



The implications of the right to life and the silent practices of euthanasia

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SUMMARY

This study deals with the incidence of euthanasia and its modalities, given the principles of the right to life, freedom and dignity of the human person, as a guarantee for the person to have a dignified death, and also discusses its applicability and legalization in the Brazilian legal system. . The Scielo and Scholar virtual libraries will be used as a data source, as inclusion criteria, articles in Portuguese, related to constitutional principles regarding the practice of euthanasia, as non-inclusion criteria, articles that do not meet the proposed theme and are published in another language, or are not available in their entirety. 833 studies related to euthanasia in Brazil were found, using the descriptors "euthanasia" and "bioethics" and "penal code" and "right to life", only studies that were related to the law being selected, totaling 563, among which, titles, abstracts and reviews were read, so that the newest articles (2017 to 2022) could be separated, noting that the subject is very relevant and the doctrine needs to pay greater attention to the topic.

Key words: Euthanasia. Bioethics. Penal Code. Right to life.

ABSTRACT

The present study deals with the incidence of euthanasia and its modalities, in view of the principles of the right to life, freedom and dignity of the human person, as a guarantee for the person to have a dignified death, still discusses its applicability and legalization in the Brazilian legal system. The Scielo and Scholar virtual libraries will be used as a data source, as inclusion criteria, articles in Portuguese, related to the constitutional principles regarding the practice of euthanasia, as non-inclusion criteria, articles that do not meet the proposed theme and are published in another language, or are not available in their entirety. A total of 833 studies related to euthanasia were found in Brazil, using the descriptors "euthanasia" and "bioethics" and "penal code" and "right to life", with only studies related to law being selected, totaling 563, among which, titles, abstracts and reviews were read, so that the newest articles (2017 to 2022) were separated, noting that the subject is quite relevant and the doctrine needs to pay more attention to the theme. **Keywords:** Euthanasia. Bioethics. Penal Code. Right to life.

1. INTRODUCTION

Life is a legal asset protected in art. 5th of the federal Constitution and is located in the field of individual rights and guarantees and, more specifically, individual and collective rights and duties. The discussion about the preservation of life in situations where a person decides to give up this right is inexhaustible, going beyond even legal conception. However, in some countries citizens are allowed to choose whether to preserve this universal legal asset, with the party, or even spouses, descendants and ascendants, making the final decision, when it is impossible for those who hold their life and wish to have this right exhausted. .

The practice of extinguishing the right to life by one's own desire is known as euthanasia (from the Greek Eu=good/good Thanatos=death) which, according to Veira (2017, p. 6) "is a method used to shorten someone's death who is in the terminal stage of some illness or who for some reason suffers from a physical problem that makes life very difficult and causes a lot of suffering." Shorten death, as observed, is a euphemism used for the real meaning that the Penal Code understands as homicide.

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The denial of the right to life constitutes, under Brazilian law, a crime of homicide, art. 121, §1º, of the Penal Code (Decree-law no. 2,848, 1940), whose penalty is imprisonment for 6 to 20 years, in hospitals, there is a kind of medical choice about who lives and who dies, given the chances of survival and vacancies in

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beds, aspects such as overcrowding, the probabilities of improvement or cure and the progression to death must be considered. In this sense, although there is an effort to try to approve this matter, legislators are cautious and warn that the Constitution is emphatic in preserving legal rights, and it is the responsibility of law enforcement agents to protect the right to life, even in circumstances considered as unsustainable or unbearable. Thus, the research sought to answer the following guiding question: "How does the doctrine understand the violation of the right to life through euthanasia?" It is believed that euthanasia violates the protected legal good, excluding the right to life, which has an individual and inviolable character, in addition, it is the State's duty to ensure that the Constitution is complied with in its terms, however, the literature discusses flexibility of legislation regarding the practice of euthanasia in cases in which the patient, willing, or in his absence, the responsible family member, decides for induced death.

The main objective is to identify the legal implications of the right to life and the silent practices of euthanasia in terminally ill patients. The secondary objectives are: a) Understand how the right to life is violated in the face of euthanasia; b) Analyze the right to life in the conception of countries that adopt euthanasia and assisted suicide; c) Discuss euthanasia from the perspective of criminal law.

An integrative review study was carried out, of a qualitative and exploratory nature, using the keywords: "right to life", "euthanasia" and "bioethics", "Penal Code", through the search for scientific articles in the database data, Scielo and Scholar, as well as reading books, jurisprudence, the Federal Constitution and the Penal Code.

As inclusion criteria, scientific articles published in the last 10 years will be considered, and in databases available on the internet, free of charge, whose materials will be made available in full. Studies that propose a theoretical review based on bibliographical research and reading of legal diplomas concerning the topic in question will also be included. Materials that are not in the digital library databases, in English, or that are not eligible for this project, will be excluded, as well as those that do not meet the inclusion criteria.

2. GENERAL ASPECTS OF EUTHANASIA

2.1. Concept of Euthanasia

In ancient times, humanity lived in search of survival, in constant wars to conquer territories, so they understood that the elderly, sick and disabled would be a burden if they needed a quick escape when their lands were besieged. In this context, and also due to precarious health and basic sanitation conditions in many cases, communities practiced euthanasia, with or without consent, however, with the advancement of time and social organization, this act began to have a meaning different and to be seen as a method below the reality of humanity, and should be discussed regarding its applicability.

It is believed that the term euthanasia, or assisted suicide, comes from Greece, and can be translated as "good death" or "appropriate death", in addition, it had the meaning of "appropriate treatment for incurable diseases". However, there is another discussion and application of the term euthanasia, configured as the act of a person who causes the death of another who is weaker, debilitated or in suffering, as a way of shortening suffering caused by a long period of illness (MENDES *et al.*, 2020)

Therefore, it can be considered, with regard to the medical/legal aspect, that euthanasia is a system that aims to shorten a person's suffering, resulting in the patient's death. Therefore, it is a planned death that needs to go through a process of acceptance and release in accordance with the laws in force in the country where the patient resides, in the case of Brazil, the legislation is against the practice of euthanasia. It is believed that euthanasia, far beyond being just an ethical problem, is considered as the compliance with a citizen's right.

two However, the most accepted definition of euthanasia is the active and intentional death at the request (voluntary, thoughtful and consistent) of the patient, through the administration of medication, following a medical prescription. This voluntarism is contested by many thinkers, philosophers and religious people who consider invalid the voice of a dying person who, in an attempt to shorten his suffering and that of his family, makes an ill-considered decision, since they use as a motto the idea that "While there is life, there is hope". There are those who disagree and understand that preserving survival is, perhaps, more inhumane than shortening it.

2.2. Types of Euthanasia

Euthanasia can be classified as voluntary, involuntary, non-voluntary; direct and indirect; active and passive. “Involuntary euthanasia” is considered when the action does not come from the patient, regardless of whether or not he or she is capable of doing so; in “non-voluntary euthanasia”, the patient is incompetent to decide, therefore being considered a crime of murder; and “voluntary euthanasia” which is when the patient is fully capable of expressing their will to die. Thus, Rijo (2018) understands that there are no types of euthanasia, since voluntary death would be its only definition and possibility of existence, and the term “euthanasia” should simply be used for whatever its application.

2.3. Dysthanasia and Mystanasia

Misthanasia can be understood as death resulting from a series of factors such as, for example, the inefficiency of the Public Power. Even though it is not popular, this concept is based on art. 1, III, of the Federal Constitution, which deals with the dignity of the human person, inviolability of the right to health. In Diniz's (2001) view, mystanasia can be considered a type of “social euthanasia”, despite the definition: “unfortunate death, outside the temporal lapse”; in contrast to the definition of euthanasia, as already mentioned “good death”.

Dysthanasia (therapeutic obstinacy or medical futility), is a medical attitude that, aiming to save the life of a terminally ill patient, subjects him or her to great suffering. Therefore, it can be understood as a slow and painful death caused by medical failure. In this context, it is considered that the worst death would be from dysthanasia, unfortunately, it is the most practiced in Brazilian hospitals, either due to malpractice or the impossibility of providing adequate care to the patient (SIQUEIRA; FERREIRA; ANDRADE, 2020).

3. EUTHANASIA AND BRAZILIAN LEGISLATION

The term euthanasia (good death or pain mitigation), first proposed by Francis Bacon (1561-1626), in the 16th century, still receives criticism from society, which understands only the divinity as responsible for the individual's life or death condition. There are those who consider it important to legally justify the practice of euthanasia, although the subject is controversial as it permeates legal, ethical, spiritual and cultural concepts of contemporary society.

In Brazil, the practice of the “good death” is controversial and conflicts with the ideological and religious conception of a significant part of society, which allows dialogue to be postponed. Although it is not defined in the Penal Code, but as qualified homicide (art. 121, §1). In this case, the judge can reduce the sentence when the perpetrator is “under the control of violent emotion”, considering intersubjective reasons. Among doctors, although they follow the Hippocratic oath not to apply or indicate any lethal dose, in cases where it is beyond their jurisdiction, and there is no possibility of a cure, they inform the family of the options and carry out procedures to alleviate suffering. of the patient and their family members. Doctors often find themselves prevented from continuing with adequate treatment, since there is a need for assistance from the Unified Health System (SUS) and this, in turn, is inefficient in some cases. Although there is underreporting of euthanasia, it is very common to talk behind the scenes and carry out these procedures that aim at a “good death” in terminal patients or those who have no chance of survival (BARBOSA; LOSURDO, 2018).

Euthanasia has been discussed and adopted by legislation in other countries, but in Brazil, there is a conflict of principles defined in the Federal Constitution, mainly between art. 1st, III and the caput of art. 5th, between the guarantee of human dignity and the protection of life, respectively.

In the conception of the Supreme Electoral Court (ADI 3.510/DF), the practice of euthanasia, abortion and use of trunk needs to be discussed from an interdisciplinary perspective (judiciary, medical, theology and philosophy), but understood as rights of human dignity, within the scope of civil law, which provides for the freedom of a person with knowledge of personality. Furthermore, Bill no. 236/12 (which configures the New Penal Code), already typifies the practice of euthanasia, exempting the agent from the imputation of punishment. However, the discussion comes up against the interdisciplinarity of concepts that make up the imagination of the country's Legislative, Executive and Judiciary, making it necessary to carry out deeper analyzes on the matter.

3.1. Euthanasia in the civil sphere

It is believed that the fact that the patient desires his own death and begs for euthanasia is not enough for someone to make the decision and carry out his request. Freedom of choice, even if it is not to remain alive, has been discussed in the civil sphere, as it is confronted with the right to human dignity and the principle of preserving life, both protected by the State.

Cabette (2013) clarifies that omission or assistance in assisted suicide only protects the legal good, “dignity of the human person”, so that it does not bear any legal reproach. In this context, the Federal Council of Medicine came forward to protect doctors who, if it was impossible to carry out treatments and procedures that would prolong the life of patients in the terminal phase of serious and incurable illnesses (respecting the wishes of the patient or their legal guardian), suspend or limit attempts to mitigate death. The Federal Public Ministry understood, however, that there was a violation of the Federal Constitution in this suspension and appealed in Resolution no. 1805/2006, but this was later confirmed in a sentence.

3.2. Euthanasia in the criminal context

Religion has always had great influence in inspiring the creation of laws, with its moral/spiritual codes even being adopted by society and even crystallized as legal bulwarks for hundreds of years, configuring a theocratic government, however, civilization suffered transformations over the years that led to the reflection and adoption of other legal mechanisms, based on coexistence in society, scientifically based, which gave the legal system a review of its concepts.

In this sense, the discussion about life and death moved from the religious and philosophical aspect to the courts, with self-inflicted death considered an abomination from an eschatological point of view and an offense to the morals and good customs of positivist society.

Suicide has always been a delicate topic for Brazilian justice. Since 1830, it began to punish those who helped the victim complete their attempt, later, in 1890, with the change of regime, the penalty was imposed in these cases and, only in the Penal Code of 1940 (still in force), it did not consider aiding suicide. , but classifies it as qualified homicide (DODGE, 2009). As times evolved, there were questions regarding the patient's autonomy in terms of preserving or shortening their own life, including discussing Hippocratic paternalism, which made the action of this terminally ill individual who was under palliative medical care passive.

Euthanasia cases in which people file a lawsuit requesting permission to end the suffering of a terminal and irrecoverable patient do not always prosper, due to the countless criticisms and pressure from society, many people give up on the cause. However, the legal system has been forceful in defending the dignity of the human person and has relativized the reason for the practice of euthanasia as a legal mitigating factor for those who exercise it.

Rodrigues (2018) understands that the legal provision in the Penal Code regarding the practice of euthanasia is to inhibit evil and homicidal conduct, but when the principle of euthanasia is respected, that is, when the objective is to end the suffering of the person who has their life unviable due to his deplorable state of health and imminent death, the right to death should be considered, not a violation of the right to life.

3.3. Bills seeking to change the law on euthanasia

PL no. 236/12 was approved by the vote of 28 parliamentarians, against 12 and 2 abstentions, being considered a fundamental step towards restructuring the Penal Code, which has even discussed the application of the law in cases of euthanasia, as expressed in art. 122:

Killing, out of pity or compassion, a terminally ill, attributable and older patient, at his request, to reduce his unbearable physical suffering due to a serious illness:

Penalty – imprisonment, from two to four years.

§ 1 The judge will stop applying the penalty by evaluating the circumstances of the case, as well as the kinship relationship or close ties of affection between the agent and the victim.

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The bill responds to the desires of thousands of Brazilians who experience this conflict, and find themselves without support, however, as it involves the creation of a New Penal Code, there are several considerations and considerations regarding feasibility. If approved, this bill, despite this matter, would avoid judicialization and exhaustion for an already unhealthy situation that is the loss of a loved one and their suffering assisted.

4. CONCLUSIONS

Euthanasia is a practice that has long been used in humanity, but with complications arising from the philosophical/religious conception that permeates legal provisions. In Brazil, despite Resolution 1805/2006, there is no provision for the practice of euthanasia outside the medical community, and only under the arguments based on this resolution.

It is understood that the principle of autonomy, in the context of euthanasia, is related to the principle of human dignity and the right to death, and it is important that the legal system protects itself from people who have homicidal or evil conduct, preserving punishment in these cases, but also consider cases in which there is a close degree of relationship and affection with the victim, as unattributable.

Brazilian legislation, in recent years, has sought to meet society's desires regarding individual and collective rights and guarantees, however, as the ideological influences of legislators consider the classes they represent, and Westerners understand, in an egoic way, that life must be extended to the maximum, even if the terminal patient's suffering is apparent, there is still a lot to discuss before euthanasia is considered legal in the country. In this way, it is expected that the scientific community and scholars on the subject will continue to build their concepts using comparative law, observing how euthanasia can be applied in Brazil. It is believed that the legalization of euthanasia will contribute to reducing the psychological impacts caused by pre-bereavement on people who are in the terminal phase of a serious and incurable illness.

REFERENCES

BARBOSA, Gabriella Sousa da Silva; LOSURDO, Federico. Euthanasia in Brazil: between the Penal Code and the dignity of the human person. **Constitutional Investigations Magazine**[online]. 2018, vol. 5, no. 2, p. 165-186. Available at: <https://doi.org/10.5380/rinc.v5i2.52151>. ISSN 2359-5639. Accessed on: 13 September. 2022.

BRAZIL, Project **Law no. 236/12**. New Penal Code. Available in: <https://legis.senado.leg.br/sdleggetter/documento?dm=3515262&ts=1645029382318&disposition=inline> . Accessed on Oct 5, 2022

BULGARELLI, Marcio José; DE SOUZA, Elen Juliane Peron. Euthanasia, right to life and a dignified death. **Scientific Magazine** here.

DUARTE, Clarice Seixas. At the limits of life: abortion, human cloning and euthanasia from the perspective of human rights. *Health Law Magazine, São Paulo*, v. 9, no. 3, p. 292-296, Feb. 2009.

Decree-Law no. 2848/1940. Penal Code. Available at: https://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm. Accessed on: 16 September. 2022

FELIX, ZC et al. Euthanasia, dysthanasia and orthothanasia: integrative review of the literature. **Science & Public Health**, 18(9):2733-2746, 2013

MENDES, AC, Mendes, MJM, Costa, GH, Pinheiro, VM, Pias, FC, & Schmitz, AK (2020). The controversy of Euthanasia Legalization in Brazil. **Brazilian Journal of Development**, 6(10), 79803-79814. <https://doi.org/10.34117/bjdv6n10-417> Accessed on: September 25, 2022

PORTO, Carolina Silva; FERREIRA, Clécia Lima. Euthanasia in criminal law: the legal aspects of mercy killing. **Scientific Interfaces–Direito**, Aracaju, v.5, n.2, p. 63-72, Feb., 2017.

ROBATTO W. **Euthanasia**: yes or no? Bioethical aspects. 2nd ed. Salvador: Empresa Gráfica da Bahia; 2008.

SANTOS, Daniel Abreu et al. Bioethical reflections on euthanasia based on a paradigmatic case. **Bioethics Magazine**[online]. 2014, vol. 22, np 367-372. Epub 19Aug 2014. ISSN 1983-8034. <https://doi.org/10.1590/1983-80422014222018> . 20 Oct. 2022

SIQUEIRA-BATISTA, Rodrigo; SCHRAMM, Fermin Roland. Euthanasia: along the paths of death and autonomy. **Science & Public Health**, 9(1):31-41, 200

SIQUEIRA, SF, Andrade Ferreira, TH, & Melo Andrade, DC (2020). **Misthanasia or social euthanasia**: the unfortunate death in the sus and the violation of the principle of human dignity. Graduation Notebook - Human and Social Sciences - UNIT - SERGIPE, 6(2), 99. Retrieved from <https://periodicos.set.edu.br/dadoshumanas/article/view/8541> November 5, 2022