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Unconstitutionality of criminalizing physicians for the practice of euthanasia

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Abstract

This study aimed to show the unconstitutionality of applying arts. 121 and 122 of the Brazilian Penal Code to the practice of euthanasia. To this end, we carried out a critical analysis of these articles, considering the constitutional foundations and cases of patients with severe and incurable diseases affected by unbearable suffering. It was based on the Brazilian Federal Constitution, the doctrine of constitutional law, and the Direct Action for the Declaration of Unconstitutionality 3,510-DF/2008. After the analysis, we found incompatibility of these articles with the constitutional framework, concluding that the application of these legal provisions to the practice of euthanasia usurps citizen autonomy to protect only one dimension of life, at the expense of violating fundamental rights: dignity of the human person, freedom, inviolability of private life, and not being subjected to torture or inhuman or degrading treatment.

Keywords: Bioethics. Euthanasia. Suicide, assisted.

Resumo

Inconstitucionalidade da criminalização do médico pela prática de eutanásia

Este estudo objetivou evidenciar a inconstitucionalidade da aplicação dos arts. 121 e 122 do Código Penal brasileiro à prática de eutanásia. Para isso, realizou-se análise crítica desses artigos, considerando os fundamentos constitucionais e casos de paciente com doença grave e incurável acometido por sofrimento insuportável. Serviram de base a Constituição Federal brasileira, a doutrina do direito constitucional e a Ação Direta de Inconstitucionalidade 3.510-DF/2008. Após a análise, verificou-se a incompatibilidade dos referidos artigos com a moldura constitucional, concluindo-se que a aplicação desses dispositivos legais à prática de eutanásia usurpa a autonomia do cidadão para proteger apenas uma dimensão da vida, às custas da violação de direitos fundamentais: dignidade da pessoa humana, liberdade, inviolabilidade da vida privada e não ser submetido a tortura nem a tratamento desumano ou degradante.

Palavras-chave: Bioética. Eutanásia. Suicídio assistido.

Resumen

Inconstitucionalidad de la criminalización del médico por la práctica de la eutanasia

Este estudio tuvo como objetivo poner de manifiesto la inconstitucionalidad de la aplicación de los artículos 121 y 122 del Código Penal brasileño a la práctica de eutanasia. Para ello, se llevó a cabo un análisis crítico de estos artículos, teniendo en cuenta los fundamentos constitucionales y casos de paciente con enfermedad grave e incurable que padecen un sufrimiento insoportable. Se utilizaron como base la Constitución Federal brasileña, la doctrina del derecho constitucional y la Acción Directa de Inconstitucionalidad 3.510-DF/2008. Tras el análisis, se comprobó la incompatibilidad de dichos artículos con el marco constitucional y se llegó a la conclusión de que la aplicación de estas disposiciones legales a la práctica de eutanasia usurpa la autonomía del ciudadano para proteger una sola dimensión de la vida, a expensas de la violación de derechos fundamentales: la dignidad de la persona humana, la libertad, la inviolabilidad de la vida privada y el derecho a no ser sometido a tortura ni a trato inhumano o degradante.

Palabras clave: Bioética. Eutanasia. Suicidio asistido.

The author declares no conflict of interest.

Research

Different historical contexts and the needs of each time period foster new lines of discussion about the end of life. Thus, this subject has evoked complex dilemmas—bioethical, moral, legal, medical and commercial dilemmas—which leads to changes on a daily basis. In this context, there is a need to understand the concept of life that is constitutionally protected in Brazil, since the very interpretation of the constitutional framework is influenced by the evolution of society, giving new meanings to the principles throughout time and space, in view of historical and cultural changes.

According to Barroso [1], Bonavides [2] and Mendes and Branco [3], constitutional rights are divided into generations: first-generation (civil and political) constitutional rights comprise classical, negative freedoms; second-generation (economic, social and cultural) constitutional rights correspond to positive freedoms, strengthening the principle of equality; and third-generation constitutional rights, which materialize powers held collectively, ratify the principle of solidarity, recognizing and expanding human rights.

New generations of law are already present, such as the right to democracy, development, information, bioethical issues, etc. However, the rise of new generations does not supplant rights previously enshrined, although these may have their meanings adapted to the new historical context. That is, the right to freedom does not retain its original meaning after the rise of the rights of subsequent generations [1,2].

As observed, the application of a constitutional fundamental right, in principle, does not exclude another; however, at certain times, they may seem antagonistic, resulting in the need for interpretation according to the historical context and the unity of the constitutional text. As an example, in the case of a patient with an incurable disease who undergoes intense suffering and wishes to be euthanized, which fundamental right should prevail: the right to life, the right to freedom, the right to dignity of the human person?

In order to answer this question, we can resort to the teachings of Barroso [1] on the principle of unity of the Constitution, the principle of proportionality and the fact that there is no hierarchy between constitutional norms. That is, at least these three points must be observed so it is possible to harmonize an apparent clash between fundamental rights.

Therefore, by criminalizing euthanasia, the State is deciding for the citizen which fundamental right should prevail at the expense of suppressing other fundamental rights. Thus, it is necessary to analyze, based on the Federal Constitution of Brazil, the interpretation of arts. 121 and 122 of the Brazilian Penal Code [4]—which define the crimes of murder and of inducing or instigating someone to commit suicide, respectively—to exclude euthanasia from its scope of incidence.

Method

This is a critical analysis of arts. 121 and 122 of the Penal Code in relation to the practice of euthanasia, based on the constitutional foundations and considering the possibility of a patient with a serious and incurable disease affected by unbearable suffering deciding on the time to end this suffering. To this end, we used the Constitution, the doctrine of Constitutional Law, votes, citations and transcripts from the Direct Action for the Declaration of Unconstitutionality (ADI) 3,510-DF/2008.

Assisted suicide in the Brazilian legal system

The discussion about assisted suicide presented in this study is directly related to the right of patients with serious and incurable diseases affected by unbearable suffering to decide on the time to end this suffering. In this regard, initially using the teachings of Sarlet, Marinoni and Mitidiero [5], it is worth differentiating some institutes related to assisted suicide:

- Euthanasia: consists in medical assistance to reduce the life time of a patient in a situation of unbearable suffering due to being in a highly compromised state of health, which will inevitably lead to death. Such medical assistance may be omissive or commissive;
- Orthothanasia: does not anticipate or prolong the end, letting death occur at the right time. In this case, there is suppression or limitation

of all futile, extraordinary or disproportionate treatment, favoring treatment aimed at relieving patient pain and suffering;

- Dysthanasia: unlike euthanasia, it seeks to delay death as much as possible, using artificial means of prolonging human life even at the expense of patient suffering. It is also called therapeutic obstinacy or futile treatment.

Another institute in question is assisted suicide, in which the patient is responsible for the act causing their own death, and the third party is only responsible for collaborating to carry out the act by providing information or providing the necessary means for its consummation [6].

There are no legal consequences, in the Brazilian criminal system, for cases of orthothanasia and dysthanasia. On the other hand, euthanasia is defined as a homicide established in art. 121 and assisted suicide as an inducement to suicide, according to art. 122 of the Penal Code [6].

Articles 121 and 122 of the Penal Code and assisted suicide

Unconstitutionality of the application

As previously mentioned, the practice of euthanasia and assisted suicide is defined, respectively, in arts. 121 and 122 of the Penal Code [4]. In this context, it is clear the relevance of the protected legal asset—the life of the patient with incurable disease affected by unbearable suffering—which is a fundamental right provided for in the constitution. However, the criminalization of these procedures violates several fundamental rights, in addition to disregarding the principles of unity and proportionality. This will be demonstrated below.

Fundamental rights violated

The criminalization of euthanasia and assisted suicide violates the following fundamental rights of patients:

- Dignity of the human person, since the individual is obliged by the State to maintain their life without dignity, even if there is no therapy that prevents the disease from leading to death or reduces their suffering;
- Freedom, since the patient no longer retains the right to make their existential choices;
- Inviolability of the private life, as the autonomy of an intimate decision is denied to them; and
- Not being subjected to torture or inhuman or degrading treatment, since the patient, in addition to being condemned to a death that will soon occur, is still obliged to live with unbearable suffering, without the possibility of ending it.

First, the dignity of the human person, listed in art. 1, item III, of the Brazilian Constitution [7], is one of the foundations that underpin the democratic rule of law in Brazil, being the agglutinating agent that gives unity of meaning and value to fundamental rights. Thus, there is no hierarchy between these rights, but complementarity, so that, in case of apparent clash, they are harmonized according to the conception that the person is the foundation and end of society and the State.

According to Barroso [8], the loss of autonomy, that is, the impossibility of the citizen having the ability to make their relevant moral choices, using their own conception of good and without undue external interference, characterizes loss of the dignity of the human person. This understanding does not apply to individual choices that may compromise relevant social values. In this context, it is clear that a human being affected by severe, incurable and advanced pathology, who faces intense physical and psychological suffering, loses their autonomy and may feel psychologically and physically tortured, characterizing the loss of their dignity as a human being.

Second, by preventing, through the criminalization of euthanasia and assisted suicide, the patient from exercising their right and responsibility to make their existential choices, the State is violating the fundamental right to freedom provided for in the main clause of art. 5 of the Federal Constitution of Brazil [7], as citizen autonomy corresponds to the essential core of individual freedom, in addition to being directly related to the principle of human dignity. Certainly, the right to decide on one's own basic and moral existential choices in order to guide the course of one's life is what characterizes people's self-determination.

In addition, as a third point to be questioned, according to art. 5, item X, of the Federal Constitution [7], every citizen is assured the inviolability of a legitimate sphere of privacy within which they can enjoy their values, predilections and purposes—in this sphere, the State and society do not have the right to interfere. As an even greater aggravating factor, in addition to patient autonomy not being respected, they are obliged to lead a life in agony. How can the State impose on a patient that they continue to have the terminal phase of their life affected by intense suffering and loss of their dignity just to please part of society?

In addition to the violations already reported, a fourth violation refers to subjecting the individual to torture and inhuman or degrading treatment. In addition to living with the certainty of imminent death, the patient is still obliged to endure intense suffering, only tolerable for lack of legal choice, as well as to undergo treatments that in no way reduce their pain or prevent the worsening of their illness.

Principles of unity and proportionality

According to Canotilho [9], there is a paradox within the legal system, which is the inconvenience of the finding that the law does not cover everything, that the factual issue in certain situations is presented as something not outlined by the rational legislator. In this context, the system itself created a mechanism to solve the problem, that is, next to the rational legislator, a rational judge/interpreter was placed. While the first is totally discretionary—if political discretion is disregarded—the second will have limitations to occupy the vacuums left by the legislator. This limitation of discretion is based on authorizing the elimination of legislative vacuums based on the general principles of law, analogy and customs.

As presented, the principles seek to build an interpretative process in which the motivation of the legal statement is evidenced without forgetting the interpreter's commitment to reality to thus adapt to the democratic rule of law.

Based on the understanding of the importance of the principles in the application of the framework, it is initially worth noting the teachings of Bonavides [2], who, based on the knowledge of the Italian jurist Perassi, states that in a legal system the rules are not separated. On the contrary, they form a block in which the principles act as links that form the principle of unity of the legal system. In this same logic, there is the principle of unity of the constitutional text, according to which there is no possibility of interpretation of isolated texts, but of the entire constitutional order jointly.

Thus, this shows the importance of understanding the principle of unity of the constitution. According to Barroso [1], this principle is in the constitutional genesis, since it is the result of debate and political composition of diverse and often divergent interests, due to the diversity of representation of a legislative house, which creates the possibility of tensions between constitutional rules. In this regard, Grau [10] states that the law is not interpreted in a fragmented manner and that the interpretation must be of the law, and not of texts of the law in isolation—that is, the Constitution is a system in which only the joint action of the parts promotes the expected result.

In addition, according to Barroso [1], the greater complexity of applying the principle of unity is related to the tensions that are established within the Constitution itself, since there is no hierarchy between constitutional rules. Thus, a constitutional rule cannot make another unconstitutional.

As a result, the principle of unity guarantees that the harmony, coherence and essence of the constitutional text are maintained, preventing one constitutional rule from being applied to the detriment of another, which Bonavides [2] classifies as a principle that will eliminate contradictions. As mentioned by Barroso [1], according to Hesse, the interpretation should seek practical harmonization between the protected legal assets when they are presented in antagonistic regulations, in order to preserve as much as possible of each asset.

In addition, also as a means to control the discretion of acts of the government, the principle of proportionality or reasonableness exist. According to Barroso [1], this principle arose in the United States as a control of constitutionality and in Germany as an instrument limiting

administrative discretion. Thus, through this principle, it is implicit the existence of rationality to maintain the relation between means and ends in both countries.

According to Barroso [1], Bonavides [2] and Canotilho [9], proportionality not only means the adequacy of the means to reach the ends, but also has two other characteristics: need/prohibition of excess and proportionality in the strict sense.

Certainly, as taught by Alexey [11], Barroso [1], Bonavides [2], Canotilho [9] and Mendes and Branco [3], the principle of proportionality is an important rule for interpretation and application of fundamental rights, including when there is a clash between fundamental rights or between fundamental rights and collective interests. Moreover, the authors justify that the objective of applying the proportionality rule is to avoid restrictions of disproportionate dimensions. In fact, it is evident that the principle of proportionality, when characterized as a tool to control the discretion of acts of the government, is a valuable device to guarantee fundamental rights and the public interest.

Discussion

In the context of assisted suicide, two points are prominent. The first concerns the application of arts. 121 and 122 of the Penal Code to the practice of euthanasia in view of the fundamental rights provided for in the Brazilian Constitution, a situation in which it should be noted that the law must be framed by fundamental rights, and not the other way around. Thus, in order to be applied, these articles must be circumscribed to the boundaries of fundamental rights, including: dignity of the human person, freedom, inviolability of private life, not being subjected to torture or inhuman or degrading treatment; and inviolability of the right to life [2].

Consequently, we reach the second point, whose resolution is more complex, because, on a more superficial analysis, by choosing to be euthanized, the patient would be causing a clash between the fundamental right to the inviolability of life and the fundamental rights to human dignity, freedom, inviolability of private life and not being subjected to torture or inhuman or degrading treatment. However, it is necessary to first understand what constitutionally protected life is.

Certainly, the 1988 Constitution [7] was thorough in many matters of lesser relevance; however, as to the right to life, it took no care to establish a concept or detail limits. Perhaps the legislator, considering the complexity of the subject, preferred to strengthen the idea of the non-existence of absolute right despite the importance of this right. In fact, the controversy over the meaning of the word "life" in the context of constitutional protection lacks legal clarification, as observed in message 436 of the President of the Republic, through the Attorney General's Office with respect to ADI 3,510 [13]:

in the field of Constitutional Hermeneutics, the function of determining and declaring the appropriate legal meaning of controversial terms according to applicable rules is the responsibility of the Supreme Courts, which consider the specificities of their corresponding nations, their corresponding historical moments and other contextual social factors, in the exercise of the function. (...) *Thus, an interpretation established by a Supreme Court at a given historical moment can be changed in another social context* [12].

In fact, in the Federal Supreme Court (STF) itself, Justice Ayres Brito, rapporteur of ADI 3,510 [13], accepted the allegation that the Constitution does not have frameworks that define the beginning of life and recognized that the legal framework protects in a different way the various stages of life. He included in his vote the following quotation:

(...) *this does not prevent our legal and moral system from recognizing some stages of human biology as requiring more protection than others. This is the case, for example, of a human corpse, protected by our order. However, there is no way to compare the legal and ethical protections provided to an adult person with those of a corpse* [13].

Added to this is the point raised by the rapporteur, which goes beyond determining the beginning of life, questioning which stages and factors guarantee constitutional protection according to the STF: *the issue does not lie exactly in determining the beginning of the life of*

Research

homo sapiens, *but in knowing which aspects or moments of this life are validly protected by infra-constitutional Law and to what extent* [13].

Therefore, considering art. 1 of the Federal Constitution [7], whose item III establishes "the dignity of the human person" as the foundation of the democratic rule of law in Brazil, it is implied that life is not just a biological state, but must be understood with the genesis of the dignity of life. In this regard, through the vote of Justice Carmen Lúcia, the STF teaches that past texts that dealt with the right to life—since the eighteenth-century constitutions—focused on existing, and not on existence, that is, they were focused on existing more than on life in the broad sense. These documents have been outdated, being reformulated into a much more comprehensive legal core, sculpted as per the principle of the dignity of the human person [13].

Piovesan [14] clarifies that the 1948 *Universal Declaration of Human Rights* provided a new conception to human rights, in which they are universal and indivisible and dignity is a value that is intrinsic to the human condition. Thus, it is understood that life is the junction of two dimensions, biological and biographical, formed by the set of beliefs, choices and values; however, dignity is part of both. Therefore, the right to the inviolability of life cannot split these two dimensions.

Thus, if life is much more than the biological condition, if the Constitution does not explicitly determine which aspects and stages of life are protected, and if the interpretations established by a Supreme Court are changeable depending on the social context, the first controversy is reached: would not the right to the inviolability of life in fact being protected if assisted suicide is applied?

After the first controversy, the discussion itself begins, on the clash between the fundamental right to the inviolability of life and the fundamental rights of human dignity, freedom, inviolability of private life, and not being subjected to torture or inhuman or degrading treatment. Thus, as taught by Barroso [1], the principle of unity presupposes the non-existence of hierarchy between constitutional provisions, since they were generated simultaneously. Complementarily, Canotilho [9] states that the principle of unity obliges the interpreter to consider and harmonize the legal institutions, carrying out a systematic interpretation.

Certainly, to eliminate this second controversy, it is necessary to understand this constitutional unity. According to Grau [15], law is not a simple set of rules, but an interconnected and coherent system, whose principles have links that guarantee its unity, which leads to the mastery of principles at the time of interpreting the Constitution.

Certainly, this unity of the constitutional text and the lack of hierarchy between its internal provisions make it necessary to apply considerations so there is harmonization between fundamental rights, only occurring sacrifice of some or part of them if it is not possible to achieve the desired result by another less burdensome process. In this sense, Alexy [11], Barroso [1], Bonavides [2] and Mendes and Branco [3] teach that the principle of proportionality is suitable as an instrument for interpretation of the constitutional text to harmonize possible antagonisms between fundamental rights.

In addition, the dominant doctrine deals with the clash between fundamental rights of different holders or between fundamental rights and collective assets, not addressing the clash between rights of the same holder, which seems logical, since it is a choice whose consequence will fall directly only on the said right holder. In this regard, Viveiros de Castro [16] presents the "triple theory of autonomy," in which acts of autonomy are classified into: acts of personal effectiveness (direct consequences only on the holder of the right), acts of interpersonal effectiveness (direct consequences on the holder and third parties), and acts of social effectiveness (direct consequences on the holder and society).

Thus, acts of personal effectiveness are part of the exercise of the individual's private autonomy, protected by the rights to freedom and inviolability of private life; therefore, these choices should not be criminalized. Therefore, the application of arts. 121 and 122 of the Penal Code to the practice of euthanasia should be unconstitutional, since the State is intervening in the patient's autonomy over which fundamental rights they want to prioritize. In addition, if the State understands that there is a clash of

fundamental rights, this decision must be based on the dignity of the human person, which is one of the principles that underpin the democratic rule of law in Brazil.

Corroborating this understanding, Fux states that, *whenever the Supreme Court is called upon to intervene, it begins its reasoning in the light of the dignity of the human person, having even decided on public policies* [17]. Also, through Justice Carmen Lúcia, the STF classified the principle of the dignity of the human person as a value founding the fundamental rights of man, elevating it to the category of constitutional superprinciple.

Therefore, how to condemn someone to the torture of unbearable physical suffering—in addition to the psychological suffering of knowing that they are condemned to imminent death, due to an incurable disease, and being denied their choice to die with dignity without degrading or inhumane treatment—only to impose a law that does not comply with the constitutional foundations, trying to elevate the right to the inviolability of life to the category of absolute, when the Constitution itself does not consider it as such, because its text provides for death penalty and abortion, even if in specific situations?

In this context, the STF considered it inhuman or degrading to impose on women an unwanted pregnancy, which,

(...) *in addition*, (...) *would imply treating the female gender in an inhuman or degrading manner, contrary to the fundamental right that is read in item II of art. 5 of the Constitution, as follows: "no person will be subjected to torture or inhuman or degrading treatment." Without mincing words, such compulsory nidation would correspond to imposing on women the patriarchal tyranny of having to bear children for their husbands or partners, contrary to the remarkable cultural advance* [13].

Certainly, the same understanding, of imposing an inhuman or degrading treatment, can be applied to those who, having a serious and incurable disease and affected by unbearable suffering, are prevented from advancing their death.

In summary, the application of arts. 121 and 122 of the Penal Code to the practice of euthanasia denies patient autonomy and the fundamental rights to the dignity of the human person, freedom, the inviolability of private life, and not being subjected to torture or inhuman or degrading treatment, however without guaranteeing the inviolability of life, because life without dignity is not life. Therefore, such articles are not consistent with the constitutional framework when applied to the practice of euthanasia.

Final considerations

As demonstrated, the Brazilian Constitution is based on the dignity of the human person, which is also the foundation of the fundamental rights, that is, it must accompany the citizen throughout the course of their life and death. In a democratic rule of law, the right to the inviolability of life does not consist in the simple task of avoiding death at any cost, but in not violating the dignity of life. Therefore, by seeking the unconstitutionality of the application of arts. 121 and 122 of the Penal Code to the practice of euthanasia, the objective is not to legitimize death, but to ensure that the fundamental rights provided for in the constitution are preserved even in the dying process.

Thus, this study showed that the criminalization of euthanasia for patients with a serious, incurable disease and affected by unbearable suffering is a State intervention that usurps the main right of citizens: their dignity. Furthermore, in view of the complexity of the subject, we suggest further studies to help determine the factors that lead the State to want to protect a life without dignity, at the expense of suppressing constitutionally protected fundamental rights.

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Research

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