# THE SUBVERSIVE EFFECT OF UTILITARIANISM ON THE RIGHT TO LIFE IN EU COUNTRIES

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**Abstract:**
*The public debate in the EU set off by the recent covid crisis, as to who should have priority access to life support ventilation machines and on which criteria the triage should take place, showed a marked tendency towards a utilitarian approach and a departure from the traditional reverence in which the right to life was held so far. This shift in values with emphasis on economic, pragmatic considerations, is not new: it has been evolving gradually, especially in field of medicine and bioethics, as shown by the growing number of EU states which have adopted end-of-life legislation, legalising euthanasia, decriminalising assisted suicide or easing up the conditions for organ transplant and donation.*
*While the EU legal framework and the European Convention of Human Rights do protect unequivocally the right to life, the sanitary policies recently adopted by some EU member states during the covid pandemic have shown the difficulties in balancing the economic considerations with the need to protect the public health, and, ultimately, the right to life.*
*This article purports to highlight, using references to specific national legislations, the conflict between the existing EU legal framework and these latest utilitarian tendencies in public policies and regulations, and the need to assess their moral foundations, as well as their long-term consequences.*
**Keywords:** *utilitarianism, right to life, EU legislation. ECHR Convention, euthanasia, covid crisis*

## Introduction

The recent covid pandemic has exposed the divisions that run deep into our modern society: between the rich and the poor, the young and the old, the believers in conspiracy theories and the non-believers, the ones who wear sanitary masks and the ones that feel threatened by it, to name but a few of the recurring themes nowadays. It also showed how unprepared we were for a major health crisis and highlighted the need for a careful and well-thought legislation dealing with the State of Emergency, which does not impose disproportionate limitations on the rights and liberties we have been enjoying so far.

The divisions mentioned above have been placed under spotlight at the very beginning of the crisis, when severe shortages of ventilation equipment in intensive care hospital units in the most-affected EU countries have led many doctors to voice their concerns about the access to these ventilation machines, in case of competing claims

from patients in need of emergency treatment. It has been publicly admitted that doctors might be forced to choose between patients based on their assessment of their chances of survival, in view of their age, health record and co-morbidities, the belief of some in the medical profession being in favour of prioritising the young over the older patients. [1] Many a voice has been heard supporting this view and many an algorithm has been put forward, some professional bodies even elaborating triage procedures, if the authorities were to endorse this stance officially, despite what would have been an obvious breach of their respective national constitutional rules and EU legal framework in force. The main arguments employed to this end are all founded on utilitarian considerations, which have proved to exert an almost irresistible appeal in these trying times.

As the allure of utilitarianism is not likely to fade away in the near future, we deem necessary for methodological purposes to briefly highlight in Section 1 the main tenets of this school of thought and the objections that are level against it, ever since its development in England in the 18th century, with specific references to its consequences on the legal system. This particular view will be balanced against the presentation, in Section 2 of this paper, of the general legal framework in the EU regarding the right to life, with emphasis on the European Convention of Human Rights (hereinafter referred to as the ECHR) and the Charter of Fundamental Rights of the European Union (mentioned below as the CFR).

Section 3 will deal with the subversive effects of utilitarianism on the extent and content of the de facto protection of the right to life, as shown by the recent legislation adopted by some EU states regulating the end-of-life procedures. This shift in values with emphasis on economic, pragmatic considerations, is not new: it has been evolving gradually, especially in the field of medicine and bioethics, as shown by the growing number of EU countries which have legalised euthanasia, decriminalised assisted suicide or have eased up the conditions for organ transplant and donation.

The final Section will put forward some brief conclusions as to the necessity, in our view, to combat these utilitarian tendencies, which threaten the much needed social solidarity, causing fractures that will prove difficult to heal. Relegating equity and justice

on second place, after the economics, using the pretext of the covid crisis or any future crisis, opens up a Pandora box with unforeseeable consequences.

## 1. The allure of utilitarianism and its discontents

Though the origins of utilitarianism could be traced back to Antiquity, to Epicure and hedonism [2], its main tenets as we are familiar with today have been put forward by the well-known English philosopher Jeremy Bentham (1748-1832) and later developed by John Stuart Mill (1806–1873).

Jeremy Bentham was not only an accomplished philosopher who founded utilitarianism, but also a very socially active jurist, author of a number of proposals for legal reform in the 18th century England, all originating in its view on the role of the law as enhancing the public happiness.

Bentham rejected the natural law and the natural rights doctrine, calling them “nonsense upon stilts”. [3] A keystone of its thought is the assumption that human beings are selfish by nature, defined by the quest for pleasure and avoidance of pain. Bentham holds that human actions are motivated mainly by self-interest, tempered by the principle of “sympathy” towards others, which ensures the social coexistence. Consequently, a human action could be classified as just or unjust, right or wrong, if it contributes to the overall human happiness – this is the famous principle of utility, expressed by Bentham as “the greatest happiness for the greatest number”. [4]

The measurement of happiness in practice implies a classification of the pleasures and pains, according to certain criteria, and the possibility of adding, subtracting and multiplying these pleasures and pains, as part of what Bentham terms a felicific calculus. This complex calculus is based on the principle of equality “Everybody to count for one, nobody for more than one”. He places this arithmetic of pleasures and pains at the basis of the moral and political life, with some very interesting (to say the least) practical results in the type of the policy reforms he proposes: for example, the rounding up of the beggars from the streets of London by authorities and concerned citizens and their subsequent placement in workhouses, where the beggars should work to pay for their maintenance. How is the public happiness affected by these beggars?

Well, amongst other things, they are a sore sight and their unpleasant presence reduces the happiness of the general public. [5]

The principle of utility has, in Bentham's view, great potential and benefits for authorities and policy makers. The laws to be enacted could be judged by the total amount of happiness or unhappiness they create, and thus their efficiency could be easily determined. However, the flawed consequences of the principle of utility unhampered by any moral (higher) considerations are countless and are exposed by analysing some extreme cases, where morals and ethics are bound to come in, as, for example, in throwing Christians to the lions to amuse the crowds in Ancient Rome or, in the 19th century, the case of the cabin boy cannibalised by its fellow crew members in order to survive while lost at sea. [6]

Aware of its shortcomings, John Stuart Mill (1806–1873), the celebrated figure of classical liberalism, developed further the principle of utility proposed by Bentham, in an attempt to address the criticism levelled at it. Discriminating between higher and lower pleasures, Mill envisions a hierarchy of pleasures that should benefit from the protection offered by the law, foremost of which should be the individual freedom and security of life, in its broadest sense. [7] He also focuses on the relation between the interest of majority and the interests of individuals, and the relation between utility and justice. [8]
In his seminal work "Justice", the well-known contemporary political philosopher and professor at Harvard University, Michael Sandel, highlights the difference between the views on utilitarianism held by Bentham and Mills, respectively. Bentham refuses to pass moral judgements of higher or lower pleasures, which count as one and can be compared and measured on a single scale, while Mills acknowledges that 'some kind of pleasures are more desirable and more valuable than others" [9], and these should be given precedence in legislation. As Sandel points out, some like dogfights and some like to go to the art museums, so if dogfights increase the public happiness, why not encourage it, by passing appropriate legislation? Mill attempts to address this point and save utilitarianism from being "a crude calculation of pleasure and pain by invoking a moral ideal of human dignity and personality independent of utility itself". [10]

A major aspect of the criticism levelled at this doctrine refers to the fact that its followers use the concept of happiness, and even more questionable, the concept of

public happiness, difficult to measure due to its aggregate nature of many competing pleasures, vague and susceptible to political and personal interpretations. Another important objection concerns the way in which the principle of utility – viewed as the greatest happiness for the greatest number – could lead to the tyranny of the majority, to the oppression of minorities in a society, to sacrificing a few for the benefits of many.

The question – what is public happiness? - to which utilitarians answer with the principle of utility has always concerned those interested in the act of government and the relationship between the citizen and the state.

In our view, the utilitarianism popular with some scholars today, especially in the filed of bioethics, looks like a clumsy attempt to mask the way in which human life is valued in monetary terms, especially in relation to the healthcare system or the social security system (retirement age, state pensions etc.). Some applications of this principles can be encountered in the field of life insurance, in the governmental assessment of the harm to human life caused by pollution or even, as with the case of a tobacco company, in its outrageous attempts to demonstrate the benefits of lung cancer on the public finances. [11] The formula ‘the greatest happiness for the greatest numbers” reduces indeed utilitarianism to the crude calculation Sandel was taking about. This line of thought has unwanted consequences when applied to social domains where traditionally, the economic considerations of profit and loss were marginal, such as medical care and patients’ lives, as recently highlighted by the ongoing covid pandemic.

This economic, ‘arithmetical’ side of utilitarianism has a strong ideological component, which is reflected by the emphasis on individual freedom and the minimal involvement of the state in regulating the lives of its citizens.

Are there any safeguards to prevent the advances of utilitarianism from impacting further a legislation which ultimately affects the very essence of the right to life of a person? The next Section will briefly outline the main EU legal framework concerning the right to life, in order to facilitate the analysis in Section 3, of its relation with the changes in regulations concerning the end-of-life procedures adopted by some countries.

## 2. The general EU legal framework covering the right to life

The EU legal framework on the right to life is imbued by the ideas of the natural law, theory which has known a revival at the beginning of the 20th century, after the end of WWII and its atrocities. The Nuremberg war trials of the senior Nazi officials have highlighted the perils of defining the law merely by reference to the provisions of positive law. Afterwards, important legislation has been enacted at international and domestic level to recognise and protect human rights, such as the Universal Declaration of Human Rights (1948, hereinafter referred to as UDHR), the ECHR (1954) and, more recently, the CFR (proclaimed in 2000 and effectively in force since 2009). What are the foundations of the human rights? As Article 1 of the UDHR proclaims " All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." [12] Natural law is to be considered "a benchmark against which to measure positive law'. [13]

The protection of the right to life in EU member states is structured on three levels: the international level, consisting of the main Human Rights Declarations, the ECHR and various other treaties, the EU level, consisting of the CFR and other primary legislations, and the national level, reflected first and foremost in the constitutions of the member-states.

For instance, at international level, the right to life is stipulated by Article 3 of the UDHR, after the principle of non-discrimination and equality before the law. "Article 3. Everyone has the right to life, liberty and security of person." [14]

At EU level, human rights protection has developed slowly, mainly through court decisions in individual cases. The Maastricht Treaty, instituting the European Union, in force since 1993, is considered a milestone in the process of creating a comprehensive legal framework for the protection of the human rights in the EU. It was followed by the Treaty of Amsterdam, Treaty of Nice (in force since 2003), the CFR and the Lisbon Treaty of 2007, to name the most important primary EU legislation. [15]

The ECHR and its subsequent body of case law have been paramount in firmly establishing and promoting the fundamental rights in Europe. The ECHR provisions on the right to life, for example, have been invoked in a wide variety of cases, ranging from

abortion to the end-of-life decisions, to force the authorities to properly investigate murders or to take all the necessary measures to protect the lives of their citizens. [16]

“ARTICLE 2 Right to life

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

The CFR takes a step further in the protection of the right to life, stipulating – in accordance with the ECHR provisions – that death penalty is prohibited.

“Article 2 Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.” [17]

In relation to the ECHR provisions, the CFR sets forth new rules, to cover the changes in technology and medicine that will definitely impact the right to life in the future. Thus, Articles 3 (Right to the integrity of the person) of the CFR stipulates:

“1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings.” [18]

Both the European Court of Human Rights (EctHR) and the Court of Justice of the European Union (CJEU) interpret the provisions of ECHR and those of CFR as part

of the general legal framework for the protection of fundamental rights, when delivering their rulings. What are the margins of appreciation on the right to life the ECtHR operates with? Many scholars point out the gradual development of the “right to assisted suicide” by the EctHR in succesive rulings in cases brought before it, such as Pretty v. the United Kingdom (n° 2346/02, 29th April 2002), Haas v. Switzerland (n° 31322/07, 20th January 2011) and Koch v. Germany (no 497/09, 19th July 2012). The court set forth an interpretation of the right to life with reference to Article 8 of the ECHR, (Right to respect for private and family life) and individual freedom, effectively sanctioning this ‘right’ and the obligation of the state to abstain from taking steps to prevent individuals to have a dignified end, if they chose to do so with full knowledge of its consequences. Thus, “the court modifies the ground of dignity: it is no more inherent to human nature, but linked to each individual's perception of dignity”. [19]

Apart from issues relating to the role of the ECtHR, this instance illustrates the shift in values in today’s society, where relativity and the freedom of choice trump up the right to life. The binding precedents of the ECtHR have had a major impact on the domestic legislation of many EU member states, dealing with sensitive moral and ethical issues, as outlined in Section 3.

## 3. “Trending now” – recent legislative changes in euthanasia and other end-of-life procedures in some EU countries

Is there a pattern to be discerned in the interaction between the generous EU regulations of the right to life and the gradual lifting of legal restrictions on issues such as assisted suicide, euthanasia or organ transplants at national level? There undoubtedly is, and the cause behind it is the dramatic shift in the values of society as a whole, which took place in the last two decades, fuelled in part, in our opinion, by a culture of rights that emphasizes individual liberty, construed in its most dogmatic and utilitarian way – if one does not harm the others, the state should not interfere either with legislation or with other measures in the private life of its citizens.

In other words, these fine principles often disguise, at policy level, hard core utilitarian considerations, opinion which we will attempt to demonstrate below. As mentioned in the previous section, in its rulings on assisted suicide and euthanasia the

ECtHR has employed the arguments of personal dignity and individual freedom to outweigh the legislative restrictions on any end-of-life procedures.

This is a very treacherous path to take, as proved by the growing number of cases in which the life of a patient has been terminated without its consent, in the EU countries that legalised and subsequently ‘’liberalised’ end-of-life procedures, Belgium being one such glaring example.

Since the legalisation of assisted suicide in 2002 and despite its being a predominantly Roman–Catholic country, Belgium has gradually expanded its legislation for physician-assisted suicide not only to those terminally ill, but also to patients suffering from severe mental illnesses, such as depression. Since 2014, even 12 years old terminally ill children can request euthanasia or can be euthanized if the doctors consider their case hopeless and their parents request it. [20] The practical consequences of this permissive Belgian legislation have led to an exponential increase in the number of assisted suicide and euthanasia cases, some highly controversial ones, such as Mortimer vs. Belgium (ECtHR case no. 78017/17), concerning the euthanasia of a chronically depressed woman which took place without any written instructions from the patient and without any prior notice to her children as to her intentions. The statistics in Belgium are staggering: from 235 euthanasia cases in 2003 to 2537 in 2018, representing 2% of the total annual deaths. Some studies have revealed that “40% of Belgians are for the end of care for people over-85” (Le Soir.be, 19.03.2019). [21]

In 2020, in the midst of the covid pandemic, the Netherlands extended the end-of-life procedures to children between 1 and 12 years of age, provided they are endowed with judgement and prove to understand the irreversible nature of the procedure. [22]

Earlier this year, the Constitutional Court of Germany has reversed the amendments of the Criminal Code dating from 2015, forbidding assisted suicide (legal until 2015), thus restoring its legal status, when performed with medical supervison and help.[23] Because of the particular historic associations stemming from the past, euthanasia is still a very sensitive topic in Germany and is not yet legalised.

These brief examples of very substantial changes in the national legislation of some EU member states regarding the right to life, which now has a new corollary - the right to die in these countries, and the obligation imposed on the state to regulate as strictly as possible this domain, to prevent abuse, illustrate the perils of applying lofty principles to promote legislation, without weighing the long-term social costs of the proposed legal changes.

Whether the full consequences of this line of argument are perceived, this remains to be seen. One particular worry is that, when confronted with a health crisis on a massive scale, humanitarian considerations, such as ending unnecessary sufferings, ensuring a dignified end of life, the right of a person to freely choose what they do with their life, can easily disguise utilitarian considerations of efficiency. In the case of covid pandemic, that would mean the allocation of financial and medical resources to the patients with the highest chances of survival. The matter of the triage of the covid patients as well as that of the criteria according to which they are granted access to ventilation systems is governed by the national law in the EU, meaning that, in the future, some countries might regulate triage criteria invoking the very humanitarian considerations above, using the same mechanisms which allowed the legalisation of euthanasia and assisted suicide. If countless human rights organisations have revealed that in many cases, elderly, sick patients felt pressured to exit life 'voluntarily', it cannot be excluded in the future the creation of a "voluntary triage" system, by which the infected patients of a certain age or with co-morbidities should "voluntarily" surrender their right to ventilation systems, to patients having better chances of survival.

All done, of course, for the public good – the greatest happiness to the greatest number and the most efficient allocation of resources.

## 4. Conclusions

As the economic crisis looms closer in Europe, the governments will be facing increased difficulties in devising effective economic strategies, given the budgetary constraints and competing claims on the public resources. While the aftermath of the pandemic has so far been efficiently managed at the EU level by the competent bodies

in crisis management [23], the future remains uncertain, even with the discovery of an anti-covid vaccine.

The debates on the retirement age, the reforms of state pensions and the steady loss of jobs due to the high levels of automation and digitalisation will challenge in the near future the resilience and strengths of the EU citizens and will put to test the principle of European solidarity, not only between member-states, but also between different categories of citizens belonging to the same country. Accepting that some categories of citizens (the elderly, the gravely ill, the destitute) could be left behind or treated as 'disposable', in the name of the common good and for the more efficient allocation of resources, should not be allowed to enter into legislation or the public discourse.

The relativization of such a fundamental right as the right to life, for the recognition of which many a life has been lost in the past, opens up a Pandora box of further relativizations and divisions within our society and is bound to transform the law into a mere instrument for mathematical calculations, turning obsolete all considerations of social fairness and justice.

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