



## Euthanasia and the principle of human dignity

### Eutanásia e o princípio da dignidade da pessoa humana

10.56238/isevmjv3n1-016

Receipt of originals: 01/02/2024

Publication acceptance: 02/23/2024

**Raquel Domingues do Amaral<sup>1</sup>, Igor José Casotti<sup>2</sup>, Vinicius Martins Ferreira<sup>3</sup>, Lucas Diniz Miguel<sup>4</sup>, Henrique da Silva<sup>5</sup>, Nathalia Peteres da Silva<sup>6</sup>, Jéssika Machado<sup>7</sup>, Roger Rodrigo Saravy Ribeiro<sup>8</sup>, Luana Harye de Sá Gois Alves<sup>9</sup>, Wilian Gabriel Jordão de Oliveira<sup>10</sup>.**

#### ABSTRACT

The general objective of this article is to address the institution of euthanasia, focusing on the right to life and the principle of human dignity. Its specific objectives are: To interpret the right to life as a good protected by the Federal Constitution of 1988; Present doctrinal definitions and differences between euthanasia, dysthanasia and orthothanasia; To address the concrete cases of euthanasia that have occurred throughout history. The methodology used for the development of the research was the deductive-bibliographic method. Thus, it is concluded that euthanasia is a form of extension of living with dignity, since the principle of the dignity of the human person seeks to accompany man from his conception to his last breath of life; And the practice of euthanasia promotes the death with dignity of those who can no longer bear an embarrassing and agonizing situation that hurts their dignity.

**Keywords:** Federal Constitution, Euthanasia, Dignity of the human person.

#### INTRODUCTION

In view of the scientific and technological development achieved by man in recent years, especially those in the medical field, it has been possible to make an enormous advance in terms of the duration of human life. As a corollary, some apparently insoluble social situations have emerged, such as euthanasia, understood as the hastening of the death of those who are in the final stage of their life and, unable to endure intense suffering, cry out for eternal rest.

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<sup>1</sup> Federal Judge and Dr. in State Law - USP

<sup>2</sup> Lawyer and postgraduate in Civil Procedural Law;

<sup>3</sup> Law student, enrolled in OAB/MS 8421-E, studying at Unigran Capital University

<sup>4</sup> Law Student, studying at Unigran Capital University

<sup>5</sup> Law Student, studying at Unigran Capital University

<sup>6</sup> Law student, studying at Unigran Capital University

<sup>7</sup> Law student, studying at Unigran Capital University

<sup>8</sup> Law Student, studying at Unigran Capital University

<sup>9</sup> Law student, studying at Unigran Capital University

<sup>10</sup> Law Student, studying at Unigran Capital University



Euthanasia brings into conflict two intimately linked legal goods, the right to life (the most important good given to man, as it is a prerequisite for the acquisition of others), and human dignity, which is a value of outstanding relevance in the Brazilian legal system. It is important to emphasize that, due to the complexity and sensitivity of the subject, which is closely linked to sociocultural aspects, the national legislation has not provided a concrete and specific legal solution for euthanasia.

In view of this, euthanasic conduct is, in general, considered as merciful homicide, one in which the penalty is mitigated, taking into account the relevant moral value for which it is practiced. An in-depth study of euthanasia is therefore imperative in order to give it better legal treatment.

Thus, the debate about a terminally ill patient with no possibility of clinical reversibility being able to dispose of his own life and hasten his death, has accompanied civilizations since their beginnings, dividing the population into two large groups that either defend or oppose the practice of euthanasia.

The discussion on euthanasia encompasses moral, ethical, medical, legal, social, and religious values, further increasing the points of divergence between classes. However, observing the concrete cases that have occurred throughout history, other issues are analyzed, such as the inevitability of death, pity for human pain and suffering, the high costs of maintaining a vegetative life in a bed that represents an exorbitant cost and the impossibility of curing the dying.

The life of the human being, well protected by the Federal Constitution, is put up for discussion with regard to its availability. A sick person who is in agony, with no hope of cure already attested by the physician and close to death, is alive, but does not live; does not enjoy a minimum quality of life.

The right to life should be interpreted not only as the right to breathe, but to enjoy quality, and here another point that stands out is the principle of the dignity of the human person, also explained in this monographic work.

Within this context, since life is the *raison d'être* of the whole society, the present study instigates the following questions: At the end of their existence, should terminal patients, due to their clinical status, have their autonomy limited? Or again, must the extent of their dignity have diminished? Or should they have the necessary respect for their "last wishes" to be considered?

Thus, the general objective of this monograph is to address the institution of euthanasia, focusing on the right to life and the principle of human dignity. Its specific objectives are: To



interpret the right to life as a good protected by the Federal Constitution of 1988; Present doctrinal definitions and differences between euthanasia, dysthanasia and orthothanasia; To address the concrete cases of euthanasia that have occurred throughout history. This study initially deals with the right to life from the perspective of renowned scholars, its importance for national legislation and the discussion about its relativization in the face of the concrete case, more specifically in relation to the practice of euthanasia.

In this context, a brief study on the crime of homicide and its evolution in Brazilian Law is also developed, pointing out how it was defined and what is the moment of death applied today. Next, the principle of human dignity is discussed, giving an overview of its content, including historical foreshortening, conceptualization and importance.

After that, we delve into the specific theme of euthanasia, conceptualizing it, showing its evolution, both legal and social, and differentiating it from other practices: orthothanasia and dysthanasia.

After that, it seeks to demonstrate that the conflict between such relevant fundamental rights must be resolved by balancing the protected legal assets, pointing out, in conclusion, which of them should prevail in the specific case. Finally, the position of some doctrinaires who proposed to present possible solutions to cases of euthanasia in Brazil is exposed.

It is expected to provide important subsidies for reflection on the subject, which must be analyzed with absolute caution, in order to obtain a legal solution that is as fair as it is close to society's desires.

The proposed theme is inexhaustible, so not all aspects inherent to the subject have been exhausted, however, it offers solidity so that the position embraced at the end of this monographic work is coherent and justifiable.

The methodology used for the development of the research was the deductive-bibliographic method, carrying out a deep review of the bibliography with systematization and discrimination of the books and other materials used. Among these, the bibliography of national books, specialized magazines, articles from legal websites taken from the Internet was defined. The methodological processes that were used in the elaboration of the research are the following studies: legal dogmatic, analytical-synthetic, historical and applied.



## THEORETICAL FRAMEWORK

### RIGHT TO LIFE

The right to life is the most fundamental of rights, so much so that our legal system protects it from before birth and, after all, it is from it that the human being appropriates others. It would make no sense to proclaim any other if the right to be alive to enjoy it were not assured. For this reason, it is inserted in the Federal Constitution, as a stony clause:

Article 5. All are equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, in the following terms:

Kant and Aristotle defended liberty as the supreme value of law, but Catholic thinkers defended life. According to Sarlet (2012), the right to life prevails in the Brazilian legal system, in large part, due to the influence of Christian religious thought, fixed in the constitution of the national culture. According to the precise lessons of Pessini (2004, p. 262) in 1956, Pope Pius XII expressed the point of view of the Catholic Church by stating

Any form of direct euthanasia, i.e., the administration of narcotics to induce or hasten death, is illicit because it is intended to dispose of life directly. One of the fundamental principles of natural and Christian morality is that man is not master and owner, but only the usufructuary of his body and his existence.

These principles were approved in 1980 by John Paul II, when the "Declaration on Euthanasia" was drafted (VATICANO, 1980, p.6). The right to life was also addressed in the Pact of San José, Costa Rica, in its article 4, which states: "Everyone has the right to have his or her life respected. This right must be protected by law and, in general, from the moment of conception. No one can be arbitrarily deprived of life" (BRANCO, 2013, p. 64).

Article 4 mentions life as a fundamental and non-derogable right. Although it is recognized as an extremely important right, it is relativized by the Federal Constitution itself.

A systematic analysis of our Federal Constitution allows us to conclude that no fundamental right is absolute, insofar as they can be mitigated. A priori, because it is possible to collide between two fundamental rights, and because of the prohibition of the use of a fundamental right to the practice of unlawful acts. It is not valid, for example, to claim freedom of expression of thought in order to propagate racist ideas.

The right to life, despite its paramount importance, is not hierarchically superior to any other right, a fact proven in the Federal Constitution itself, in article 5, XLVII. This understanding is reinforced by ethical or humanitarian abortion, as provided for in the Penal



Code. The suppression of intrauterine life is a criminal offense, however, article 128, II, of the Penal Code, brings a legal permissiveness for the type of abortion: "Abortion performed by a doctor is not punished: [...] II. if the pregnancy results from rape and the abortion is preceded by the consent of the pregnant woman or, when incapable, of her legal representative" (BRANCO, 2013, p. 66).

Ethical or humanitarian abortion consists of the possibility of taking the life of a fetus, even a healthy one, when it is the result of rape, constituting an exclusion of illegality. Placing the right to life of the child and the rights of the abused woman in the balance, the rights of the abused woman were prioritized.

The right to life is not only relativized to Article 5, XLVII, of the Federal Constitution of 1988. In April 2012, the Supreme Court indicated another exception to the rule. Horta (2001, p. 153) understood that there was no criminal protection for the anencephalic fetus, saying: "The anencephalic fetus, even if biologically alive because it is made of living cells and tissues, is legally dead, not enjoying legal protection and, I add, mainly legal-criminal protection". This transformation of the interpretation of the right to life is the broad matter, which is not only focused on the protection of the individual holder of the right, but also on the human dignity of those involved. In this regard, Canotilho (2000) understands that the right to life is expressed as the defense of the right to live imposed on the State and society, and also states that such right does not constitute a freedom or a possibility of availability.

According to Gaudêncio (2011), the debate surrounding terminality raises dilemmas about the process of dying and the end of life. In the debate, the distinction between active euthanasia and passive euthanasia and between these and assisted suicide is often emphasized, with an abundance of arguments for and against one or the other conduct, relegating to the background issues such as dysthanasia and orthothanasia, the latter often wrongly defined.

Dworkin (2009) records the states in which end-of-life issues are usually confronted, from the perspective of the major stakeholder: Conscious and capable, conscious and incapable and, finally, when the individual is unconscious, evaluating the limits of self-determination and, in the case of incapacity, who should decide, thus, as possible criteria and practices to be adopted.

## HOMICIDE

There is no specific type of euthanasic conduct in the Brazilian legal system, and it is considered by most of the criminal doctrine as a kind of privileged homicide, therefore, it is



interesting to bring notes about homicide in the Brazilian Penal Code.

Life, although not an absolute right, is the most valuable asset that human beings possess. And for this reason, homicide was the first crime provided for in the Special Part of the current Penal Code. The murders committed by the Indians, which occurred in Brazil in the period before colonization by the Portuguese, were not seen as illicit, and had no punishment.

Brazilian law was greatly influenced by the European continent during the period of discovery. During the colonial period, as it could not be otherwise, Portuguese legislation was in force: Afonsine, Manueline and Philippine Ordinances. The influence of the Philippine Ordinances, in which Book V was devoted to Criminal Law, was greater. Murder carried the death penalty. The provision was that "any person who kills another, or orders to be killed, shall die a natural death" (PIERANGELLI, 1980).

He also took care to deal with the institute of legitimate defense, describing it as follows: "But if death is in its necessary defense, there will be no penalty, unless it exceeds temperance, which should, can have, because then it will be punished according to the quality of excess" (GUIMARÃES, 2011, p. 70).

It was in force from 1603 to 1824, covering the colonial period and almost the entire period of the first Empire. According to Bruno (1966), in 1824, with the first Constitution, Brazil was inspired by the Enlightenment, adhering to the principle of individualization of punishment. The Criminal Code of the Empire, of 1830, did not mention anything about mercy killing, but in the chapter that deals with justifiable crimes, it determines:

Art. 14. The crime shall be justifiable, and shall not be punished: § 1. When it is done by the delinquent to avoid a greater evil. In order for the crime to be justifiable, in this case, the following requirements must intervene jointly in favor of the offender: 1st. Certainty of the evil he proposed to avoid; 2nd. Absolute lack of any other less harmful means; Third. Probability of the effectiveness of what was used.

At the beginning of the nineteenth century, Brazil drafted a Penal Code, which reflected the ideals of the Enlightenment, where cruel punishments were abolished. In 1890, the death penalty was removed from the legal system and replaced by deprivation of liberty. The offense in the simple form was punishable by imprisonment of between six and twenty-four years. However, he also made no mention of mercy killings (BORGES, 2001).

In 1940, with Decree-Law No. 2,848, which came into force in 1942, the current Brazilian Penal Code was created. The latter removed the mentions of justification of the crime, where the agent, despite infringing the penal norms, sought with certain actions to avoid a greater evil, and there was no criminal intent, so to speak. In view of this, the possibility of



making a connection between the practice of euthanasia and the possibilities of justifying conduct that provoked death was unfeasible (MORUS, 1997).

Article 25 of the Penal Code of 1969 highlighted the state of necessity as excluding culpability. This provision, which distinguished the state of necessity as excluding culpability, seemed to bring the possibility of the state of necessity encompassing the situation of euthanasic homicide, but this Code did not come into force.

For Greco (2011, p. 228), "homicide consists of the elimination of extrauterine life caused by another person. The victim ceases to exist as a result of the agent's conduct." Extrauterine because it is another crime to eliminate life before birth.

The crime of homicide is subdivided into three modalities, simple, qualified and privileged. The legislator defined only the hypotheses in which the crime is considered qualified or privileged, simple homicide is residual. It is appropriate here to delve into privileged homicide, which is intimately linked to euthanasia.

Privileged homicide is provided for in Article 121, paragraph 1, of the Penal Code, which provides as follows: "If the perpetrator commits the crime impelled by a motive of relevant social or moral value immediately after the victim's unjust provocation, the judge may reduce the sentence from one-sixth to one-third" (NUCCI, 2003, p. 298).

The hypotheses of privilege have the legal nature of a cause for reduction of sentence. The judge, despite the criminal type using the expression "may", is bound, as long as the elements are present, to the reduction, being the subjective right of the defendant. The discretion of the judge lies only in the fact that he can choose the rate of reduction between one-sixth and one-third. One of the possibilities of the cause of reduction of sentence is the motive of relevant moral value, which "concerns the personal feelings of the agent approved by the average morality, such as pity, compassion, etc." (GUIMARÃES, 2011, p. 314). Euthanasia is cited as an example of homicide committed for a significant moral value.

## MOMENT OF DEATH

The discussion about euthanasia involves the analysis of the moment of death, because once the former is verified, the former is mischaracterized. However, until the current chronological definition of death was reached, there was a development that accompanied remarkable technological advances.

From the eighteenth century onwards, the definition of life and death belonged to medical knowledge, founded on science. The organization of a logical, rationalized structure for the



production of truths about the universe became the preeminent axis (MARTIN, 2004).

During the twentieth century, especially in the second half, there was a significant development of technologies applied to the medical field. The creation of artificial respirators and the advent of methods to maintain the functioning of vital organs made it possible to prolong life, which determined new criteria for defining death (NUCCI, 2003). Until the second half of the twentieth century, the paradigm that governed the concept of death centered on the stopping of the heartbeat and breathing. From the 1960s onwards, techniques were implemented that enabled organ transplantation, which was the milestone for the change in the criteria for defining death. In the 1960s, cardiorespiratory arrest was no longer used as a criterion for death, but rather in the total and irreversible absence of brain functions, i.e., brain death (MORUS, 1997).

Kovács (2003) says that the brain is an organ that cannot be replaced. As is well known, after brain death, all other systems also cease their activities after a few hours or days. To conclude the diagnosis, it is necessary to wait for seventy-two hours, because there are situations with characteristics similar to death, such as hypothermia, and also due to the inaccuracy of the devices that assess brain death.

In Brazil, the moment of death was defined by law, more specifically in Law No. 9,434/97, which deals with the removal of organs, tissues and parts of the human body for transplantation purposes. It can be inferred from the aforementioned article that the law regulated the final term of the individual's life, which occurs from the confirmation of brain death. Only from this moment is it possible to remove organs and tissues for transplantation purposes. According to the law, even if there is still a heartbeat, the individual is considered dead if there are no more brain functions. With the regulation of the end of life, that is, the legal moment of death, the problems that existed regarding the civil and criminal liability of the individual who "killed" out of compassion those who were in a terminal state of incurable disease, without any brain activity, were exhausted.

With the delimitation of the moment of death, there is no liability, since, if brain inactivity is verified, death is presumed, even if there is a heartbeat or respiration by artificial means. The conduct is atypical.

## HUMAN DIGNITY

The expression "human person" originated from a long philosophical evolution, where the notion of the dignity of the human person began among philosophers as an object of reflection, until it reached Law and added legal values. For many, the term human person sounds





strange, redundant, because they question who the person who is not human would be. Various philosophers and scholars over the years have endeavored to conceive of man as a rational being who, unlike other beings devoid of reason, existed as an end and not as a means.

The concept of the dignity of the human person dates back to antiquity. In the texts of the New Testament, there are references to man having been created in the image and likeness of God, from which it is inferred that the human being is endowed with intrinsic value, and cannot be an instrument or object (SARLET, 2012).

Already in classical antiquity, according to the political-philosophical line of thought, the dignity of the human person existed in degrees, depending on the social class that occupied the citizen in the midst of society. For the Stoic doctrine, dignity was an inherent quality of the human being, and everyone was endowed with this same quality in the same proportion, and this thought was linked to the personal freedom of each individual.

It was Marcus Tullius Cicero who formulated a new understanding of the sense of dignity, detaching it from the idea of social position. He preached respect among men. It was from then on that there was a separation of the understanding between dignity and social or political position and it began to be observed in the moral sense (VIEIRA, 2009).

The notion of human dignity that is preached today owes much to the interpretation made by St. Thomas Aquinas during the Middle Ages. He defined the person as "individual substance of a rational nature" (SARLET, 2012). Dignity is seen by Kant (2003) as a value of such dimension that there is no amount that can buy it. Conceptualizing it is a complicated task, perhaps impossible, to say the least, since it takes care of qualities inherent to the human being. It would be more correct to affirm that scholars and doctrinaires give the dignity of the human person basic contours for its better understanding.

Borges (2001, p. 481), on the nature of human dignity, teaches that "the principle of the dignity of the human person seems to belong to that group of realities that are particularly averse to clarity, even giving the impression of being obscured by the effort to clarify it".

The human being, just by the fact of being part of the human race, is endowed with dignity, a quality inherent to all men, and a universal value, regardless of all existing socio-cultural differences, every person is endowed with dignity in the same proportion, and it is not possible to reject it, since it is inalienable.

Dignity as a moral value is made up of four pillars: freedom, equality, respect and solidarity. The UN Universal Declaration makes considerations about human dignity. Article 1 states that "all human beings are born free and equal in dignity and rights. Endowed with reason



and conscience, they must act towards each other in spirit and fraternity" (VIEIRA, 2009, p. 47). Here we see here two pillars that are the masters of the essence of human dignity.

Sarlet (2012, p. 52) brings his conceptualization of human dignity, emphasizing that it does not aim to exhaust the meaning of the term, but presents a proposal for a definition that is always in the process of evolution:

We consider the dignity of the human person to be the intrinsic and distinctive quality recognized in every human being that makes him or her deserving of the same respect and consideration on the part of the State and the community, implying, in this sense, a complex of fundamental rights and duties that ensure the person against any and all acts of a degrading and inhuman nature. how they will guarantee them the minimum existential conditions for a healthy life, in addition to providing and promoting their active and co-responsible participation in the destinies of their own existence and of life in communion with other human beings, through due respect for the other beings that are part of the network of life.

In view of this, it is concluded that, although there is no concrete and fixed definition of human dignity, all interpretations and attempts to make its nature clearer, give it the characteristic of being intrinsic to the human being, going back to the Kantian ideal. It is characterized by the protection of the individuality and autonomy of the person against any type of interference by the State and third parties, in such a way as to ensure the role of the human being as a subject of rights.

Human dignity is recognized in the national legal system, in the highest law of the country, the Federal Constitution, already in its article 1, item III, within the title of the fundamental principles, thus recognizing that the State exists in function of the person and not the person in function of the State, since the human being constitutes a substantial purpose, and not as a means of state activity.

It is highlighted in other constitutional provisions, such as Article 226, § 7, which bases family planning on the aegis of human dignity; and Article 227, which imposes the duty of the State, the family and society to protect children and adolescents in order to ensure their dignity, among several other rights.

Human dignity is directly linked to the right to life. In this context, where there is life, there is dignity and, for this reason, the violation of one, as a consequence, affects the other legally protected good.

In a systematic interpretation of the Federal Constitution, it is extracted that the right to life does not consist only in being alive, but in living with dignity. And dignity necessarily depends on life to be effectively conquered.

Branco (2013) gives human dignity supreme value, the highest value of the legal system,



in the face of neo-constitutionalist ideals. Life and human dignity are values so dear to our legal system that any debate involving concrete situations in which these rights are in conflict is filled with excessive polemics.

## EUTHANASIA

The practice of euthanasia is quite old, but this nomenclature was only used in the seventeenth century by Francis Bacon. The theme had appeared in the work "History Vitae and Mortis" The concept underwent several changes. Del Vecchio states that Bacon, more than giving new meaning to the expression, became the precursor of today's euthanasic thesis. Until the seventeenth century, euthanasia referred to the acceptance of one's own death; and, in 1605, Bacon gives the term a connotation of alleviating the suffering of terminally ill patients (PIERANGELLI, 1980).

More (1997) preached the responsibility of magistrates and priests, in order to encourage the shortening of the lives of those who were in a state of incurability, since they lived at the expense of those who were stronger and healthier.

This ideal, apparently linked to the notion of euthanasia, translates a wrong view on this conduct, since it is economistic, more linked to the purification of a race. In addition, hastened death, by itself, does not characterize a euthanasic conduct, which is also linked to the care of the suffering of the patient, with the concern not to prolong the agony of those who are in this situation.

The practice of euthanasia is linked to providing a less painful death to the terminally ill, since this situation is inevitable, and not to the idea that many have of being a cold and calculated death. For this reason, it is essential to conceptualize euthanasia. Renowned authors in Brazilian law do so with precision.

Lepargneur (1999, p. 41) adopts the term euthanasia as "the use or abstention of procedures that allow the death of an incurable patient to be hastened or caused, in order to free him from the extreme suffering that assails him or for another ethical reason".

For Capez (2007, p. 34), euthanasic behavior refers to the good death. In other words, "It consists in putting an end to the life of someone, whose recovery is very difficult to prognosticate, by means of his express or presumed consent, in order to shorten his suffering." From this perspective, Martin (2004, p. 199) defines euthanasia as the "medical act that aims to eliminate pain and indignity in chronic illness and dying, eliminating the sufferer of pain". It is important to emphasize that the concept of euthanasia was not restricted here to acts of a medical



nature. Such practice is seen by a broader panorama of conducts, passive or active, that shorten someone's life in order to spare them suffering, and these behaviors are always intentional.

### **Species of euthanasia**

Having taken for granted the concept of what euthanasia is, we can now speak of making explicit the existing modalities of euthanasic practice. Authors usually divide euthanasia into three types: therapeutic, selective, and eliminating.

The first type, therapeutic euthanasia, also called liberating, is that in which the patient suffers terribly from an illness with no cure, and has death administered by the doctor. Selective euthanasia, or also called eugenics, as the name implies, consists of the improvement of the human race, that is, exterminating the deformed, degenerating children and anyone who, in the future, may generate useless expenses. And finally, the last type of euthanasia, also called economic, which aims to eliminate the mentally retarded, the elderly, the physically handicapped and anyone who proves to be useless for work (PESSINI, 2004).

Therapeutic euthanasia is subdivided into active and passive. Active euthanasia is one where, in order to make the incurably ill die, drugs or techniques capable of alleviating or even extinguishing the suffering of the dying person are applied. It can be performed by doctors or laypeople. Active euthanasia has deserved different treatment by legislation, since some countries consider it a crime, others provide for attenuated penalties and there are also those that exempt the agent from any punishment (BORGES, 2001).

### **Conceptual and practical differentiations**

#### **Orthothanasia**

The word orthothanasia comes from the Greek, the root *orthos* means correct and *thanathos* death. Its etymology is quite clear as to the meaning given to the word. Here, death does not suffer any interference, neither to postpone it nor to anticipate it: medical care is used to the patient who is terminally ill, not to try to reverse his state – which is irreversible – but only to give him better conditions in his death (GOMES, 2004).

Medical conduct is not punishable in these cases, since death is considered a natural process, and not by interference. And it is in this context that passive euthanasia differs from orthothanasia, both conducts are omissive. However, in the absence of treatment or measures, it shortens the life of those who are terminally ill, while in orthothanasia, any and all treatment would be useless; Therefore, the doctor's omission here does not cause a shortening of the vital



period, death occurs naturally. Passive euthanasia, as will be seen below, consists of passive merciful homicide, and orthothanasia is characterized by letting die.

The problem lies in the medical treatment available. If this treatment proves to be fruitless in the specific case, and there is an omission, we are faced with orthothanasia. Now, if the treatment were able to develop – remembering that the disease is incurable and terminal – the treatment would only give the patient some more time to live, without life being artificially maintained, inertia qualifies passive euthanasia (BORGES, 2001).

In view of this, in the criminal sphere, orthothanasia cannot be punished, since the event of death occurs by natural means. Any and all omissions or actions of the physician would be innocuous, not modifying the event which, in this case, is future and certain.

Orthothanasia is the opposite of the idea of dysthanasia, while the former is nothing more than the non-prolongation of life, or rather, death is a natural consequence, without any intervention in the sense of postponing it, dysthanasia consists of the increment of life in a synthetic way (MARTIN, 2004).

### Dysthanasia

If orthothanasia consists in allowing the natural end of life of the person who is terminally ill with an incurable disease, and euthanasia, in anticipation of the event of death, dysthanasia is distinguished precisely by being a practice aimed at procrastinating death, that is, artificially maintaining the life of those who, without medical intervention, would have already perished (MARTIN, 2004).

Thus, orthothanasia brings the notion of death in its due time, euthanasia, the conception of anticipation of the death event, and dysthanasia, death after the natural time. The word dysthanasia comes from the prefix dys, which means defective act, and thanatos, which refers to death. According to Pessini (2004), dysthanasia is the act of excessively prolonging death; The doctor, in an attempt to save life at all costs, causes the patient to go through great suffering. In this process, life is not necessarily prolonged, but the process of dying.

A concrete case of dysthanasia that occurred in Brazil was with the first elected president of the Republic after the military period, Tancredo Neves, who was considered dead on April 12, 1985, but was kept by devices and drugs for another 9 days, when, at 10:23 p.m., his death was officially announced (BRANCO, 2013).

Dysthanasia is characterized by the futility of maintaining survival, since there is no possibility of reversing the patient's situation. Dysthanasia is an affront to the principle of the



dignity of the human person, since the patient is not benefited by prolonging his or her "life" (OLIVEIRA, 2001).

The roots of this process are linked to today's culture, where human beings cannot deal with their finitude, and are always looking for ways to overcome death. And, for this reason, it seeks, in any case, with scientific and technological progress, to achieve means not to end its existence.

Dysthanasia, with the passage of time, only gains more strength, in view of its direct connection with technological and scientific evolution, since in past periods, the conditions of the medical field did not provide conditions for the maintenance of life. The greatest invention in this sense was the creation of ICUs, where situations of dysthanasia occur daily, causing unnecessary suffering to the patient. Guerra (2005) brings up the problem at this point, saying that the figure of the doctor is directly linked to the one who fights death, but it is necessary to keep in mind the fact that death is a natural event, because death is undeniable, what varies is only the way it occurs.

## CONCRETE CASES OF EUTHANASIA

Euthanasia, although legal in some places and not in others, has been practiced for a long time. We now highlight some concrete cases that have occurred around the world, facts that have reached a certain publicity involving the "good death".

In 1983, in Britain, a woman in her thirties named Anna had become quadriplegic as a result of a traffic accident. He was in severe diffuse pain, which required heavy doses of painkillers. Anna had three young children. She made a living as a teacher, but she was very active, she loved walking, theater, music, in short, she was a person who enjoyed life intensely. After the accident, he saw no reason to live anymore and always made it clear that he did not want resuscitation in case something happened to him. One day, away from her usual nurses, she suffered a respiratory arrest and underwent resuscitation (BORGES, 2001).

After she was resuscitated, she became dependent on ventilators. After lengthy ethical and professional discussions, his request to turn off the devices was accepted. A device was installed on the devices that would allow her to turn them off. One day, in the presence of all her family members, she hung them up. He was knocked unconscious and given medication to prevent any respiratory fatigue. A few minutes later she came back and asked, "But why am I still here?" More medicine was administered to her, she returned to unconsciousness, her breathing stopped completely and she died (BORGES, 2001).



A case of great repercussion was also that of the Polish actress Stanisława Umńska, who went to Paris in response to the anguished request of her lover Juan Zinowski. Juan was a writer, and he was in the terminal stage of two very serious illnesses: tuberculosis and cancer. Zinowski begged Stanisława to cut short all that suffering. On July 15, 1924, while Juan was falling asleep under the effects of the painkillers he had taken, his mistress took the revolver and shot Juan. She was tried in Paris, and declared impunity (PESSINI, 2004).

The most recent case, which gained worldwide notoriety, was that of the American Terri Schiavo. Terri suffered a cardiac arrest in 1990 and went five minutes without blood flow to the brain region. Due to the major injury, Terri has found herself in a vegetative state ever since. The case was of great complexity, due to the divergence of positions between Terri's husband and her parents. Her husband, Michael Schiavo, requested the removal of the tube that fed Terri, while her parents and siblings were not in favor of such conduct.

Terri's situation went beyond the scope of arguments between her family members and took to the streets. People demonstrated with placards in the streets, on television, on the internet; some in favor, others against the shutdown of Terri's probe. The event went to the courts, to the House, in short, the United States, as well as the world, were all involved in the story of Terri Schiavo. The husband claimed that Terri, when she was still conscious, said that she did not want to remain in a state like the one she was in at the moment, while her parents declared that her husband's interests in turning off the tube had nothing to do with pity, but with economic endeavors (DWORKIN, 2009).

Several tests were done on Terri, and all of them proved the lack of consciousness, as well as the total absence of brain matter in the patient. Terri's husband went to court three times to get the probe shut down. He was successful in the first two, but soon after the request was reconsidered and the probe rewired. However, the third time, on March 18, 2005, the probe was permanently shut down, and remained so until the death of Terri Schiavo, which happened on March 31, 2005 (DWORKIN, 2009).

## LEGAL INTERESTS VIOLATED AND PROTECTED BY THE PRACTICE OF EUTHANASIA

Bearing in mind that the Constitution is the statute that contains the most important values for a society, the infra-constitutional legislator, in choosing the assets that should be protected by Criminal Law, should have it as a foundation.

It is the constituent that elects the legal assets of society, while the infra-constitutional



legislator only extracts them from the Magna Carta, thus imposing limits on the creation of criminal types, since it is bound to the guiding constitutional principles.

Euthanasia is an extremely complex issue, as it collides with two fundamental rights inherent to the person. First, the right to life, which is constitutionally protected in Article 5, and it is the duty of the State to take care of and respect it. The right to life is of such relevance because it is from it that the human being constitutes all others.

The second right linked to euthanasia is human dignity, which also has a constitutional provision in Article 1, constituting the foundation of the Federative Republic of Brazil, the pillar and key to the interpretation of the entire Brazilian legal system.

These two rights, so elementary, are directly linked, since, in a more restricted view of life, its essence is only complete when it is worthy. And dignity necessarily requires a life in order to be recognized. The clash between these two values is a difficult issue to solve.

The first point for resolving the problem is to accept that there is no absolute right. In our current legal system, there is no supreme right. Even the most fundamental of rights can be relativized in the face of the concrete case, such as the right to life, which is mitigated by the Federal Constitution, in cases of declared war, and by the Penal Code, by admitting abortion, legitimate defense and the state of necessity.

The second is to make a balance between these conflicting rights, and to consider which one has greater weight in the face of the concrete situation; which must overcome the other; or if there is a possibility that both coexist in the face of a partial cession between them (DWORKIN, 2009).

In the euthanasic context, the right to life, the supreme good, collides with other values besides the dignity of the human person, such as the right to individual freedom and personal autonomy. Article 5, III, of the Federal Constitution provides that no one shall be subjected to inhuman or degrading treatment. The balance must be made taking into account the secular character of the State, and human dignity, which here encompasses the right to a dignified death, in the sense of not receiving inhuman or degrading treatment, and without offending personal autonomy.

It can be observed both in the constitutional text and in the observations already reported here that the right to life encompasses much more than simply being born. The protection of life is as self-evident as saying that the right to breathe is safeguarded. The right to life is also about having a quality of life, living with dignity, hence it is said that the right to life and the dignity of the human person are rights that go together, complementing each other.





It is the function of the State to ensure the right to life – not only in the sense of being alive – but also in the sense of guaranteeing the citizen a dignified life in terms of subsistence. In this sense, Moraes states: "the State must guarantee this right at a level appropriate to the human condition, respecting the fundamental principles of citizenship, human dignity and the social values of work and free enterprise" (TOKARSKY, 2005, p. 44).

It is also emphasized that the right to life is qualified, that is, it should not be considered only the right to life in itself, but on the contrary, the right to a dignified life should be taken into account. Thus, it is true that the right to life is intensely protected, but the conditions to bring a minimum of self-sufficiency, self-living, and decency to life are also protected (Dworkin, 2009).

It must also be borne in mind that the right to life has an essentially deeper meaning, whereby respect for life has greater value than the maintenance of life against the will of the one who holds it. Guimarães (2011) points out that euthanasia can be considered a moral and possible practice, since the obligation to alleviate the pain and suffering of the patient can override the right to life.

Furthermore, Borges (2001) says that the Federal Constitution, while guaranteeing the right to life, did not guarantee it as absolute. Moreover, he claims that it is not a duty, since the right to life is guaranteed and not the "duty to life". For this reason, attempted suicide is not typified by the Penal Code.

The argument brought by the doctrine that defends euthanasic conduct, for the preponderance of human dignity over life, is that, although there is no express right to die, life is also not an absolute legal good, and its notion is of right and not a duty to live. In view of this, in a global interpretation of the right to life, it can be inferred that its core, its true nature, is that of a dignified life. From this we derive a right not to die unworthily, because "dying with dignity is part of living with dignity" (GUIMARÃES, 2011, p. 224).

## POSSIBLE LEGAL SOLUTION TO THE PRACTICE OF EUTHANASIA

Despite its legal importance, some scholars still argue that euthanasia should not be dealt with by law, it should be a matter dealt with only by ethics and morals. The importance of the legal treatment of euthanasia is, however, undeniable, considering that it is linked to life, which is of paramount importance, and also to human dignity, and the Law cannot shy away from providing answers to socially expressive and conflicting situations.

Euthanasia is currently considered by the Brazilian legal system as a kind of privileged homicide, because it is a merciful homicide, where the conduct would be motivated by relevant



moral value. But this was not always the case, there was a time when it was argued that euthanasia was an aggravated form of homicide, as it was a way of eliminating a person unable to defend himself.

The change in this thinking occurred from 1919, when Binet-Sangle, Binding and Hoche, did research and work on the subject. They established the understanding that, even in the presence of an incriminating law, the agent of euthanasic conduct could be acquitted, using one of three grounds, which are the lack of criminal intent, the state of necessity and, in exceptional situations, the disturbance of the senses. (GUIMARÃES, 2011).

It so happens that, currently, euthanasia does not have its own legislation, and Brazilian law has not taken care to give a better treatment to the issue. And, for this reason, several authors seek a legal solution to the problem of euthanasia in Brazil.

Some scholars, such as Nucci (2003) affirm that, in the case of euthanasic conduct, the absence would be done, since the agent, with the intention of doing good, would not have discernment for the illegality of his act, thus not being able to speak of a crime, since an element would be missing. But this thesis is rejected, since malice is confused with motivation.

Others, such as, for example, Capez (2007) understand that the solution would be to consider it an exclusion of causal liability, where different conduct of the agent would not have excluded the result, and could only have anticipated such a consequence.

In Brazil, with the evolution of cultural thinking, technologies and changes in customs, legislation has tried to keep up with such social changes, taking into account the advances obtained. With an interpretation of the principle of human dignity, they supported the possibility of euthanasia and, thus, in the preliminary draft of the reform of the Penal Code - special part, they created a § 3 to Article 121, which was presented as follows:

Art. 121 [...] § 3. It is not a crime to fail to maintain someone's life by artificial means, if death has been previously certified by two physicians as imminent and inevitable, and provided that there is consent from the patient or, if this is not possible, from an ascendant, descendant, spouse or sibling.

When forwarding the bill to Congress, they made changes to the matter, removing the character of the exemption from punishment and granting it a reprimand of imprisonment from 2 to 5 years. They added a § 4, which decriminalized orthothanasia, provided that with the approval of two doctors about the imminent death, the patient's consent or in the impossibility of doing so, the legitimacy would be that of an ascendant, descendant, partner/spouse or sibling, who is alive by artificial means. Much was questioned about the subject addressed and they decided, at the time, to prolong the debate to identify the real social will (GUIMARÃES, 2011).



The classification of euthanasia in a provision of criminal legislation has been the object of arduous studies and searches in international criminal systems. In the search for legal provisions, in the criminal legislation of other countries, we find, in the majority, precepts referring to consensual, merciful homicide, with which the national doctrinaires insist on typifying euthanasia.

Scholars, such as Greco (2011) and Guimarães (2011) and even jurisprudence, stick to the piety and compassion that impel the agent of the euthanasic practice to produce the death effect to configure euthanasia as privileged homicide, because in such a conjuncture, the moral and social value found in it is considered relevant to the point that the action is the object of mitigation of the penalty. It must be remembered that an important moral value is the superior, ennobling value of any citizen in normal situations.

It is essential that this value is in line with the prevailing ethical principles. That which in itself is approved by the moral order, by practical morality, for example, compassion or pity in the face of the unbearable suffering of a person who has an incurable disease, will be a reason for relevant moral value. In this way, the agent who commits the so-called mercy murder or euthanasia acts impelled by motive of relevant moral value.

Nowadays, an alternative to euthanasia would be the application of judicial pardon to certain cases, under the perception that euthanasic conduct is not tainted with criminal intent, there is no intention to kill in its pure sense, but only the desire to free the suffering from the one who suffers. The application of the principle of human dignity is crystal clear.

Judicial pardon was provided for in Article 107, IX, of the Penal Code. It is an institute that does not remove the crime, but allows the punishment to be avoided, due to the suffering caused by the agent to himself. In other words, it is the State's commiseration in the face of certain situations provided for by law, where the penalty provided for criminal conduct is not applied. Judicial pardon takes effect after the magistrate has handed down a sentence. Only after being judged guilty can the judge grant him the benefit of pardon (CAPEZ, 2007).

For others, it is in the nature of a declaratory decision. The difference, in this case, for the first current, is that the effects of the condemnation subsist and, for the majority of the doctrine, it is seen as a condemnatory decision. Nucci (2003, p. 606) argues that it is a condemnatory decision, considering that "no one forgives an innocent person", in addition to basing his understanding on Article 120 of the Penal Code, which establishes the non-recidivism of the judicially pardoned. Therefore, although cases of judicial pardon are provided for by law, some scholars on the subject understand that it could be used as a solution to euthanasia cases in an



analogous way.

Another way to solve the problem of euthanasia would be the creation of its own type within the Penal Code. This type is permissive, by which, if certain requirements – the elements of the type – are respected, it would configure the legitimacy of the euthanasic practice.

Legal abortion, which is codified in Article 128 of the Penal Law, would be used as a parameter for the creation of this norm, since there is also, in cases of abortion caused by rape, a conflict between the right to life and the right to human dignity, prevailing the dignity of the woman, who suffered violence to the detriment of the life of the fetus.

## FINAL THOUGHTS

A parallel between euthanasia and the principle of human dignity was the object of study of this monographic work, observing that the practice of euthanasia is not something recent, but has accompanied man since the dawn of civilization. The study of euthanasia is complex and widely discussed, as it involves several aspects, such as religion, life, death, ethics and also justice. In the legal sphere, specifically, it involves a conflict between the right to life and human dignity.

The right to life of all is the most fundamental, because it is from it that others can be enjoyed. However, it is not admitted as absolute, since the Federal Constitution itself, which guarantees it, also excepts it. The right to dignity, on the other hand, also occupies a prominent position in the constitutional norm, and implies respect for minimum existential conditions for a healthy life, free from any degrading treatment. The idea of euthanasia is to shorten the life of a patient who is known to be incurable, who is in deep suffering, doing so in an active way, by provoking death; or by the passive form, by refraining from measures that would preserve life.

Euthanasia differs from other practices that interfere with the moment of death. This is the case of orthothanasia, which translates as "letting die", since any interference would be useless; and dysthanasia, which is the act of maintaining life artificially, prolonging it unnecessarily.

Over time, there has been a profound change in the concept of euthanasia, which, in the early days, had a eugenic purpose, that is, it aimed at genetic improvement. With the socio-cultural evolution of peoples, the current conception has been reached, according to which euthanasia has strictly humanitarian objectives, of shortening suffering.

However, anticipating the moment of death, in order to shorten suffering, disagreements with constitutionally guaranteed fundamental rights: life and dignity. What is necessary, in the



face of conflicts of this nature, is to balance the legal goods involved, in order to admit the prevalence of dignity, since the right to life can only be fully enjoyed if this life is dignified, so that dying with dignity is part of this dignified life. From the perspective of Brazilian legislation, there is currently no specific treatment for the practice of euthanasia, which, in general, is considered a crime of homicide, although privileged and, therefore, with a reduced sentence.

While in euthanasia the life of the patient is taken by another at the request of the patient, in assisted suicide, the truth observed is that someone suppresses his own life with the help of another, and the latter does not actively participate in the realization of the death. The Brazilian Penal Code, as noted, does not make explicit the euthanasic modality, but considers that if someone practices euthanasia on another, he acted induced by relevant moral value, thus mitigating the individual's penalty.

At the same time, a careful analysis of the Brazilian Penal Code shows that someone who attempts suicide is not punishable, even if they do not suffer from any serious illness. A great question arises regarding euthanasia, because if a dying person begs for his life to be taken because he cannot bear such suffering anymore and because he knows that death is inevitable, the person who helps him is convicted of homicide. In the first case, it can be seen that the Penal Code respected the victim's will not to punish the one who attempted suicide, but did not succeed, but does not approve the second case where there is no arbitrariness in the conduct.

It is worth noting that the search for the legalization of euthanasia must be carried out with great caution, so as not to trivialize the institute and not cause arbitrary deaths. There are several criteria that must be observed before deliberating on the impunity of the euthanasic practice, the main ones being the existence of an incurable disease, where the hope of cure has already been scientifically proven to be impossible; unbearable suffering and pain, and the patient's request.

Consent must be free and informed, i.e., the dying person must be aware of everything that occurs to him, as well as the alternatives for treatment or palliative methods; Have all the truthful information so that your decision is based on consistency. The patient's autonomy must be respected, thus asserting the exercise of his dignity as a human person, which concerns having the rights and guarantees granted by the State inviolate. Euthanasia is not an act contrary to the principle of human dignity, a principle that has been widely discussed throughout the work, but rather in favor of it, since it seeks to guarantee a dignified death.

In view of this real gap, in order to give a more adequate treatment to the subject, some legal solutions are admitted. First, the possibility of a legal provision for judicial pardon, as a



form of commiseration by the State in the face of the peculiarity of the circumstances. Another solution would be the creation of a permissive type in the chapter of the Penal Code that deals with crimes against life, in analogy to what was done in relation to humanistic abortion (Art. 128, II).

It is recognized that it is not possible, in the short term, to reach the ideal legal equation for the issue of euthanasia, since the subject is still the subject of much controversy in the social environment. It is up to the legislator, using his sensibility, to try to get as close as possible to the wishes of the population, and to confer, at least, a differentiated treatment to those who act out of compassion, guaranteeing dignity to their fellow men.

It is concluded that the principle of the dignity of the human person was placed as one of the most important, or for many, the main foundation of the Federal Constitution. The State, in addition to guaranteeing such dignity, has the task of promoting it, providing every man with a dignified life from birth to death, also allowing the patient to precede his death when he realizes that he is no longer living with dignity.

The "dignified death" does not violate the principle in question, since it ensures dignity to the individual only as long as he or she is healthy; and when, in a state of illness, he is left at the mercy of the will of doctors and the State, without valuing his will or dignity, it is not a beneficial guarantee. The right thing to do is to ensure that the individual, even on his deathbed, has his dignity respected and has the power to decide whether he wants to continue in deep agony that will inevitably result in his death, or whether he wants to anticipate it and spare himself such suffering.

Knowing that in the constitutional sphere the essential thing is to respect these principles and values, which are: the dignity of the human person, freedom, autonomy and the right to life; And as demonstrated throughout this work, such principles do not contradict the law of euthanasia or orthoethanasia, it is evident that they constitute the basis for the defense of the so-called "dignified death". It is necessary for the Brazilian justice system to adopt a clear and concrete position on a subject that is increasingly relevant, and continues to have the Law alien to it. A silent revolution is already underway and it will be wise for the State to deliberate on the matter before arbitrariness takes over hospitals in the name of death with dignity.

Thus, it is concluded that euthanasia is a form of extension of living with dignity, since the principle of the dignity of the human person seeks to accompany man from his conception to his last breath of life; And the practice of euthanasia promotes the death with dignity of those who can no longer bear an embarrassing and agonizing situation that hurts their dignity.



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