



**Decision C-239/97
Constitutional Court of
Colombia on Constitutionality
of Art. 326 of the Criminal Code
of May 20, 1997**

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**DECISION C-239/97 CONSTITUTIONAL COURT OF COLOMBIA on
CONSTITUTIONALITY of Art. 326 of the CRIMINAL CODE of May 20, 1997**

Background

Art. 326 of the Criminal Code provides as follows:

“Mercy Homicide. Anyone who kills another person for mercy reasons, to end intense suffering derived from physical injury or serious or incurable illness, will be sanctioned with imprisonment of 6 months to three years”.

The constitutionality of this provision was challenged before the Constitutional Court based on the principle that the Government has to guarantee and protect life. This provision does not comply with such principle, according to the plaintiff, because it leaves to the decision of the doctor or the individual the decision on the termination of life of those that may be considered a burden or whose health may represent high expenses.

Considerations

In order to determine the sanction assigned to a crime, the specific intent of the perpetrator becomes relevant when the legislator has determined so. It is not the same to kill for mercy reasons than the killing for any other reason. The provision in question does not imply that killing is a just action but that killing for mercy deserves a less severe sanction than any other homicide.

Moreover, the provision does also require more than mercy for the mitigated type of the crime. It also requires the presence of intense suffering derived from physical injury or incurable or serious illness.

Art. 1 of the National Constitution provides that the Colombian State is based on the respect for human dignity and solidarity. And therefore, the State may not enforce an absolute obligation to live, since a pluralist Constitution like the Colombian, may not require heroic behaviors based on moral or religious beliefs, which under a pluralist government system may only be an option and not an obligation. The right to life, according to the Constitutional Court, is not the mere subsistence but a life lived with dignity. Only the holder of the right to life is the one who may decide what is or is not compatible with human dignity. If rights are not absolute, neither is the obligation to guarantee them, since it has its limits within the decision of each individual.

Decision

The Constitutional Court concludes that the State may not oppose the decision of an individual who does not want to live and who asks for help to die when he or she is suffering of a terminal illness producing unbearable suffering, incompatible with his or her notion of dignity. Therefore, if a terminal patient in the objective conditions established under art. 236 of the Criminal Code considers that his or her life should end, because of the above considerations, may proceed

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accordingly, exercising his or her freedom and having the State no right to oppose to his or her will or to prevent that a third person would help him or her to make use of such option, through a prohibition or sanction.

The behavior of someone who helps another to die in these conditions is not illegal since it is an act of solidarity that is not performed because of a personal decision to terminate a life, but upon the request of the one who, because of intense suffering derived from a terminal illness is requesting help to die. The consent has to be given by a person with capacity to understand his or her situation in a free and unequivocally expressed decision. Therefore, the required consent has to be based on a reliable and accurate information on the illness, its prospects, and options for treatment. This is the reason why the Court concludes that the person performing the killing has to be a medical doctor, since he or she is the only qualified professional to provide the patient with the required information and the means to terminate his or her life with dignity. It is therefore the opinion of the Court that such a doctor may not be criminally liable if the homicide is performed under the conditions above stated.

Finally, the Court mandates the legislature to regulate as soon as possible the “dignified death” according to the conditions and within the scope set by the decision of the Constitutional Court.

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