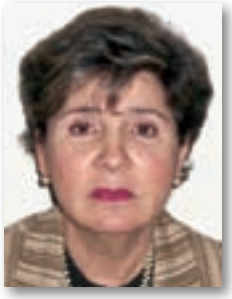
The decriminalisation of active euthanasia [La despenalización de la eutanasia activa]

The decriminalisation of active euthanasia:
a little known sentence handed down by the Columbian Constitutional Court



Luz María Restrepo Mejía
Profesora Titular de la Facultad de Derecho
Universidad de Antioquia
Medellín, Colombia

"It is unseemly to go on living when one reaches a certain state. To go on vegetating in cowardly dependence on physicians and medication, after the meaning of life, the right to life, has been lost, ought to arouse a profound contempt in society".

F. NIETZSCHE

1. Making decisions at the end of live

On speaking about making decisions at the end of life, of necessity one must refer to active euthanasia, which originally implied the individual deciding to end his or her own life; in modern times its meaning has changed; in this age of basic rights, it has been replaced by the right to a dignified death.

Given the various definitions of euthanasia, one can perceive the philosophical perspective from which it is broached, because it is inevitable that when dealing with a subject that so profoundly affects the person, as is his or her sense of life and death, ethical preferences are involved.

As regards the manner of reacting to euthanasia one can say, in partial accord with **Ernst Tugendhat**, that both ideology, as per the Judaeo-Christian-Islamic tradition, as well as modern philosophy, mainly by way of its utilitarian variants, Kantian ethics and contractualism, exert an influence. The big monotheistic religions are marked by the belief in the sacredness of the individual human life, given that this is a gift from God. Thus euthanasia is rejected by believers, who in general, are opposed to it in all its forms. Within the world of philosophy, the utilitarians are always guided by the idea of avoiding the suffering of all living creatures, which enables them to approve euthanasia in those cases where suffering is deemed to be unnecessary. Meanwhile, the Kantian concept of ethics allows for some forms of euthanasia whenever the individuals involved do not belong to the moral community, which groups together rational beings. Contractualists, for their part, will accept all forms of euthanasia wherever it may be agreed that an unjust, or arbitrary, situation needs to be resolved.

2. Columbian Constitutional sentence C-239 OF 1997

Following the Spanish Constitution of 1987, those who drew up the Columbian Constitution of 1991 adopted the basic principles of the Social and Democratic State and included basic rights in the new text: social economic and cultural rights, as well as collective and environmental rights.

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Between 1996 and 1997, the Columbian Constitutional Court conducted a case of unconstitutionality against Article 326 of the now abolished Penal Code, which established a reduction of sentence for the so-called "mercy killing", grounded in the argument that such a reduction was a breach of the recently adopted constitution. The Constitutional Court, presided by Judge Carlos Gaviria Díaz, handed down Sentence C-239 on May 20 1997.

The decision was based on the response to two questions with respect to the criminal category of the mercy killing: 1) Is the qualified mitigation of the sentence for mercy killing legitimate in the light of the Constitutional Charter of 1991? 2) What is the legal relevance of the consent of the passive subject to the act?

In response to the first question, the Court found that the punitive reduction of the sentence was proportionate and legitimate, given that, although it addresses the emotional condition of the author, it does not leave the legal right to life unprotected.

With respect to the second question, the Court analyses the legitimacy of penalising whoever carries out a mercy killing upon the request of the passive subject:

> *Whoever kills another out of mercy, with the aim in mind of ending the intense suffering of the passive subject, is acting clearly for altruistic purposes, and it is that motivation that has lead the law-maker to create an autonomous category, to which he assigns a considerably reduced sentence than that which is provided for in the case of simple, or aggravated, homicide. […] In the face of the terminally ill that are experiencing intense suffering, this state duty yields before the informed consent of the patient who wishes to die in a dignified manner. The basic right to live in a dignified way, thus implies the right to a dignified death, given that to condemn a person to prolong his or her existence for a short period of time, whenever he or she does not so wish, and whenever he or she is suffering from severe distress, not only amounts to cruel and inhuman treatment, expressly prohibited by the Charter (Article 12), but represents the abrogation of his or her dignity and of his or her autonomy as a moral subject. The person would be reduced to a mere instrument to preserve life as an abstract value.*

On reiterating the fact that the Constitution is based on the person as a moral subject capable of autonomously assuming responsibility for his or her destiny, and that the state must not interfere by promoting moral or religious imperatives, the Court held that:

> *If the manner in which individuals see death reflects their convictions, they cannot be forced to continue living by virtue of the inadmissible argument that a majority adjudge it to be a religious or moral imperative, when, given the extreme circumstances in which they find themselves, they do not deem it either desirable or compatible with their dignity […] when the response concerning the duty to live when the individual is suffering from an incurable disease that is causing him or her intense pain, is seen from two standpoints: 1) that which understands life to be something sacred, and 2) that who deems life to be valuable, but not sacred, then the religious beliefs, or metaphysical convictions, that argue for the sacredness of life merely represent one option among several.*

Having pondered both of these positions, the sentence decided that this dilemma must be resolved from a secular and pluralist perspective. It so decided given that Article 1 of the Columbian Constitution recognises human dignity as a supreme value that governs the interpretation of basic rights, and finds

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its maximum expression in the free development of the personality (Article 16).

The idea of life defended by the Constitutional Court is that "life is the presupposition required for all other rights, it is an inalienable good, without which the exercise of other rights would be inconceivable". However, the criterion of maintaining life in purely quantitative-biological terms begins to give way to a qualitative consideration, which turns it into a relative value; thus allowing for the individual to decide to continue living, or not, in extreme circumstances in which life has become both undesirable, and undignified. What needs to be reflected is a new way of dealing with the subject of euthanasia, at least, as far as the state is concerned, in order to reach the conclusion that as regards mercy killings, whenever consent is forthcoming from the terminally ill patient, such an action becomes lawful:

> *[…] Consequently, if a terminally ill patient who finds himself or herself in the objective conditions set forth in Article 326 of the Criminal Code deems that his or her life should be brought to an end, because he or she adjudges it to be incompatible with is or her dignity, he or she may as a result proceed, in accordance with the exercise of his or her freedom, without the state having any power to oppose, or impede, his or her plan, by means of prohibition or penalty, that a third party help him or her to satisfy his or her choice. The intention is not to minimise the importance of the duty of the state to protect life but rather, as has been indicated, to recognise that this duty does not translate into the preservation of life as merely a biological act.*

The Constitutional Court went immediately on to indicate several requirements that need to be complied with in order for the decriminalisation of active euthanasia to come into play, as are for example: the capacity of the passive subject to understand his or her condition and the therapeutic options available, in order to enable the making of an informed decision that may give rise to the unequivocal expression of the wish to end his or her life, and at the same time to impede any abuse of the authorisation to carry out such an act and to prevent, both the patient who may be suffering from a transient depression, or any third party that may in some way benefit from the death of the patient, having recourse to this option. Moreover, the active subject must be a doctor, and as such must not only be capable of providing the patient with information, but must also be capable of providing the patients with the conditions to die in a dignified manner. The Court further indicates that "as far as terminally ill patients are concerned, the doctors that carry out the act described in the criminal regulation with the consent of the passive subject cannot then be the object of any sanction, thus, the judges must grant relief from any responsibility to those who act in this way".

Moreover, aforementioned sentence pointed out that as the requirements listed can only be established by the law-maker, until this were to come to pass, every mercy killing concerning a terminally ill patient must be subject to a criminal investigation in order to establish whether or not the conduct of the doctor has been illegal pursuant to the conditions set out above.

Finally, out of the interests of legal security, the sentence urges the Columbian Parliament to legislate, as soon as possible, for dignified death pursuant to constitutional principles and for reasons of basic humanity.

3. The consequences of the sentence

The sentence has been applied very little, obviously as a result of the fear of health care professionals being subject to a criminal investigation.

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Something rather paradoxical happened in 2000; the Columbian Parliament brought in the Criminal Code that is currently in force, pursuant to Law 599 of 2000. Article 106 of this Code fully regulated the legal form of mercy killings by repeating preceding rules and increasing the minimum sentence, while at the same time completely ignoring aforementioned Constitutional Court recommendations.

Only on 24th August 2006 was Statutory Draft Bill 100 of 2006 submitted to the Columbian Senate, the aim of said bill being to meet the recommendation that concludes Constitutional Court Sentence C 239 of 1997.

In the light of other concerns facing the Columbian Parliament at present, it is quite difficult that a bill that does not enjoy the favour of the government be passed. This however, does not take away from the fact that one can continue to maintain that the right to freely avail of one's own life, as an autonomous moral being, in order to decide the moment in which one may wish to die, is grounded on the basic principles of the right to life, in the recognition of human dignity, autonomy, a dignified life, plurality, freedom of conscience and the freedom to develop one's personality; principles which enable me to conclude with NIETZSCHE: "To die proudly when it is no longer possible to live proudly. Death freely chosen, death at the right time, brightly and cheerfully accomplished amid children and witnesses: then a real farewell is still possible, as the one who is taking leave is still there; also a real estimate of what one has achieved and what one has wished, drawing the sum of one's life".

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luzmariarestrepo@gmail.com