PC, executive cooperation to suicide. Although it is not indicated if the degenerative condition she has will anticipate her death, the seriousness of such ailment is completely out of question: she has not only seen her personal independence completely reduced due to the impossibility of moving, but also suffers pain due to a condition which exceeds irreversibility, bearing in mind its worsening character. It is logical to think that, under such circumstances, no Judge would dare to question the seriousness of the situation. Additionally, her express, valid and unequivocal consent should be considered in light of her age and her capacity to act [122]. For all that, any person helping Rose to die will be guilty of an offence under art. 143(4), and depending on the reduction of the punishment which is applied, will be facing a sentence of imprisonment:

- From 3 years to 6 years – 1 day, if the punishment is only reduced in one degree.
- From 1 year, 6 months to 3 years – 1 day, if it is reduced in two degrees.

In both cases, the Judge will have to apply at least one of the accessory penalties of art. 56 PC., and according to analogous cases [123], it is really likely that such penalty will be further concretised in the special disqualification for the exercise of passive suffrage.

Regarding the last issue posed by question 3, the rules for the prescription of criminal offences must be contemplated. But firstly, it is essential to indicate that, in virtue of art. 130(6º) PC, the prescription of the offence determines the extinction of criminal responsibility, and therefore, when a specific period of time has elapsed, no one shall be hold accountable for such crime. This is due to the impossibility of fulfilling the objectives of general and special prevention which justify the imposition of punishments themselves. Keeping this in mind, art.

[118] Judgement 11/1981 of the 8th April, Constitutional Court of Spain, ECLI:ES:TC:1981:11.
[119] Art. 8.11 PC.
[120] Which authorises to threaten someone's life whenever other values are at stake, art. 8.4 of the PC.
[121] Art. 8.7 PC.
[122] According to the case study, she is of legal age and is able to stand for herself in the judicial processes she started.
[123] Ibid 114.

131(1) PC states that, if the sentence of imprisonment is under ten years, the offence shall prescribe after ten years. If not exceeding five years, it shall prescribe after 5 years have gone by. The line to start counting shall be allocated to the moment in which the offence was committed[124]. For that reason, it is irrelevant to wonder if the punishment would have been reduced by one or two degrees: after 20 years, the person helping Rose to die would not be able to be prosecuted for such aid.

4. **Analyse the appropriateness of the way chosen by Rose to enforce her claims: the ordinary judicial process for the protection of fundamental rights and freedoms. Which is the constitutional and legal substantiation for the existence of such procedure? List the different types of processes regarding its nature and identify its distinctive characteristics. Does Rose's judicial *"journey"* fulfil the standards of preferential and summary treatment that define this procedure?**

The ordinary process for the protection of fundamental rights and freedoms is, to be clear, a special process within the ordinary jurisdiction. Article 53 of the Spanish Constitution has a clear objective: providing the rights and freedoms granted therein with an integral protection and effective enforcement. Although the traditional enlightened conception of fundamental rights required the lack of intervention of the State, most of the constitutions enacted post-WWII understood that the statewide protection of such grants was necessary in order to assure their pragmatical functioning. Not much later, the scale would tip to the other side, making most of academics, including Pérez Serrano, assure that *"the value of any right is directly determined by the value of its protection"*. For that reason, section 2 of the document projects a constitutional mandate that ensures the imposition of a dualist system: on one hand, the establishment of the amparo appeal before the Constitutional Court, but on the other, the creation of a *"procedure based on the principles of preferential and summary treatment before the ordinary Courts"*. Both of the systems are addressed to protect the rights contained in arts. 14, 30 and those encompassed in Chapter II of Title I (arts. 15-29) of the Constitution, although they do so in very different ways.

This constitutional duty was soon harvested by the legislator, which decided to regulate it in Law 62/1978, of Jurisdictional Protection of Fundamental Human Rights[125], specifying three separate procedures according to the fundamental right being protected and the jurisdiction which was assigned to hear from them: the civil, the penal and the administrative procedures. The rights and the scope of protection were further concretised in RLD 342/1979[126] and the 2º Transitory Disposition of OL 2/1979[127], of the Constitutional Court. However, an excessive strive for specification led to the dismemberment of the unitary corpus of Law 62/1978 from 1998 on, a process that would culminate around 2002. Since that moment on, the above-mentioned law was completely removed from the legal system.

The procedures regulated therein, even if now dispersed throughout multiple bodies of legislation, are constitutionally required to be guided by the *"principles of preferential and*

[124] Article 132.2 PC.
[125] Law 62/1978 of the 26th December, of Jurisdictional Protection of Fundamental Human Rights, ELI: https://www.boe.es/eli/es/l/1978/12/26/62
[126] Royal Legislative Decree 342/1979 of the 20th February, on the enlargement of the scope of Law 62/1978, ibid 128, ELI: https://www.boe.es/eli/es/rd/1979/02/20/342
[127] Organic Law 2/1979 of the 3rd October, of the Constitutional Court, ELI: https://www.boe.es/eli/es/lo/1979/10/03/2/con

summary treatment". The Constitutional Court gives a definition of such concepts in its Judgement 81/1992[128]: *"preference implies the absolute priority in regards to the norms that regulate the functional competence and arrangement of the workload; summary character is tantamount, as stated by doctrine, to its vulgar acceptation of quickness"*. This legal taxation is translated in the short terms which are settled by the different competent laws and precepts to solve the abbreviated procedures which arise from the interposition of any procedure of this nature. These consolidated provisions are the following:

- In regards to the protection before the civil jurisdiction, art. 249(2º) of Law 1/2000[129] including the rights to honour, intimacy, personal portrayal or any other asking for civil coverage.
- Penal protection of fundamental rights was redesigned by Law 38/2002[130] as to fit into the scope of criminal abbreviated procedures. Any offence which affects a fundamental right might be subsumed to this type, including, among others, intimacy, personal portrayal, inviolability of homes, slander and defamation.
- Law 36/2011[131] created a new specific procedure which was not contemplated in the original 1978's scheme: the social/labour procedure. In virtue of arts. 177-184 of the text, matters on trade-union freedom, strike or others related to the labour relationship might be dealt with under the present.
- Quite surprisingly, OL 2/1989[132] establishes, in its article 453, a proceeding by which *"disciplinary actions affecting the exercise of a fundamental right might be challenged (...) within a summary and preferential appeal"*.
- Last, but not least, arts. 114 to 122 of the Law 29/1998[133] embody the consolidated version of the old administrative appeal provided by Law 62/1978[134]. As this was the way chosen by Rose to enforce her claims, it will be further analysed continuedly.

Before proceeding to the such analysis, it is considered necessary to indicate that the above mentioned dispersion does not merely end there. Some rights are protected under their own regulatory laws, such as in the case of judicial dissolution and suspension of political parties, right of rectification or habeas corpus procedures. This further fragmentation has led a considerable part of the academic world to support a future reunification of all the provisions in a single legislative body, adopting a similar structure to that prior to 2002.

4.1. Administrative Protection of Fundamental Rights under Law 29/1998, Regulatory of the Administrative Jurisdiction.

For the sake of determining whether the use of this procedure is adequate to the means Rose intended, article 114, enumerating the material objects of this special procedure, must be read side by side with article 31(2) of this legaltext. According to the latter, people can turn to the Administrative Jurisdiction whenever *"they intend the judicial acknowledgement of a juridically individualised situation, or the adoption of the appropriate measures to reestablish*

[128] Judgement 81/1992 of the 28th May, Constitutional Court of Spain, ECLI:ES:TC:1992:81.
[129] Law 1/2000 of the 7th January, of Criminal Procedure. ELI: https://www.boe.es/buscar/act.php?id=BOE-A-2000-323#a249
[130] Law 38/2002 of the 24th October, of partial reform of the Law of Criminal Procedure, regarding the quick and immediate indictment of certain offences and misdemeanours, and the modification of abbreviated procedures, ELI: https://www.boe.es/eli/es/l/2002/10/24/38
[131] Law 36/2011 of the 10th October, regulatory of the Social Jurisdiction, ELI: https://www.boe.es/eli/es/l/2011/10/10/36/con
[132] Organic Law 2/1989 of the 13th April, of Militar Procedure, ELI: https://www.boe.es/eli/es/lo/1989/04/13/2
[133] Law 29/1998 of the 13th July, regulatory of the Administrative Jurisdiction, ELI: https://www.boe.es/eli/es/l/1998/07/13/29/con
[134] Ibid 125.

it". It is not explicit whether Rose starts the procedure as a consequence of a previous administrative act, but whatever the case may be, art. 114 section 2 allows her to lodge the claim regardless the existence of that previous document. In such case, the author considers she would argue that the ignorance of her individual situation, together with the inexistence of a solid legal framework in the matter, constitutes a violation of the articles mentioned in the wording of the case study[135], and as a consequence, she will be able to effectively enforce her claim before the Administrative Courts.

In relation to these issues, the author would like to point out that the exact same procedure, differences aside, was used by Debbie Purdy in the United Kingdom. Thus, Purdy sought a statement from the Crown Prosecution Service deciding whether they would accuse her husband if he would help her to reach assisted dying in Switzerland. The Office found itself unable to respond to such a question, given the inconsistency and fuzziness with which the topic was regulated. On its side, the House of Lords recognised this situation[136], estimated the cause and encouraged the Prosecution Service to enact the Policy for Prosecutors in Respect of Cases of Encouraging or Assisted Suicide[137], which indicated a set of circumstances that would be taken into account whenever to decide (or desist) from prosecuting such offences.

Taking into account these consideration, the author estimates Rose's claim would most likely seek such a statement from the Public Authorities. Nonetheless, her pretensions are desestimated due to the criminal regulation in force of assisted suicide and euthanasia. Regarding the formal characteristics of the first instance protection process itself, arts. 115 ff. of Law 29/1998 establish a very specific temporary terms to which the deciding court must abide. As no further information is provided regarding the duration of the procedures, it is impossible to analyse whether the first Court complied with those timelines or not. Without precluding the exposed, it is indeed possible to analyse the extension of the integrity of the processes. Nothing can be said in regards to the grounds invoked for the desestimation of the cause by the Administrative Court, the High Court of Galicia and the Supreme Court of Spain, as the Constitutional Court, that would most likely have a saying in regards to the potential violation of such rights, never took a stand: the defeat of the procedural succession after Rose's death prevented the Court from further analysing the circumstances. Withal, the whole judicial process was long enough to be heard by three different instances, another jurisdiction and even allow Rose to find her way to a graceful death. No matter how short each procedure was, the succession of events described in the case study requires an amount of time that certainly does not comply with the aims pursued by the summary and preferential principles inherent to this protection procedures.

5. **Clare D.L., mother of the deceased, asserts the existence of civil law precepts, apart from the express desire of her daughter captured in her will, which allows the first to represent the latter within the already-mentioned constitutional process. Is there any role for Rose's will on the procedural legitimation of her mother to represent her? Which is the reasoning that leads to the dismissal of the procedural succession by the Constitutional Court?**

[135] Articles 10 and 15 of the Spanish Constitution.
[136] R (on the application of Purdy) v Director of Public Prosecutions (2009) UKHL 45, available in: https://publications.parliament.uk/pa/ld200809/ldjudgmt/jd090730/rvpurd-1.htm
[137] Available in: https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide

Question 2 of the present dissertation already dealt with some provisions that indirectly referred to procedural succession in the context of subsidiary civil liability. Nonetheless, it is clear that the succession intended by Rose's mom exceeds the rationale explained back then. Thus, she does not merely intend to be recognised with a right, initially allocated upon her daughter, that now, being the latter deceased, she could inherit in accordance with the provisions of the Civil Code. Furthermore, she expects to be granted, under such grounds, with sufficient *locus standi* as to represent not only her daughter, but also her cause.

The transmission of the totality of the rights, duties and assets being part of a person's legacy is formally enshrined in art. 659 CC. But for the purpose of Question 5, the indisputable cornerstone provision will be art. 661 of the same legal text, stating that *"heirs replace the deceased in all his rights and duties just for the mere fact of his death"*. When proclaiming so, the CC is opening the door to the possibility of, arguing the death of a person meddled in a judicial process, constituting a *de facto* right upon the heirs of the claimant or defendant that will allow them to participate in such diligences in the place of their predecessor. Art. 16(1) CivPL embodies this right in what is commonly known as *procedural succession mortis causa*, giving the beneficiaries the exact same rights, standing and obligations that the original party held until his death. The subsequent sections of the article specify the quite simple procedure that must be followed to achieve this succession:

> *"once the deceased has been communicated to the Court clerk by the successor, the first will arrange the suspension of the procedures and communicate the fact to the rest of the parties. Once the death and the inheritance title have been certified, the Court clerk will acknowledge the succession of the requester in the name of the deceased, being such fact taken into account by the Court solving the case".*

According to what has been described above, it would be enough to simply present, firstly, the death certificate of the initial party of the proceedings and, more importantly for the case, the will that states that the requester of the procedural succession is the legitimate and appointed heir of the deceased. For this reason, the role of Rose's will is more than clear: it allows her mom, constituted as her legitimate heir, to substitute her daughter as a party in any proceeding which is open right in the moment of her death just by the mere acceptance of the legacy. The extension of the provision to the constitutional jurisdiction should not be doubted, as art. 80 of OL 2/1979[138], of the Constitutional Court, establishes the supplementary character of the Law of Civil Procedure in, *inter alia*, matters of appearance to trial.

Nonetheless, the same art. 16 CivPL will pose the core problem to the proposed succession. While using the expression *"whenever the object of the trial is transmitted",* the Law of Civil Procedure admits the existence of some rights that, either because of their nature or legal regulation, cannot be transferred to others. In this vein, the Constitutional Court has declared that, due to the development that certain rights have been subject of by the legislator, their transferral is legally impossible and, therefore, should be regarded as of utmost personal character. Constitutional Court Order 242/1998[139], also referring to procedural succession in the context of amparo appeals, indicates that, in order to assure the possibility of transmitting a right, the following aspects should be taken into account:

[138] Organic Law 2/1979 of the 3rd October, of the Constitutional Court, ELI: https://www.boe.es/eli/es/lo/1979/10/03/2/con

[139] Constitutional Court Order 242/1998 of the 11th November, Constitutional Court of Spain, ECLI:ES:TC:1998:242A

- The legal background that must be examined is not that of succession rights, which are undeniable and out of question, but the specific legal regulation of the right which is understood to have been violated. If the configuration of the right allows its transmission, the following subjective requirement will be assessed.
- The potential violation of the fundamental right in which the appeal is based must exceed the personal scope and project either a harm or a legitimate interest over the person that is willing to succeed the deceased in the proceedings. The most illustrative example of such circumstances lies on the appeals regarding the rights of honour, personal portrayal and personal and familiar intimacy[140] that, due to the indisputable affectation that can be derived to family and relatives as a group, will be subject of procedural succession even before the constitutional jurisdiction. Accordingly, the grounds of the appeal should not be built over such actions or values that constitute, as enshrined by Judgements 120/1990[141] and 137/1990[142], *"pure acts of will that only concern the person in question"*: the potential legal successors must be able to claim an objective constitutional interest in the progression of the proceedings.

The legal protection and regulation of the right to life throughout the whole legal framework turns it, ultimately, in the most personal right of those which are granted by the Constitution. Suicide and euthanasia are acts of self disposition of life that only affect the right to life of the person who takes such a life-ending decision. The commission of suicide (either assisted or not) does not raise the matters of e.g. the right to freedom, which due to its nature, is likely to collide with other people's interest. Its unassailable personal character has led, without a doubt, to the desestimation of Clare's procedural succession claim by the Constitutional Court, understanding that both the right and the derived interest are non-transferable.

6. Identify possible European and International judicial bodies or institutions that, being the case already dismissed by the Spanish courts and tribunals, may hear it and determine the suitability of the decisions to the international standards and obligations binding for Spain, as well as the possible requisites for the acceptance of the claim.

Spain, as a democratic state under the rule of Law, has subscribed a well-nourished list of international treaties and conventions[143], and is part of most of the European and international bodies which have the promotion of Human Rights among their aims and objectives. The membership of such international organisations is commonly coupled with the existence of supervisory bodies and complaint procedures, addressed to force the commonality of Member States to not merely ratify, but also enforce, uphold and protect those agreements and covenants, looking after the pragmatical application of their provisions. And even so, the existence of such procedures has not been able to eradicate, at least completely, the behaviors and practices which are considered to be condemned. In relation to this, we would like to mention that the 2020/2021 Report of the Situation of Human Rights in the World elaborated by Amnesty

[140] Under OL 1/1982 of the 5th May, of Civil Protection of the Right to Honour, Personal and Familiar Intimacy and Personal Portrayal, ELI: https://www.boe.es/eli/es/lo/1982/05/05/1/con

[141] Juridical Ground nº 7, Judgement 120/1997 of the 27th June, Constitutional Court of Spain, ECLI:ES:TC:1990:120.

[142] Juridical Ground nº5, Judgement 137/1990 of the 19th July, Constitutional Court of Spain, ECLI:ES:TC:1990:137

[143] With the notable exception of the International Convention on the Protection of the Rights of All Migrant Workers and Member of their Families, that was not ratified by any Western European or North American country considered to be a migrant-receiving State.

International[144] brought forward some delicate topics that would undoubtedly make more than one blush, such as: the regulation of housing, the use of excessive force within penitentiary institutions[145] and the rights of elderly people. All of those matters where considered to be endangered in Spain, within a report further characterised by the legal friction caused by the Covid-19 pandemic.

Withal, the rights and grants included under these covenants have ensured the progressive development and further refinement of those legal systems that strive for the factual and real fulfilment of human rights. Within this question, the author will analyse three different complaint procedures that, either because of their degree of legal acceptance, their binding character or their regulation, have been considered suitable for the present case study. Without further ado, such examination may be found hereafter.

6.1. The European Court of Human Rights.

The European Convention of Human Rights[146] provides, in its art. 34, for the existence of a complaint procedure *"available to individuals claiming to be the victim of a violation by one of the Contracting Parties of the rights set forth in the Convention or the Protocols thereto"*, which shall be addressed to and heard by the European Court of Human Rights. Such proceeding, as stated before, must refer to the lack of compliance, violation or disregard made by any of the contracting parties of the Convention within a decision of its internal affairs that, due to the binding character of the agreement, shall always be interpreted in accordance with the provisions therein.

Regarding the present case study, it should be mentioned that Clare could argue that, in light of the rights contained in the European Convention of Human Rights, and more specifically for this case, arts. 2[147], 3[148] and 8[149], the Spanish institutions did not comply with the obligations arising from the document when desestimating the procedural succession.

In relation to it, it has to be mentioned that, in order to present an admissible claim before the ECrtHR, the following requirements must be observed:

- The pretension will be signed by the claimant, no anonymous claim shall be accepted[150].
- She must have ran out of all the national legal ways available to solve the pretended violation, and no more than 6 months may have elapsed since the end of such national

[144] Report 2020/2021 of Amnesty International, the situation of the Human Rights in the World, 7th April 2021, POL 10/3202/2021, Available in: https://www.amnesty.org/download/Documents/POL1032022021ENGLISH.PDF

[145] The Report refers to *"coercitive measures"* that intend to reduce and immovilise inmates, even when not objectively needed, page 334.

[146] European Convention of Human Rights and Fundamental Freedom, Council of Europe, 1950, available in: https://www.echr.coe.int/documents/convention_eng.pdf

[147] Right to life, understanding the dying process as a human state prior to the actual moment of death.

[148] Prohibition of inhuman or degrading treatment, bearing in mind Rose's state and the denial of the Spanish authorities to give a solution effectively improving, at least, her quality of life.

[149] Right to respect for private and family life, which has been acknowledged by the vast majority of academics to have been progressively enlarge as to cover *"situations and circumstances that were not in the mind of its creators back in the 50's"*, Lord Jonathan Sumption, former Justice of the Supreme Court of the United Kingdom.

[150] Art. 35(2)(a) ECHR, except in situations in which the integrity of the claimant may be at stake. That is, however, not case.

sources. This time will expire on the very last day, counting clear days, regardless such day is Sunday or bank holiday.
- The pretension must not be identical to a previous one. When assessing identity, the Court will look at the claimant, the reported State and the alleged violation that is being challenged.
- The violation must not have been assessed, considered or examined by another international authority[151].
- The application form which is needed to present the claim must be filled out in an exhaustive, careful and clear way: the mere vagueness in the description of the facts will lead to the inadmissibility of the pretension.

Against this background, it is considered that even then, Clare would be facing a similar problem to the one described in Question 5: the Court must either acknowledge her *locus standi* to challenge a cause she is not a part of through the appreciation of a legitimate interest.

6.2. The Court of Justice of the European Union.

Although the idea would make the eyes of any jurist shine with excitement, we will soon send the thought to exile due to the lack of an European legal framework in regards to assisted dying, euthanasia or palliative care. The Court of Justice of the European Union (hereinafter, CJEU) has been traditionally granted with 3 main complaint procedures, of which actions for omission could play a role in the case. In accordance with art. 265 of the Treaty on the Functioning of the European Union (TFEU)[152] such procedure will be addressed to acknowledge an omissive situation provoked by the lack of action of any European institution. Such omission should constitute a violation of a right recognised within the European framework. Clare could try to argue that the absence of a minimum regulation of such issues in the European Union embodies a violation of some of the rights contained in the Charter of Fundamental Rights of the EU[153]. Nevertheless, that would be forcing the EU to make a statement over a matter in which it cannot legislate[154], and the CJEU, when being presented such a case, would directly desestimate any related pretension. The EU merely complements what is decided at a national scope in regards to Public Health, establishing cooperation between some of its members or bringing certain matters closer together at an European level[155]. However, it does not define health policies, nor organises the provision of health services or medical care. In consequence, the possibility of forcing the EU to make such a statement is not only legally unfeasible[156]. Thus, this possibility lacks solid legal substantiation. In addition, there is no room for claiming a violation of the rights included in the Charter in light of the denial of the procedural succession by the

[151] Art. 35(2)(B) ECHR.
[152] Consolidated version of the Treaty on the Functioning of the European Union, 2012/C 326/01, ELI: http://data.europa.eu/eli/treaty/tfeu_2012/oj
[153] Charter of Fundamental Rights of the European Union, 2012/C 326/02, ELI: http://data.europa.eu/eli/treaty/char_2012/oj
[154] J. L. Pridgeon, *"Euthanasia Legislation in the European Union: is a Universal Law Possible?",* HanseLR, Vol. 2, nº 1, 2006. Available in: http://hanselawreview.eu/wp-content/uploads/2016/08/Vol2No1Art04.pdf
[155] The EU has legislated in food safety, pharmaceuticals, disease prevention or risk management, in virtue of the powers derived from arts. 4(k) and 6 (a) TFEU. As a matter of fact, the existence of the European Centre for Disease Prevention & Control (ECDC) and the European Medicines Agency (EMA) embodies the harmonisation strive that is intended in certain matters.
[156] The principles of attribution, proportionality and subsidiarity that bound the EU expressly impede such an action.

Constitutional Court, bearing in mind that the Charter does not have a pure binding character for legislation exceeding the European framework[157].

6.3. The United Nations Human Rights Committee.

Lastly, Clare could try to assert that, with the denial of the procedural succession, the Constitutional Court of Spain contravened the legal obligations which are derived from the International Covenant on Civil and Political Rights (hereafter, ICCPR)[158]. Such procedure, heard by the United Nations Human Rights Committee (hereafter, UNHRC), is regulated in arts. 6 to 27 of Part III of this Covenant, and in truth, the formal character of the claim does not differ enormously from that of the ECrtHR. Nevertheless, some considerations must be pointed out:

- Although not providing for specific terms to propose the claim, it is generally accepted that an abuse will be considered if the proceedings are not initiated before the time of 5 years since the exhaustion of the national way or, if having resort to another international jurisdictional body, after 3 years from the resolution of the entity in question.
- The claim cannot be examined if being simultaneously assessed by other international mechanism of revision.
- If facing a situation in which another international mechanism desestimates the claim for procedural grounds, the matter shall not be deemed as examined and, therefore, it is still possible to seek the protection of the Committee. Furthermore, even when being already assessed by another legal *apparatus*, the claim may be considered if the Committee appreciates that the ICCPR offers a larger scope of protection compared to the previous phase.
- The country being challenged must have expressly accepted the competence of the Committee under the terms laid down by the First Facultative Protocol of the ICCPR (1966).

The flexible approach with which the last procedure is regulated complies the author to state that, if Clare would have to seek subsequent protection due to the potential desestimation of her cause in the international scope, the most intelligent way to proceed would be, firstly, to challenge the denial of the procedural succession before the ECrtHR and, if effectively desestimated or not appreciated, seek protection before the UNHRC and under the ICCPR.

7. Describe the current Spanish legal framework in regards to dignified death and assisted dying, analysing relevant Spanish and European jurisprudence on the matter, with special focus on transcendent decisions of the European Court of Human Rights and the Court of Justice of the European Union.

The last question of the present dissertation has been formally divided as follows:

7.1. Jurisprudential considerations on the situation prior to March 2021.

[157] The Treaty establishing a Constitution for Europe would have granted binding power to the Charter of Fundamental Rights, and in such circumstance, the claim might have prospered.
[158] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of the 16th December 1966, available in: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

The legal consideration of euthanasia and assited dying prior to the enactment of OL 3/2021[159] were described in Question 3: both of those conducts, either subsumed to necessary cooperation of art. 143(2)PC or to executive aid of art. 143(3)PC, where punished under section 4 of the same article. Nonetheless, little was said in regards to the application of such provisions by the Spanish Courts. It is time to consider two of the cases that, without a doubt, have hasten the regularisation and decriminalisation of both activities in March 2021:

- Ramón Sampedro (1943-1998) was a Galician sailor who saw himself bedridden after an accident on the beach. During the late 90's, he was the symbol of the movement asking for the regulation of euthanasia, and actually allowed the whole Spanish society to acknowledge a situation suffered by many people that, prior to the broadcast of the documentary "Sampedro, dying to live[160]", was merely ignored. He started judicial proceedings asking the legal framework to recognise the individual and extraordinary character of his circumstances. Throughout the diverse instances, the different judicial bodies only agreed to say the following: due to the criminal condemn of conducts related to the assistance to die, it was legally unfeasable to disregard those precepts and offer a particular solution to his case. Eventually, he found his way to a graceful death with the aid of Ramona Maneiro, his partner. She was formally accused of necessary cooperation to suicide, but the proceedings were dismissed due to the lack of objective evidences against her. Seven years later, once the offence had prescribed, she publicly admitted to have helped his then couple to achieve his euthanasic aims.

- María José Carrasco (1958-2019) might be an easier name to recognise due to its more recent character. She suffered amyotrophic lateral sclerosis, a very serious, degenerative and disabling disease that had shrunk her quality of live to unhuman levels of pain. Together with her husband, she decided to tape her death in an attempt to show society the pragmatical consequences of the lack of regulation of assisted dying procedures. As the death was provoked by the administration of a lethal substance by her husband, he was accused under the terms of art. 143.3 PC. The handling of the case by the authorities was, to say the least, calamitous: the competent Provintial Court determined that, within the tape, some signs of psychological violence and manipulation could be observed, and therefore, asked the Courts of Violence against Women to investigate the cause. The case was dismissed and, during the trial, the Public Prosecution even stated his intention to accept a potential pardon given to the executor.

Apart from their courage, braveness and determination, they both had something else in common: their clear predisposition to corner the legal framework with the most painful weapon they had, their merciless reality. Without them, the present thesis would end at this point and, in any event, would not pose the legal interest that has motivated the author to research and the reader to listen.

7.2. OL 3/2021, regulating euthanasia.

Without further delay, it is time to explain the inherent implications deriving from the enactment of OL 3/2021[161] and its pragmatical consequences in relation to the previous legal

[159] Organic Law 3/2021 of the 24th March, regulating euthanasia, ELI: https://www.boe.es/eli/es/lo/2021/03/24/3
[160] Available in: https://www.rtve.es/alacarta/videos/especiales-informativos/especial-informativo-sampedro-morir-para-vivir/5516449/
[161] Ibid 159.

situation. The necessary point of departure will be to determine which conducts are being regulated, decriminalised and accepted by such legal text. But first, one essential fact must be pointed out: the law should not be taken as a hard break with the previous legal regime. In fact, it does not derogate art. 143 PC. Far from that, it retains the previous system and, additionally, includes a new subsection 5 within the article. It is clear that, by doing so, the legislator intended to give a certain degree of legal protection to those cases that, even when not complying with some of the requisites of the Law explained herein, are not worthy of the criminal comdemn of sections 2 and 3. The OL regulting euthanasia settles down the more than necessary legal framework in regards to two conducts: physicial-assisted dying and euthanasia. Such concepts and its substantial difference were already explained at the very beginning of the thesis. Nevertheless, the law's exhaustive character encompasses the definition of the terms in its arts. 3(G)(1º) and 3(G)(2º). The guarantee of access to such procedures is proclaimed under art. 13, that incorporates both of the behaviors into the medical services being offered within the National Heathcare System, further stating its public financing.

Art. 5 of the legal text contains the formal requirements that trigger the access to dying procedures. Its formal subdivision into sections 1 and 2 already enshrines the existence of two radically different situations to which the law responds differently:

- Art . 5(1) refers to the generality of cases, laying down the "ordinary" requirements which must be complied with. Among them, it includes:

    - Being a Spanish national, having legal residence in Spain or, at least, being censed in Spain for a minimum period of twelve months, being of legal age and having mental capacity to act.
    - Relying on the material existence of a document that contains the medical process, the alternatives and factual possibilities in regards to the medical situation of the requester, including, among those, the existence of the different palliative care procedures available in Spain.
    - Having requested twice, either in written way or any other that may leave record, the free determination to initiate the procedure, with a minimum separation of fifteen days in between both of them[162].
    - Suffering from a serious, untreatable condition or a chronic, disabling and severe ailment which may be certified by a health professional.
    - Giving informed consent before the initiation of the procedure.

  In this case, the request must be signed and dated by the requester in presence of a health professional. That being done, a deliberative process regarding the potential options of the patients under the current development of science will be initiated by the competent doctor, followed by a second consent, a second deliberative process and a cooling-off period of 24 hours, after which the patient will decide whether to continue or desist from the procedure. A doctor differing from the patient's physician will have to assess whether the formalities of the law are being objectively complied with until this step. If going on, the *"Assessment and Guarantee Commission"*[163] will create a working group composed of a jurist and a health professional that, within 7 days, must submit a positive or negative report. Negative reports may be challenged before the administrative courts[164]. Positive reports will trigger

[162] This temporal requisite may be disregarded if a professional actually considers that the elapse of such an amount of time might compromise the patient's capacity to consent, art. 5(C), second paragraph.
[163] Provided for by art. 17 and regulated in Chapter V.
[164] Art. 10(5).

the access to the procedure, being executed under the terms of art. 11 and, in any case, providing an integral support to the patient until the very moment of his death.

- Art. 5(2) would be applicable whenever the patient, at an earlier stage, has provided for his desire of dying proceedings in advance directive documents or living wills. Under such circumstances, the requirements of legal capacity, consciousness and consent will be disregarded[165]. The rest of the demands are, however, still applicable. This constitutes a more than remarkable progress in regards to the previous situation, that due to the requirement of the revokability of the consent at any stage, did not even consider the validity of an unconscious, unaware or legally uncapable patient's consent to be granted with such help.

7.3. The European perspective: ECrtHR decisions and comparative approach.

The plural, diverse and culturally varied character of Europe is not strange to any person aware of the past, present and potential future of the continent[166]. Logically, this heterogeneous human manifestation throughout the territory has its consequences on the regulation of assited dying, euthanasia and palliative care in the different countries included in the physical scope of Europe. While some, as it is the case for Belgium, Netherlands and Switzerland, regulate all of the above-mentioned procedures, the vast majority only tend to regulate some or one. This may lead the reader to think that, in the rest of the cases, countries decide to regulate palliative care and, accordingly, proclaim the absolute sacrality of the right to life. However, that is not necessarily true: countries as Albania have found in euthanasia an easy, economically profitable way to end up with the problems inherent to enacting a regulation that offers an effective help to the wide range of cases that reality is able to come up with. In this context, the ECrtHR must solve issues brought up by private individuals in a way that, on one hand respects the rights contained in the ECHR and, on the other, upholds and protects the individual power of each Member State to regulate such issues within their margin of appreciation. That being said, it is unavoidable to mention art. 8 ECHR: it constitutes the backbone of all the cases related to assisted dying which have been heard by the Strasbourg Court. However, the selection of this provision, technically referring to everyone's *"right to respect for his private and family life, his home and correspondence*" is not arbitrarily made. As foreseen before, the article has been subject of an extensive judicial interpretation expanding its protection to matters that, *"prima facie",* have not much to do with such topics. Indeed, all of those matters had a clear, common goal back in the 50's: the protection of individuals against the unjustified interferences of the Member States[167]. In accordance with such aim, the ECrtHR has extended the scope of protection to any interference that may fall within the personal, private sphere of individuals. Although such obligation was firstly characterised by its negative nature[168], the Court has progressively moved towards a position in which it requires its members to guarantee that such unlawful interferences are not given in an "individual to individual" scheme[169]. Notwithstanding the foregoing, section 2 of art. 8 ECHR actually does recognise the states with some margin of appreciation as to regulate private matter in a manner which is consider

[165] Sections b, c and e. of art. 5(1).
[166] J. L. Pridgeon, *"Euthanasia Legislation in the European Union: is a Universal Law Possible?",* HanseLR, Vol. 2, nº 1, 2006. Available in: http://hanselawreview.eu/wp-content/uploads/2016/08/Vol2No1Art04.pdf
[167] As stated by the ECrtHR in its landmarck decisión of Libert v. France, ECHR 072 (2018).
[168] Abstaining from interfering, as stated in Barbulescu v. Romania, ECHR 742 (2017)
[169] This positive obligations was finally stated as such in Kroon and others v. The Netherlands, ECHR 35 (1994).

"legitimate" under the standards of the Convention. Such ultimate right to lawfully interfere of the individual must be justified by:

- Interests of national security, public safety or the economic wellbeing of the country.
- Prevention of disorder or crime.
- Protection of health, morals, or rights and freedoms of others.

Requiring those exceptions to be not only democratically logical, but also legally provided for, is thought to eliminate, at least in theory, the potential, undesired arbitrary intervention of any Member State. That being said, the momento to analyse the landmark decisions of the Strasbourg Court in regards to assisted dying has arrived:

7.3.1. **Pretty v United Kingdom**, (2002)[170]: the European Court held that the regulation of assisted dying in the UK and its limitations were within the scope of art. 8(2) of the ECHR, and therefore was not only lawful, but within the State's margin of appreciation to decide whether assisted dying procedures should be regulated or not. The peculiarity of this case lies within the consideration of life-ending decisions: while the UK's national decision stated that they did not fall within the scope of art. 8, the Strasbourg Court did understand that such considerations were included within the scope of the respect for private life and, therefore, should be protected in accordance with the Covenant's provision.

7.3.2. **Haas v Switzerland**, (2011)[171]: the Court reaffirmed the position stated in Pretty v. UK, assuring, once more, that life-ending decisions were unquestionably covered by the protection of art. 8 ECHR, and therefore, within the scope of private life. However, it denied the existence of any kind of purported *"right to assisted suicide"*, keeping in mind the negative nature of the obligations imposed on the States ex art. 8 and the margin of appreciation conferred whenever the application implies the execution of an active duty

7.3.3. **Koch v Germany**, (2012)[172]: although the considerations regarding the right itself were very similar to the case mentioned above, the real particularity of the present case lies in the consideration of the *locus standi* of the claimant: he was the husband of the interested party (Mrs. Koch) and was representing her *post mortem*. The Court declared the case admissible, although dismissed Mr. Koch's pretension.

7.3.4. **Gross v Switzerland**, (2013)[173]: opened the door, according to Daria Sartori[174], to the jurisprudentially substantiated application of the article to cases related to assisted suicide in the European scope. The Strasbourg Court did not only admitted Gross pretensions' to fall within the scope of art. 8 of the ECHR: it acknowledged the inadequateness of a country's regulation on assisted dying with the standards of art. 8, when stating *that "such regulation lacked legal certainty, as leaving certain situations unregulated"*.

7.3.5. **Lambert and others v France**, (2015)[175]: concerning a completely unaware and life-sustained patient, the Court accepted the withdrawal of all kinds of life-extending

[170] Pretty v United Kingdom, ECHR 423 (2002).
[171] Haas v Switzerland, ECHR 2422 (2011).
[172] Koch v Germany, ECHR 1621 (2012).
[173] Gross v Switzerland, App. Nº. 67810/10 (2013).
[174] D. Sartori, *"End-of-life issues and the ECHR. The value of personal autonomy within a proceduralised review"*, QILJ, Vol. 1 (2014), available in: http://www.qil-qdi.org/end-life-issues-european-court-human-rights-value-personal-autonomy-within-proceduralized-review/
[175] Lambert and others v France, App. Nº. 46043/14 (2015).

treatments, understanding that the scientifically objetive and recommended character of the withdrawal did not interfere with the right to life enshrined in art. 2 of the ECHR.

7.3.6. **Nicklinson and Lamb v United Kingdom**, (2015) [176] : the case was declared inadmissible, and accordingly, the Court did not proceed to the examination of the legality of the regulation of assisted dying in the UK. Nonetheless, it did enshrine its respect and carefulness when dealing with matters that could affect a Member State's margin of appreciation.

It is clear that, due to the disparity in the regulation of such phenomenons under the Member States of the Council of Europe, the ECrtHR is quite reluctant to make any statement that could be identified as a potential requirement to legalise or regulate assisted dying, euthanasia and related procedures. Although some progressive liberal tendency can be appreciated in the Court's doctrine, it is to soon to point out the direction in which the European consideration will move. However, it does not seem illogical to state that, as national jurisdictions approve and accept these dying proceedings, the Court will start to examine more in depth the requirements that must be appreciated from the existence of art. 8 ECHR and its inherent obligation to respect a person's life-ending decision.

CONCLUSION

The introduction of this paragraph into the present thesis shall be considered as a requirement deriving from the formal nature of the analysis. With everything that has been exposed, the author does not intend to force the reader to think one way or the other, but quite the opposite: the objective of the dissertation, from its very start, has been to provide anyone, regardless legal professional, lay citizen or mere interested, with the necessary weapons to participate in one of the most exciting and polemic debates of our century, the self-disposition of life, through the resolution of the ethical, legal and human interrogatives which are posed by the Case Study.

Predicting the direction in which the topic will move is unnecesary, illogical and redundant. It is clear that, as societies move towards new levels of acceptance, the issue arising from a now fiery debate will be progressively normalised. And for that very reason, the present thesis is made: considering the past, knowing where things come from, is the necessary requisite to avoid the future malfunctioning and misinterpretation of such a trascendental matter.

[176] Nicklinson and Lamb v United Kingdom, ECHR 23 (2015).

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