



## INTERNATIONAL LAW

### Euthanasia in the Context of Spanish Law

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**Abstract:** The recognition of the right to life, as well as the right to die, is a sensitive subject to be addressed, but also topical, as the approach to these two rights is a multidisciplinary one, in relation to legislative, religious, medical, social provisions. A person's right to die involves compassion for physical and mental suffering, translated into a deliberate act of ending a person's suffering, with their consent. In the analysis of the two rights, namely the right to life and the right to die, we notice that, surprisingly, we cannot dispose of them, even if, in many states, both euthanasia and assisted suicide are legalized, the legislator omitted to draw with accuracy the limits of the exercise of these fundamental principles of man, and a major problem that can arise precisely from the lack of limits of the exercise of the right to death, is reprised by "death tourism"<sup>2</sup>.

**Keywords:** euthanasia; assisted suicide; international protection of human rights; European law

#### 1. Introduction

In 2021, the Spanish Congress approved the law regulating euthanasia, namely Law no. 3/2021. In the content of the law, both euthanasia and assisted suicide are approved.

Starting from the preamble of organic law no. 3/2021, it is provided that from the etymological point of view "buena muerte"<sup>3</sup>, euthanasia means "good death" and can be defined as the deliberate act of ending a person's life, produced by the express will of the person himself and in order to avoid suffering.

In the Spanish bioethical and criminal doctrines there is a broad agreement in limiting the use of the term "euthanasia" to what is actively and directly produced,

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<sup>2</sup> In Spain, 180 euthanasia was carried out in the first year after the adoption of the law, according to data provided by the Ministry of Health, <https://ziarulromanesc.es/viata-in-spania/eutanasierea-in-spania/>, accessed on 24.04.2023.

<sup>3</sup> <https://www.boe.es/boe/dias/2021/03/25/pdfs/BOE-A-2021-4628.pdf>, accessed on 30.05.2023.

so that actions of omission that have been designated as passive euthanasia, i.e. the failure to adopt treatments that tend to prolong life or the interruption of treatments already established, or of those that could be considered active indirect euthanasia, such as the use of drugs or therapeutic means that alleviate physical or mental suffering even if it accelerates the patient's death, being excluded from the bioethical and juridical-criminal concept of euthanasia.

The legalization and regulation of euthanasia in Spain had as its main objective the corroboration of several essential principles that were the basis of people's rights and were provided for by the Spanish Constitution, being on the one hand, the fundamental rights to life and physical and moral integrity and, on the other hand, constitutionally protected goods such as dignity, freedom, or autonomy of will.

Also, Decree 225/2021<sup>1</sup>, of October 6, of the Government Council, aims at creating and regulating the Register of medical personnel who are conscientious objectors to aid in dying, as well as the Guarantee and Evaluation Commission, in accordance with the provisions of the articles 16, 17, 18 and 19 of Organic Law no. 3/2021, of March 24, the Euthanasia Regulation. Conscientious objection is accepted as "The individual right of health care professionals not to respond to those requests for health care action governed by this Act that are inconsistent with their own beliefs."

It is provided that health professionals directly involved in the provision of aid in dying can exercise their right to conscientious objection. Rejection or refusal to provide the above-mentioned service for reasons of conscience is an individual decision of the health professionals directly involved in its performance, which must be declared in advance and in writing.

## **2. The Structure of Law no. 3/2021 regarding Euthanasia**

The euthanasia law is structured in 5 chapters, 7 additional provisions, 1 transitory provision, 1 derogatory provision and 4 final provisions.

The above-mentioned law wants to give a legal, systematic, balanced, and guaranteed answer, regarding a sustained request of today's society, such as euthanasia, proposing to regulate the right that corresponds to each person who meets the necessary conditions to request and receive the necessary help to die, the procedure to follow and the guarantees to respect. It also establishes the duties of the health personnel who cares for these people, defining their framework of action,

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[http://www.madrid.org/wleg\\_pub/secure/normativas/contenidoNormativa.jsf?opcion=VerHtml&nmnorma=12307#no-back-button](http://www.madrid.org/wleg_pub/secure/normativas/contenidoNormativa.jsf?opcion=VerHtml&nmnorma=12307#no-back-button), accessed on 30.05.2023.

and it regulates the obligations of the administrations and institutions interested in ensuring the correct exercise of the right recognized in this law.

According to art. 2, the law applies to all natural, legal, public, or private persons who are in the territory of Spain. Thus, we note that the legal provisions are somewhat permissive, any individual can request the granting of aid in death, meeting some minimum conditions.

Analyzing the legal provisions, it is noted that the applicant does not have to be a Spanish citizen, the law giving the possibility to resort to this "right" also to people who have legal residence in Spain, or a registration certificate attesting that the applicant is in the territory of Spain for a period of more than 12 months, being of legal age and able and sane at the time of application.

According to the provisions of art. 5 of the law<sup>1</sup>, to benefit from the death benefit, the person must meet requirements such as:

a) To have Spanish citizenship or legal residence in Spain or the registration certificate proving a time of permanence in Spanish territory greater than twelve months, to be of legal age and to be capable and conscious at the time of application.

b) To have in writing the information that exists about the medical process, different alternatives and possibilities of action, including access to comprehensive palliative care included in the common portfolio of services and benefits that he was entitled to follow the rules of addiction care.

c) Two requests have been made voluntarily and in writing or from another recordable medium that is not the result of external pressure, leaving a time of at least fifteen calendar days between the two. If the responsible physician considers that the applicant's loss of capacity to give informed consent is imminent, he may accept any shorter period considered appropriate based on the concurrent clinical circumstances, which must be recorded in the clinical record.

d) to suffer from a serious and incurable illness or from a serious, chronic illness and disablement in the terms established by this law, certified by the responsible physician.

e) Informed consent is given before receiving aid to die. This consent will be noted in the patient's medical history.

However, the law provides that the provisions of art. 2 lit. b), c) and e) from the previously mentioned article, do not apply in cases where the attending physician certifies that the patient is not in full mental faculties, nor can he formulate the requests freely, voluntarily, and consciously. However, if the applicant has

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<sup>1</sup> Boletín Oficial Del Estado/ State Official Newsletter, no. 72/25 March 2021.

previously signed a document of advance directives, living will, advance directives or equivalent legally recognized documents, assistance in dying may be facilitated in accordance with the provisions of the said document. If a representative is designated in that document, he will be a valid interlocutor for the doctor in charge.

After completing all the formalities provided by law, it is provided that the aid for death will be offered in public, private or concerted health centers, and at home, and without access and quality of care, the provision can be undermined by exercising conscientious objection, health or of the place where it is performed.

Continuing the analysis of the legal framework, we note that in Law no. 3/2021, it is also provided that section 4 is amended and section 5 is added to article 143 of Organic Law no. 10/1995 of November 23 regarding the Criminal Code, respectively: "Anyone who causes or actively cooperates with the necessary and direct acts in the death of a person suffering from a serious, chronic and disabling condition or a serious and incurable disease, with constant physical or mental suffering and unbearable, for the express, serious and unequivocal request thereof, shall be punished with the penalty of one or two degrees lower than those indicated in sections 2 and 3"<sup>1</sup>.

Regarding section 5, it is provided that the person who causes or actively cooperates in the death of another person, respecting the provisions of the organic law regulating euthanasia, is not criminally liable.

Regarding performing the euthanasia procedure, the patient has two options, namely the administration of the substance by the medical staff, where the health team will assist the patient until the moment of death, or by providing the substance that the patient can administer himself, in order to cause death alone.

Thus, the most recent case of euthanasia in Spain is represented by Marin E.S., a Romanian citizen who became paraplegic in December 2021, following an armed incident that he allegedly caused. Accused of shooting three employees of the company he worked for and two policemen, Marian Eugen Sabău will become the first prisoner in Spain to obtain the "right to a dignified death" since the euthanasia law came into force in 2021<sup>2</sup>.

The Romanian was being tried for five attempted murders, and after receiving the first medical opinion for euthanasia, the lawyers of the victims appealed to the judge and asked for the suspension of assisted death so that the armed man could sit on the bench and be tried.

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<sup>1</sup> Boletín Oficial Del Estado/State Official Newsletter no72/25 March 2021.

<sup>2</sup> <https://www.hotnews.ro/stiri-esential-25719004-roman-devenit-primul-detinut-din-spania-care-obtinut-dreptul-moarte-demna-eutanasiat.htm>, accessed on 30.05.2023.

Reported to the object of the Romanian's request, the magistrate who resolves the case rejected the victims' request, stating that the rights were in favor of those affected by the euthanasia law.

The court considered that the accused's rights to physical and moral integrity, dignity and personal autonomy prevailed over the victims' interest in having a trial. The judge emphasizes that it is not a conflict between "considerable" rights, since the desire of Marin E.S. is to die with dignity "because of its proximity to the core of the right to life", without making distinctions "according to their life trajectory" for their assessment<sup>1</sup>.

The court also ruled that the recent regulations "do not specifically regulate euthanasia applied to persons in provisional detention or subject to judicial proceedings of any kind", and that their action was only considered in the cases of minors or persons with disabilities.

### **3. An Overview of this Phenomenon**

Returning to Romanian legislation, Gheorghe Antoniu defined euthanasia as "Killing committed under the impulse of a feeling of pity, to end the physical suffering of a person, who suffers from an incurable disease and whose death is, because of this, inevitable" (Antoniu, Bulai, & Chivulescu, 1976, p. 107).

Or, what some consider to be doing well to the victim, by resorting to euthanasia, has been and still is a vast object of research, since ancient times. In the primitive order, euthanasia appears in the form of the habit of suppressing the life of the elderly and the helpless, as an accepted practice for the good of society, and in Greek and Roman antiquity, the suppression of the life of undeveloped children was a unanimously accepted practice, and the action of taking the life of a comrade to free him from suffering, was seen as a dignified, humanitarian, comradely act (Boroi, 1999, p. 31).

Analyzing this phenomenon, related to the current context, we can see that when we talk about euthanasia, we reach 3 possibilities of this action, namely:

Mainly, we are referring to hastening the death of people who are in a terminal phase of an incurable disease, a possibility that is highly debated and disputed by both legal experts and doctors. Secondly, euthanasia can be seen as a help given to people suffering from certain handicaps, very serious mental or physical infirmities, and lastly we see euthanasia as a reduction of final suffering, without causing death. J.

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<sup>1</sup> [https://www.eldiario.es/catalunya/justicia-autoriza-primera-vez-eutanasia-presoespana\\_1\\_9151090.html](https://www.eldiario.es/catalunya/justicia-autoriza-primera-vez-eutanasia-presoespana_1_9151090.html), accessed on 31.05.2023.

Pradel (Pradel, 1991, p. 512) in (Boroi, 1999, p. 31) shows that the term euthanasia is one of the most ambiguous: it designates either the art of easing the suffering of a dying person, or the decision to refrain from any treatment that has become futile in relation to the patient's situation, or the act that tends to suppress life to a person in order to make him end his sufferings and at his request, more often this latter meaning is attributed to the term euthanasia" (Horvath, 1972).

Related to all the debates that have been held regarding the criminalization or not of euthanasia, I agree with the point of view of the authors K. Binding and A. Hoche, who supported the legalization of euthanasia, highlighting the fact that euthanasia is not inhumane, respectively its legalization, but forcing the patient to die in agony, when there would be the possibility of getting rid of them by hastening the production of death (Manzini, 1937, p. 77).

Regarding the jurisprudence, we note that at the level of the European Union there is no uniformity of regulation regarding the right to euthanasia, the European Court of Human Rights has solved emblematic cases over time, which have allowed the shaping of its opinion regarding the phenomenon of euthanasia and assisted suicide. Thus, the Court affirmed the existence in Article 8 of the Convention of "a right of the individual to decide by what means and at what moment life will end, provided that he is capable of reaching a decision freely in this matter and to act in concession" and launched the idea that states had "a positive obligation to adopt measures to facilitate the act of suicide with dignity"<sup>1</sup>. There have also been cases in which the courts have handed down verdicts of acquittal of the defendants for acts committed out of mercy or upon request, as was the case of Dr. Herman Sander.

Also, in ECtHR jurisprudence, in the case of Lambert and others v. France (n° 46043/14), on June 5, 2015, the Grand Chamber of the European Court of Human Rights issued the judgment regarding the euthanasia of disabled persons unable to communicate. With 12 votes for and 5 against, the Court decided that art. 2 of the European Convention on Human Rights (the right to life) is not violated in the case of the execution of the decision of her doctor to stop the hydration and nutrition of the disabled person. It is noted that although euthanasia is illegal in France and contrary to human rights, the ECHR has validated a practice of masked euthanasia.

#### **4. Conclusions**

"In a free society, people should have the right to choose how they want to die", argued Scottish philosopher David Hume in the 18th century. In relation to the legal provisions, as well as to the fundamental human rights, it is considered that the unfounded maintenance regarding the extension of a person's life would violate

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<sup>1</sup> The case of Haas v. Switzerland (nr 31322/20).

human dignity. Therefore, in all legal aspects, the psychological status of the individual must also be considered.

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