

REPUBLIC OF COLOMBIA
CONSTITUTIONAL COURT

SENTENCE # C-239/97

REF. Expedient # D-1490

Demand of unconstitutionality against section 326 of Decree 100 of 1980 -
Criminal Law-.

Plaintiff : José Eurípides Parra Parra

Magistrate - Reporter : CARLOS GAVIRIA DIAZ

Santa Fe de Bogotá, D.C., May 20th, Nineteen Ninety Seven (1997).

I. BACKGROUND

Prosecuting the public action of unconstitutionality, the citizen JOSE EURIPIDES PARRA PARRA files a demand against section 326 from the Criminal Law as he regards such provision as infringing the following sections : 1, 2, 4, 5, 6, 11, 12, 13, 14, 16, 18, 44, 45, 46, 47, 48, 49, 50, 83, 94, 95, items 1, 2 and 4, 96, 98, 99, 100, 277 items 1, 2, 3, and 7, 282 items 1 and 2, 365 and 366 of the Constitution. Having accomplished all the appointed procedures in the Constitution and the law, and having heard the concept of the Department of the Public Prosecutor, the Court proceeds to decide.

A. ACCUSED RULE

The following is the text of section 326 of the Criminal Law:

Mercy killing. *That who killed someone else for mercy, to end the acute suffering caused by a bodily injury or serious and/or incurable disease, will be sentenced to imprisonment between six months and three years.*

B. DEMAND

The following are the arguments exposed by the plaintiff to claim section 326 of the Criminal Law to be unconstitutional :

- The principal role of a Social and Democratic State of Right is to guarantee people's lives by protecting them from dangerous circumstances, avoiding attempts against them, and punishing those who breach their rights. The State is not performing its function in the accused rule because it leaves to the discretion of the doctor or the person in charge of making the decision to terminate the life of whom he regards as an obstacle, as a nuisance, or as a high expense for health care.
- If the right to live is inviolable, as it is declared in section 11 from the Constitution, it will be inferred that nobody can dispose of someone's life; therefore, that who kills someone who is in bad health conditions, in a coma, unconscious; or under pain, deserves to be applied the sanction stated in sections 323 and 324 of the Criminal Law, and not the sanction stated in

section 326 ibidem, that because of its lightness, constitutes an authorization to kill; and this is why this last rule must be declared unconstitutional, compendium of moral insensibility and cruelty.

- The accused rule breaches the right to equity because it enacts discrimination against the person who is seriously ill or under a lot of pain. In this way, the State makes the value of human life relative, allowing the existence of diverse citizen categories in Colombia.
- Life is treated by the legislator as a non legally protected good, non legally guarded; it is treated as an object that, when not having certain qualities or conditions, must disappear. Mercy killing is a subterfuge brought from European legislation where science, technique and formation are dissimilar from the Colombian environment, where people are abandoned to die at hospitals doors. It is a figure that involves the desire of disposing of a social burden.
- The rule disregards that not every person whose health is in bad conditions, has the vehement desire of ending his/her life; on the contrary, people want to complete their mission, no matter how big or small it is.
- Tendencies of totalitarian fascist and Communist States are reflected in mercy killing, they respond to Hitler's and Stalin's ideas; where the weakest, the most seriously ill are lead and condemned to the gas chambers, to probably "help them die better".

C. INTERVENTIONS

1. Based upon the following considerations, the People's Defender, José Fernando Castro Caycedo, defends the constitutionality of the accused rule :

- The conduct of that who ceases someone's life to end his/her acute suffering, is not out of sanction. Such conduct is precisely typified in section 326 of the Criminal Law, which is part of title XIII that represses facts that involve injury to life and personal integrity. Its distinction from other criminal rules, identified under the same object of protection, lies in the normative element that contains and qualifies the incriminating behavior for which a cultural, ethical or social appraisal is required in the process of typical adjustment.
- While the Constitution states with absolute character the right to live, within the competence of the legislator to establish the proportion of the penalties applicable to the different modalities or kinds of homicide, under principles of rationality and proportionality, which are closely related with the principle of juridicity, in the sense of the imposed punishment for a criminal type of homicide must keep symmetry with the imputed subject's guilt and behavior; that is why it would be neither reasonable nor proportional that the same sanction were applied to both the responsible for mercy killing and the responsible for simple or aggravated homicide.
- Even though euthanasia, the practice of causing death without physical suffering, is reproachful from the ethical and moral point of view, the legislator can regulate this criminal type in an autonomous way, and independently from

other modalities of homicide, with the purpose of avoiding excesses or punitive weaknesses.

2. THE SECRETARY OF JUSTICE AND LAW, acting through the attorney in fact, requests the Court to declare the constitutionality of the accused rule, based on the following considerations :

- The demanded rule does not deny the right to live, and, on the contrary, when penalizing a conduct which attempts against it, it makes that right prevail over any other consideration. A violation to a constitutional mandate can not be inferred from establishing a minor penalty for mercy killing since that would mean aspiring to have the same sanction for all the criminal and infringing conducts established by the law to punish conducts which attempt against life.
- The accused rule does not breach the right to equity, on the contrary, it reaffirms it, on making the difference between the penalty for mercy killing and the penalty for other criminal types that protect the right to live; so , besides acting within the autonomy that helps it to define which conducts are criminal, it is also applying the principle of equity which in criminal affairs allows to treat several behaviors differently, taking into account the dynamic nature of the social life and the essential mutability of the criminological phenomena.
- The argument about mercy killing breaching the prohibition of forced disappearance is absurd since the action of disappearing cannot be confused with that of killing someone who is under a lot of serious suffering.

- Neither does the rule ignore the duty of solidarity imposed by the Constitution.

The establishment of the type of mercy killing involves a way of protection by the State to the fundamental right to live; so, precisely, what is looked forward with the shipping of the rule is that nobody incurs the prohibited rule; because of this, it would be wrong to affirm that the interest of the State is to favor the breaching to such a right.

3. THE ATTORNEY GENERAL bases the constitutionality of the rule on the following arguments :

- The right to live is not absolute, it is relative, as it is the law which establishes the cases when one can kill someone without committing homicide, as well as when the person acts under a state of necessity, self defense, or in the war. In the case of mercy killing, on the contrary, the legislator does not justify the conduct, and for this reason, regards it as a criminal one.
- The minor sanction of mercy killing is due to the fact that the criminal law is based upon guilt, which implies that the proportion of the penalty must be directly related with the action of reproach. Mercy killing does not have a perverse motivation, it is altruistic, it is not helping to die, it is to help when dying. In this way, the action of reproach taken against a murderer who kills motivated by pity, must be less than the one taken against a murderer who kills for other reasons. It is an unequal treatment for an unequal situation that makes us closer to justice than to its negation.

- The Constitution protects human dignity and the right to live, that is why the concept of life quality is taken into account, based on the fact that in a Social State of Right people must live with dignity. If this is applied to life, why not to death ?

D. DEPARTMENT OF THE PUBLIC PROSECUTOR

Based upon the following considerations, the Public Prosecutor requests the Court to declare section 326 of the Criminal Law to be constitutional :

- In the accused rule, more than propitiating a homicidal conduct, it is fully understood that it injures a legal interest, and in this sense, a sanction is imposed to that who incurs it; but the sanction is lower than the one imposed to the simple homicide, since such a conduct is preceded by special subjective circumstances that are taken into account by the legislator as a mitigating factor for the punishment, with the proposition that in our judgment, it is not only determined on the juridical property but upon principles such as the one of proportionality towards the actor's responsibility.
- Using an equitable arithmetic criterion in the homicide's sanction would lead to the absurd decision of applying the same penalty to that who involuntarily or accidentally has murdered another person, or to who, without any justification of murder, has incurred the same conduct, just because the result is the same; and even more absurd would be to treat homicide committed under aggravated punitive circumstances, as the homicide regarded in the accused rule, which is

committed with the altruistic purpose of avoiding the extension of suffering, in circumstances in which life expectations have been scientifically discarded.

- Taking into account the juridical property as an only criterion to establish the punishment for a determined person's conduct leads to the dehumanization of the State's punitive activity, therefore, when the legislator does not take into account the logical principle of proportionality of the actor's responsibility on committing a typical action, a basic axiom of the criminal law will be denied, from which the man's vulnerability is recognized, his fallibility, his fears, his desires, his anger, his conditioning, his crisis points and his answers against the stimuli in his surroundings.

II. COURT'S ARGUMENTS

A. COMPETENCY

Because the accusation is against statutory provisions that make part of a legal decree, it is this Corporation's competence to decide on their constitutionality, according to what is disposed in section 241-5 of the Constitution.

B. ELEMENTS OF MERCY KILLING

Mercy killing, according to the elements described by this type of killing, is the action of a person who acts guided by the specific motivation of ceasing the

intense suffering of another person. Doctrinally it has been called euthanasia or mercy killing. As such, the person who kills with a different interest, such as the economic one, cannot be punished according to this type of killing. The doer confuses the concepts of euthanasia and eugenesic killing; in the former, the motivation consists in helping the other to die with dignity, while the later is sought as an objective, based on pseudoscientific hypotheses, on the preservation and on the improvement of the race or the human species. In addition, mercy killing depends on some objective conditions of the passive subject consisting in the fact that the subject is under intense suffering caused by body injury or by a serious or incurable disease, that is to say, it does not consist in eliminating unproductive people, but in ceasing the pain suffered by a person who has no hope that such suffering ends.

It is necessary to clarify that different conducts can fit this criminal type of killing, which implies that the Court, according to the Constitution, has to carry out a different analysis in each case. Thus, the behavior is not the same when the passive subject has not expressed his will or is against the materialization of the event because in spite of his physical conditions he is willing to go on living until the end, than when the person is conscious of the act and pleads for help to die.

Under these conditions, the questions to be solved by the Court are, in order, the following: 1) Does the Constitution consider the penalty included in Section 326 of

the Criminal Law for mercy killing? and 2) What is the judicial relevance of the consent of the passive subject?

1. In a criminal law of the act the penalty is conditioned to the performance of an antijudicial event, depending on the degree of guilt.

Given that mercy killing is of a fraudulent type, the reflections that follow are limited to this form of guilt.

a. The Colombian Constitution states a criminal law of the act, that implies the adoption of the principle of guilt.

Section 29 of the Constitution, in harmony with the definition of the political character of the State as a Social State of Law, and with the postulate of respect for the dignity of the human being, states the principle that there is no offense without behavior, upon establishing that "no one will be judged unless it is done according to the pre-existing laws concerning the act he is charged with". In these terms, it is obvious that the Constituent opted for a criminal law of the act, opposed to a criminal law of the actor.

Such definition implies, on the one hand, that the event liable to penalty can be constituted neither by an internal fact of the person, nor by his character, but by an outward appearance and, thus, the repressive law can only punish people by what

has actually been done, but not by what has been thought, proposed or wished, neither can it sanction individuals by their temper or by their feelings. Summarizing, from this standpoint, a person can only be punished by what he does, by his social behavior, but neither by what he is nor by what he wishes, thinks or feels.

Besides, a criminal law of the act assumes the ascription of the actor's conduct , in so far as the subject's will aimed at the specific observance of such conduct is required as well as the material existence of a result. That is to say, the criminal law of the act assumes the adoption of the principle of guilt which has its foundation on the will of the individual that controls and dominates the external behavior he is charged with, in virtue of which only a voluntary event can be called act.

Criminal reprobation of the event, then, must not be aimed at its materialization, but at the subjective sense which the actor confers to his social behavior, as free subject; and thus, only that who is charged with a causal relation between his decision, the action and the result can be considered the doer of an event, taking into account his psychophysical capability to understand and want the event, considered in abstraction, and the intention, in concrete, of undertaking the behavior which the criminal rule describes.

In other words, the principle that there is no action without guilt, corresponds to the exigency of the subjective or psychological element of the crime; according to this principle, no event or human behavior is valued as action if it is not the fruit of a decision; henceforth, it cannot be punished if it is not intentional, that is, done consciously and voluntarily by a person able to understand and want. Therefore, only a penalty can only be imposed to that who has guiltily committed something unjust.

The previous considerations agree with the definition stated by Criminal Law as a regulatory mechanism of the human behavior, oriented towards actions susceptible to be done or not by the sufferer of the rule; as a result, the rule implies the knowledge and the will of those to whom is directed, with the purpose of giving them directions or conditioning their behavior. The opposite would imply a responsibility on the grounds of the result, which is copy of a right based on the objective responsibility, which is against the dignity of human being.

For the Criminal Law of the act, one of the basic criteria of imposition of punishment is the degree of guilt, in such a way that the actor is imposed a penalty, greater or lesser, according to the entity of the judgment of the liability to be demanded; in other words, the punishment must be proportional to the degree of guilt.

Nevertheless, it is important to consider that the subjective aspect of the prohibition is not extinguished, in all cases, in the forms of guilt that are listed in the Criminal Code (fraud, fault, and past intent). The illicitness of many events does not only depend on their materialization and conscious and willingly performance, but also on the specific sense that the end prosecuted by the subject impresses to the action or omission. Such psychological components can only be taken into account when the type of killing is the one that openly meets them, either to lay the foundations of the unfair event, its aggravation, attenuation or exclusion.

These additional subjective components perform the function of distinguishing the punishable behavior from the one that is not or of differentiating various criminal figures. Carrara was clear in this aspect when he observed that the title of the imputation may change with respect to the subjective aspect of the act: "and considering that the right is only infringed by the physical act, the formula used by us: variety of the infringed right, is not identical to this: variety of the physical actor; because two similar physical acts ^{may} ~~may~~ be directed, by each one of the agents, to infringe two different rights, and due to the influence of the intentional element on the essence of the offense, may give rise to (in spite of the identity of physical acts) different offenses, due to the variety of the agent's intentions, who oriented the physical act to infringe one right rather than another."

The dogmatic location of this element has been discussed in the doctrine. There are authors that consider it a subjective element of the type while others consider it a subjective element of the guilt. But not considering the discussion according to the doctrine, the truth is that in order to grade guilt, the motives of conduct must be taken into account but only when, the legislator has considered them relevant in describing the punishable act. Such motives which determine in a concrete way the type in as far as they neither ignore criminal guarantees nor the other fundamental rights, adjust to the Constitution and their adoption forms part of the orbit of the competence which is reserved to the legislator.

b. Mercy as a subjective consideration of the act

Once accepted that the motives may form part of the description of criminal type, notwithstanding, in principle, any constitutional regulation, the next step will consist in examining if the punitive reduction which is provided by the accused ruled with respect to the type of simple or aggravated homicide, considering the subjective aspect of the act, results reasonable and proportional or, on the other hand, does not recognize fundamental rights and guarantees.

Mercy is a deep emotional state, similar to the painful state which is included in Section 60 of the Criminal Code as a generic causal of punitive attenuation; but which, on the contrary, impels to act in favor of someone rather than in consideration of oneself.

That who kills another on mercy, with the purpose of ending his intense sufferings, acts with a clear altruist sense, and it is that motivation which has impelled the legislator to create an autonomous type, to which a considerable minor penalty is attributed than that foreseen for the crime of simple or aggravated homicide. Such decision does not ignore the fundamental right to live written down in Section 11 of the Constitution for the conduct regardless of motivation goes on being antijudicial, that is to say, legally unjust; but taking into consideration the subjective aspect, the punishment is a minor one, a fact which is translated into due respect for the principle of guilt, derived from the adoption of the criminal law of the act, as it was entered by the Constituent in Section 29, as it was referred to beforehand.

Now, the extent of that penalty which, is insisted, as such, carries reproach due to the materialization of a behavior which ignores the judicial well-being of life, but which, on the other hand, considers relevant the motivation of the act, can only be determined in abstract by the legislator without being possible for the constitutional judge to ignore the criteria of utility which is implicit in this election.

It should not be forgotten that mercy has been historically considered by the legislator as an attenuation motive of the penalty and thus, in Section 364 of the prior Criminal Statute (Law 38, 1936), it was established that the penalty for homicide could exceptionally be attenuated, exchanged for imprisonment or arrest

and even "grant judicial pardon" when the act was undertaken on the basis of mercy.

It is clear that for an attenuated homicide to ensue, it is not enough to act in accordance with a feeling of mercy, since it is necessary for the other objective elements required by the criminal type to be presented, that is to say, that the passive subject undergo intense suffering derived from body injury or serious or incurable disease. Henceforth, there is not mercy killing when a person kills another individual who does not undergo those sufferings even if mercy is evoked. In this particular case, in which there is a simple or even aggravated homicide, death is the product of the selfish feeling of the victimary, who annuls one life, because, according to his own judgment this life does not have any value. Within this particular conduct, the person kills because he does not acknowledge any dignity in his victim, whereas in the case of mercy killing, as it is described in Section 326 of Criminal Law, the active subject does not kill for disdain towards the other, but because of totally opposed feelings. The active subject considers his victim as a person with equal dignity and rights, but he acknowledges that the person is in a total situation of suffering so that death can be seen as an act of compassion and mercy.

As such, seen from this perspective of analysis, the impeachment of unconstitutionality that the actor exhibits, considering that Section 326 of the Criminal Law ignores the right to live of the person who is in precarious health

conditions, because the lightness of the sanction constitutes and authorization to kill, carries within itself an attitude which calls for the application of a penalty in virtue of the sole material nature of the behavior, without taking into account the subjective aspects involved in the same and whose relevance is in harmony with the constitutional mandate. The actor forgets that in a Social State of Law penalties are to be proportional to the degree of guilt of the act, and not just with the material and objective seriousness of the lesion to the judicial property.

C. Consent of the passive subject

The consent is, in relation to some criminal types, a cause of atypicality, as in theft, damage in other people's property, kidnapping, extortion: in others, circumstance of punitive attenuation, for example, the penalty given to a person who carries out an abortion is less when the woman is conscious of the fact and in other punishable events, the consent of the victim is a necessary condition for the configuration of the type of event, as in rape. With respect to mercy killing, no criminal provision refers to the consent of the passive subject of the event. Does this omission mean that such consent is not relevant?

The Criminal Code of 1936 considered a criminal type called consented killing (Art, 368), which ascribed a penalty of three to ten years' prison, which indicated that even though the legislator considered life as a property juridically protectible,

in spite of its holder's decision, and hence qualified as unjust the consented killing, the will of the passive subject acted as a causal of attenuation of the penalty.

In conjunction with this type, it was established the mercy killing, characterized by the fact that the actor acted motivated by the wish of accelerating an imminent death or by terminating severe sufferings or body injury known as incurable. The judge of this act could attenuate the penalty provided in the law for killing, change hard labor by prison and even grant judicial pardon. This often happened when, in addition to mercy, there was the passive subject's will of the fact. In addition, it is important to say that neither in that Statute nor in the Criminal Code that is nowadays in force, it was stated that attempted suicide is a crime, accepting that even in a Constitution openly less explicit than the one in force today in the recognition of personal autonomy, the subject's decision about his existence did not deserve any criminal provision.

The Constitution of 1991 introduced significant modifications with respect to the fundamental rights that oblige to reinterpret all the provisions of the Criminal Code from that new perspective; it is because of this that the Court begins to analyze if it is legitimate that within this constitutional ordering the person who kills for mercy, but meeting the will of the passive subject, is penalized.

1. The right to live and autonomy on the light of the Constitution of 1991

Accepting that there is consensus that life is the assumption necessary for the other rights, that it is inalienable property, without which the exercise of the others would be unthinkable, its protection in the Western juridical scope and the answer with respect to the must of living when the individual suffers from an incurable ill that causes him intense suffering, is seen from two perspectives: 1) the one that assumes that life is something sacred and 2) the one that estimates that it is a valuable asset but not sacred, since religious beliefs or metaphysical convictions that support the sacralization are only one of several options. In the former, death, independently of the conditions the individual finds himself in, must occur naturally. In the latter, on the contrary, it is accepted that under extreme circumstances, the individual may decide if he goes on living or not, when the circumstances surrounding his life neither make it desirable nor worth to be lived, for example, when the intense physical suffering the person undergoes are not liable to be relieved, and his living conditions are so precarious that can lead him to consider death as an option preferable to survival.

In Colombia, on the light of the Constitution of 1991, it is necessary to resolve this issue from a secular and pluralist perspective that respects the moral autonomy of the individual and the freedom and rights that inspire our higher ordering.

The decision, then , cannot be made without considering the higher postulates. Section 1 of the Constitution, for example, states that the Colombian State is founded on the respect for the dignity of the human being: this means that as a supreme value, dignity irradiates the set of recognized fundamental rights, which find in the free development of the personality their maximum expression.

As declared by this Corporation, " Human dignity is truly the founding principle of the State..., that more than a right in itself, is the essential assumption of the statement and effectiveness of the whole system of rights and guarantees included in the Constitution."2. This necessarily principle responds to the individual's improvement respecting all the time his autonomy and identity. In this sense the Court stated:

"The principle of dignity would not be understandable if the necessary process of the individual's socialization were understood as a way of integral massification and homogenization of his conduct, reducing any possibility of originality and peculiarity. If the individual is an end in himself, the uninterrupted search and attainment of his fate conform his reason of being and by force, every instant, they are accompanied by an ineradicable singularity that nourishes the social ego and that expresses a radical interest and necessity of the subject that cannot be unprotected by Law running the risk of converting him in a thing". 3

On the other hand, the same Section 1 of the Constitution, in accordance with Section 95, states *solidarity* as one of the basic postulates of the Colombian State, principle that implies the positive must of every citizen of helping the one who is in a situation of need, with humanitarian measures. And it is not difficult to discover the altruistic and solidary motive of the individual who acts with the only purpose of ceasing other people's suffering, overcoming, for certain, his own inhibition and repugnance in front of an action intended to terminate an existence whose protection justifies the whole ordering, when the circumstances that dignify it constitute the founding value of all the others.

In these terms, the Constitution is inspired in considering the person as a moral subject, able to assume in a responsible and autonomous way, the decisions about issues that in the first instance concern himself, limiting the State to impose on him, in principle, duties with respect to the other moral subjects with whom he is bound to live and therefore, if the way the individuals regard death reflects their own convictions, they cannot be forced to continue living when, due to the extreme circumstances in which they are found, they do not think it either desirable or compatible with their own dignity, with the inadmissible argument that the majority judges it as a religious or moral imperative.

Job is a pathetic example of the courage needed to live amidst painful and degrading circumstances but the resignation of the saint justifiable and dignifying just because of his unshaken faith in God, cannot be the content of a judicial

duty, because the State cannot demand from anybody heroic conducts, even less if their foundation is ascribed to a religious belief or to a moral attitude, which, under a pluralist system can only have the nature of an option.

There is nothing more cruel than obliging a person to subsist amidst awful pain, on behalf of other people's beliefs, even if a great majority of the population regards them as intangible. This is because the philosophy which informs the Constitution is based on its purpose of erradicating cruelty. Rorty has expressed this in very precise words: He who adheres to that humanistic cosmovision is a person who thinks "that cruelty is the worst thing to be done" 4.

In summary, from a pluralist perspective, the absolute duty to live cannot be declared, for as Redbruch has said, in a Constitution which adopts that type of philosophy, the relations between moral and law are not on the same rank of the duties, but of the rights. In other words, he who lives a conduct as compulsory, in function of his own religious or moral beliefs, cannot pretend that this be done cohesively extended to everybody; only that he is allowed to live his moral life in plenty, and act in harmony with it without interference.

Besides, if the respect for human dignity irradiates ordering, it is clear that life cannot be regarded simply as something sacred up to the point of ignoring the real situation in which the individual is and his position in front of the value of life for

himself. In words of this Court: the right to live cannot be reduced to mere subsistence, but rather it implies living adequately in conditions of dignity.

2. Life as a constitutional value, the duty of the State to protect it, and its relation with the autonomy of the person.

The constitution not only protects life as a right (CP Section 11), but it also incorporates it as a value of ordering, which implies competence of intervention and even duties from the state and from individuals. As such , the Foreword pinpoints that one of the aims of the Constitutional Assembly was that of "strengthening the unity of the nation and to safeguard its members' life". On the other hand, Section 2 establishes that the authorities are instituted to protect individuals' life and to assure the fulfillment of the social duties of the state and of the individuals. Equally, Section 95 number 2, enters as one of the duties of the person to act humanitarily before situations which may endanger the life of their fellow persons. Finally, the last item of Section 49, implicitly establishes a duty for all the inhabitants of Colombia: the one of preserving their life to its maximum. In effect, that item reads that every person must take care of his integral health, which implies at fortiori that it is his obligation to take care of his life. These higher rules show that the Constitution is not neutral in front of the value of life but rather that it is an ordering clearly in favor of such value; this is a political option which has implications for it within a duty of the state to protect life. However, as the Court has shown in anterior decisions, the State cannot pretend to comply with

such obligation ignoring the autonomy and the dignity of people. Because of that, it has been a constant doctrine of this Corporation that every therapy must count with the informed consent of the patient, who then can refuse treatments which objectively could prolong the duration of his biological existence, but which he considers incompatible with his deepest personal convictions.

Sentence T-493 of 1993 which was proposed by the magistrate Antonio Barrera constitutes an irrefutable milestone in a matter such as the one that now occupies the Court. In it and in the light of the present Constitution, the autonomy of the person (the free development of his personality), and the right to choose, in the event of a serious illness, if he faces death or if his existence is prolonged by means of medical treatment are rightfully stated. The thesis is essentially the same: only the tenor of the right to live can decide to what point it is desirable and compatible with human dignity.

" The decision of Maria Livia Perez Angel (who was ill of cancer) of not making use of medical services... does not undermine or threaten the rights of the others, neither the judicial ordering; as such, it must be respected within an atmosphere of acknowledgment of her right to the free development of her personality.

In addition, the Court has said that "the fundamental rights, regardless their statement in the Constitution and their importance, are not absolute and therefore they must necessarily harmonize among themselves and with the other

properties and values protected by the Constitution for if this does not happen, that is, if that indispensable relativization is absent, the social coexistence and institutional life will not be possible."6

And if the rights are not absolute, neither is the duty to guarantee them which may find limitations in the decision of the individuals with respect to those matters which pertain only to them.

3. Terminally ill, , mercy killing and passive subject's consent

The duty of the State of protecting life should, then, be consistent with the respect due to human dignity and the free development of personality. Thus, the Court considers in front of the terminally ill that suffers intensively, this statal duty renders to the informed consent of the patient who wants to die with dignity. In effect, in this case, the statal duty weakens considerably due to the medical reports on which it can be assured that death is inevitable in a relatively short period of time. On the other hand, the decision on how to face death acquires a decisive importance for the terminally ill who knows that he can not be cured and as a result he is not choosing between death and many years of life in plenty but between death under the conditions he selects or death under painful circumstances after a brief period of time he considers unworthy.

The fundamental right to live with dignity implies, then, the right to die with dignity, since to condemn a person to continue living for a short period of time, when he is not willing to and while suffering deeply is equivalent not only to a cruel and inhuman treatment, prohibited by the Constitution (CP Art. 12), but also to an annulment of his dignity and autonomy as a moral subject. The person would be reduced to an instrument for preserving life as an abstract value.

Based on the previous considerations, the Court concludes that the State cannot oppose to the decision of the person who does not want to continue living and who requests help to die when he suffers a terminal illness which produces unbearable pains inconsistent with the idea of dignity. Therefore, if a terminally ill who is under the objective conditions stated in Section 326 of the Criminal Code considers that his life must be finished as he judges it inconsistent with his dignity, he can proceed in consequence, exercising his freedom, without allowing the State to oppose his intention or to prevent a third person from helping him to use this alternative through a prohibition or penalty. It is not a matter of reducing importance to the duty of the State to protect life but, as it was said, of recognizing that this obligation is not translated into the preservation of life as a purely biological fact.

The duty^{to} not kill finds its exceptions in the legislation through the statement of figures such as legitimate defense and the state of need in virtue of which killing

is not antijudicial, as long as the objective assumptions stated in the corresponding provisions are given.

In the case of mercy killing, consented by the passive subject of the act, the character relative to this juridical prohibition is translated into the respect for the will of the subject who suffers a terminal illness causing him great suffering and who does not want to prolong his painful life. The performance of the active subject lacks antijuridicity because it consists in a solidary act that is not caused by a personal decision to cease a life but by the request of the person who asks for help to die because of his intense suffering which is the result of a terminal illness.

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It is not superfluous to have in mind that the consent of a passive subject must be free, expressed unequivocally by a person with the capacity of understanding the situation he finds himself in. In other words, the consent implies that the person has serious and trusty information about his illness and its therapeutic possibilities and its prognosis and has sufficient intellectual capacity to make decision. Thus, the Court concludes that the ^②active person must be a physician, since he is the only professional able not only to provide the patient with such information but also to offer him the conditions to die with dignity. As a result, in the case of a terminally ill, the physicians who perform the event described in the criminal provision, with the consent of the passive subject, cannot be, then, object of

penalty and, in consequence, the judges must exonerate from any responsibility those who act in this way.

D) Regulation of death with dignity

As the State is not indifferent to human life but as previously mentioned, it has the duty of protecting it, it is necessary to establish very strict legal provisions on how the consent should be communicated and the assistance to die in order to avoid that on behalf of consented mercy killing, , people who want to go on living or that do not suffer of intense pain due to their terminal illness are killed. These regulations must be directed to make sure that the consent be genuine and not the result of a temporary depression. For example, the State may request that the claim be expressed more than once and after a reasonable period of time between them has passed. There might also be the possibility that in all cases there is a judicial authorization in order to ensure the authenticity of the consent and guarantee that all parts involved be concerned exclusively for the dignity of the ill. Equally, law may demand that, previous to the last request, the person attends a meeting with a supporting team that integrally explains his situation and shows him all possible alternatives different from the option of dying. This means that the State, due to its commitment with life, should offer the terminal ill that faces intense sufferings all the possibilities to go on living. For this reason, it is its obligation, in particular, to provide the palliative treatments to avoid pain. In conclusion, essential points in this regulation will undoubtedly be the following:

1) Rigorous verification, by competent people, of the real situation of the patient, of the sickness he suffers, of the maturity of judgment and of his unequivocal will of dying.

2) A clear indication of the people (qualified individuals) that should take part in the process.

3) Circumstances under which the person who consents his death or asks for the end of his suffering should express his consent: how he should express it, individuals before who he should express it; verification of his sane judgment by a competent professional, etc.

4) Measures that should be taken by the qualified individual to obtain the philanthropical result.

5) Incorporation of topics such as life value and its relation to social responsibility, freedom and person's autonomy to the educational process, in such a way that criminal provision appears as the final instance in a process that may result in other solutions.

As these regulations can only be established by the legislator, the Court considers that, while the topic is regulated, every mercy killing of a terminally ill must give rise to the corresponding criminal investigation that would enable

judicial officers, taking into consideration all the relevant aspects to determine the authenticity and trustiness of the consent, to establish if the physician's conduct has been antijudicial or not, according to the stated terms in this sentence.

On the other hand, and favoring judicial security, the Court will exhort the Congress to regulate the issue of death with dignity in the shortest possible period of time and according to the constitutional principles and to elementary considerations of humanity.

III. Decision

Based on the previous reasons, the Constitutional Court, administering justice on behalf of people and by mandate of the Constitution,

DECREES:

First: To declare Section 326 of Decree 100 of 1980 (Criminal Law) to be CONSTITUTIONAL with the warning that in the case of a terminally ill free will of the passive subject of the act concurs, no responsibility should not be attributed to the acting physician, as his conduct is justified.

Second: To exhort Congress to make provisions on the matter of death with dignity in the shortest possible period of time and taking into consideration the constitutional principles and the elemental considerations of humanity.

To be copied, notified, and communicated to whom it may concern, published and inserted in the "Gazette of the Constitutional Court" and expedient to be filed.