Euthanasia: right to die or mercy killing?

28 marzo 2014
Lodovica Raparelli

La parte precedente, contenente i primi due capitoli, ha riguardato l’analisi dell’eutanasia dal punto di vista medico e il problematico dibattito sugli aspetti religiosi e morali della legalizzazione dell’eutanasia.

Nei capitoli che seguono, è trattato l’argomento del rapporto che intercorre tra la legge e la morale nella materia oggetto d’analisi; nel percorso che ha portato alla legalizzazione dell’eutanasia negli ordinamenti stranieri da me esaminati, per prima cosa sono esaminati i modi in cui viene giudicata in tribunale una persona responsabile di atti eutanasici e, in seguito, le posizioni assunte in merito alla possibile legalizzazione di essa.

Nell’ultimo capitolo di questa seconda parte è affrontata la situazione ordinamentale di un paese europeo, l’Olanda, in relazione alla legalizzazione dell’eutanasia, dalle origini del dibattito nel 1945, ai giorni odierni.

Infine, è stato inserito un caso tra i più emblematici, ovvero il caso Schoonheim. Questo caso è stato affrontato analizzando le parti del procedimento processuale che ha portato alla sentenza, di cui sono riportati diversi stralci.

CHAPTER 3: LAW AND MORALITY IN EUTHANASIA

In this chapter I am going to talk about the legalization’s problem of euthanasia, because we all know that this is a very complex obstacle: on the one hand, it is required to guard against any possible mistakes. On the other hand, legislators cannot think about an extremely bureaucratized procedure, because it will be contradictory with the drama of the patient’s condition.

After this general introduction about legalization and the problems of social political of euthanasia, I will consider and compare what happened and still happens in Netherlands and in the U.S.A.

First of all, I have decided to talk about the way in which is treated a person in court if he killed someone who is really suffering for mercy: this is clearly a subject midway between ethics and law.

In 1967 Robert Weskin’s mother was dying of leukaemia with terrible pain in a Chicago’s hospital; the son introduced a gun in the hospital and shouted her three times. He never tried to hide what he did and he only accounted for telling that his mother was not suffering anymore. He was accused of murder but the court considered him not guilty; legally talking, this verdict was incorrect because American law do not distinguish between euthanasia and murder but sometimes, when a judge is in front of similar cases, he can utilize his discretionary powers to mitigate the law’s impact.

The same situation happened in Great Britain, where also killing for mercy is illegal. In 1971, James Price drowned his six years old son, described as an alive vegetables; six hundred citizen of Birmingham, which knew Mr Price, sent to the court a petition asking for clemency and the judge decided to put him on probation. [1]

Courts are not always so clement: in a fifties’ lawsuit, for example, the accused have killed his son which conditions were less serious than the cases mentioned before.

“Al processo dichiarò che la morte del bambino era stata un incidente, ma fu riconosciuto colpevole di omicidio premeditato e condannato alla sedia elettrica, anche se più tardi la pena venne commutata in carcere a vita”.

[1]
Therefore, there is a substantial difference between the official position of the law, which affirms that euthanasia is equal to murder, and what actually happens in courts.

Some people consider that law does not have to decriminalize the killing for mercy but, at the same time, it is appropriate that judges and juries treat defendants with tolerance. It is possible to wonder what is the result of being on trial. The most common answer from those who oppose the legalization of euthanasia is that, maintaining the legal prohibition, we protect the most important value that we have: the life.

According to this topic, if euthanasia would be legally permitted, there will be a general decline in the respect of human life. Let’s suppose to allow killing for mercy only for this people who extremely suffers and asks for death, our motivations could be respectable and the results could be decent. Nevertheless, once we start killing people, where will we stop? The problem is, as we accept to kill a terminally ill patient in a few cases, we start to walk on an inclined plane, down which we inevitably risk to fall and, in the end, human life will be considered of no account.

Bishop Sullivan affirms that:

“Permettere in un unico caso l’uccisione diretta di una persona innocente vorrebbe dire introdurre un pericolosissimo che potrebbe alla fine mettere ogni vita in condizione precaria. Quando si permette ad un uomo di sua iniziativa di uccidere una persona innocente direttamente, non ci sono modi per fermare l’azione di questo cuneo. Non esiste più nessun fondamento razionale per affermare che si può avanzare oltre un certo punto e non più oltre. Quando si ammette l’eccezione, è troppo tardi. Se si legalizzasse l’eutanasia volontaria, ci sono buone ragioni per credere che successivamente sarebbe legalizzata anche l’eutanasia obbligatoria. Se il rispetto per la vita umana fosse così basso da consentire ad una persona innocente di venire uccisa direttamente sia pure su richiesta, l’eutanasia obbligatoria diventerebbe molto vicina. Questo potrebbe facilmente portare all’uccisione di tutti i pazienti incurabili, gli anziani in carico alla pubblica assistenza, i soldati feriti, i malati di mente e così via.” . [2]

Even if Sullivan is an exponent of the Catholic Church, it is clear that his argument against euthanasia is not strictly religious. What Sullivan tries to explain is the so-called logic version of the subject: once a particular practice had been accepted, we are logically committed to accept also other practices, because there are no reason not to accept the additional practices.

But this is completely wrong: there are rational foundations to distinguish between a man in death struggle who wants to die and all the other cases, for example the one of an old and infirm man who does not want to die. So, we are not logically commit to accept euthanasia in the second case only because we accepted it in the first.

Unlike Sullivan, Philippa Foot thinks that, in a few individual cases, euthanasia is morally right; however, she thinks that euthanasia should not be legalize, because of the serious abuse’s problem:

“Molte persone vogliono liberarsi dei loro parenti più anziani e persino delle mogli o mariti infermi. Quali misure potrebbero mai impedire loro di descrivere come eutanasia ciò che in realtà va a loro esclusivo beneficio? (...) La possibilità dell’eutanasia attiva legale potrebbe cambiare la scena sociale in peggio. Allo stato dei fatti, la gente si aspetta di essere assistita quando si invecchia o si ammala. Questa è una delle conquiste che abbiamo fatto, ma potremmo perderla, e stare molto peggio senza di essa.”[3]

She sustains that, if we start to release terminally ill patients from terrible sufferings killing them, then we will kill other people for other reasons, without minding the logical distinction. So, if we would avoid this last step, then it is better to avoid the first one.

Those who sustain the subject of the inclined plane, are not completely wrong: the legalization’s defenders of
euthanasia always formulate their proposals in such a way as to apply it only in particular and reduced cases. The suggestions made improper to the legislator permit euthanasia only for dying patients that are still conscious and ask for death because of their terrible pain. Technically, all the fears of the conservatives should cease in front of these motivations; indeed, in that subject, there is definitely something insincere because euthanasia’s defenders almost approve to kill in more cases than those presented.

However, while voluntary and non voluntary euthanasia are almost accepted, because of the critical conditions of the people, it is the involuntary euthanasia –killing those who do not want to die- the one morally wrong and the one that will never be legalized.

To sum up, the opposition to the euthanasia’s legalization comes from those who retains it immoral, from those who fears legalization’s consequence and from those who believes that this could be a great idea, but in practice, it is impossible to regulate it.

There was and there are a lot of proposals to legalize euthanasia. The British Society for Euthanasia once suggested this procedure: the patient, who has to be more than twenty-one years old and has to be affected with an incurable disease, has to submit an application, added with two certificates written by two different physicians, to a special euthanasia judge who, only then, will have a conversation with the patient. If the judge will be satisfied by the result of the conversation, the patient could be kill seven days later.

American Society for the Euthanasia suggested another procedure, more complicated than the previous. The patient, who has to be affected by a disease –with incredible sufferings- for which there cannot be any treatment, has to present an euthanasia’s request in the presence of two witnesses and he has to send the request with a medical certificate in the court. Then the court will name a committee of three people, included three doctors, which will examine the case and report to the court. Only in this moment, if the court will be satisfied, it will accomplish the request.

The problem with these two procedures is that they are quite opposite with the idea of a rapid and easy death, that is the only aim of euthanasia.

As the American jurist Yale Kamisar affirms, “the legal structure is so long, complex, formal and exasperating that offers to the patient not so much comfort”[4]; in the other hand, if procedures will simplified, the risk is that there would be very few guarantees against not necessary killing.

There could be a way to legalize euthanasia, proposed by James Rachels but, first of all, it is necessary to explain some aspects of the Anglo-Saxon and American law.

The individuals accused of a crime do not have the duty to prove their innocence; the burden of proof it is duty of the prosecution and the defence can only highlight that the prosecution do not have provided with decisive proofs to the guilt. If the prosecution does not have fulfilled his duty to prove the guilt, then the accused is acquitted. However, if the prosecution presents coherent proofs, there are two possible choices for the accused: he can deny his responsibility and give the proofs that he does not commit it, or he can confess his crime. Also in this case, there are two ways legally accepted to sustain that a person should not be punished, even if he actually committed the crime: it can be possible to offer an excuse, for example the coercion, the mental insanity, the ignorance of the law etc. Then it can be possible to offer a justification: invoking the self-defence against a murder charge is an example of justification.

The suggestion of Rachels to legalize euthanasia is the following: the killing’s declaration for mercy is acceptable as defence against a murder charge almost in the same way for which it is acceptable a self-defence declaration.
In according with this theory, the person accused of murder can invoke the killing for mercy; then, if it would be possible to prove that the victim, when was clear, asked to die because of his terminal disease, the accused will be acquit.

Therefore it is overtaken the need to promulgate complicated laws to consent euthanasia and, the conduct of the jury, would not be more different than today: many juries already behave like killing for mercy is an acceptable defence and they refuse to condemn in these cases.

I have already mentioned the establishment of the British Euthanasia Society in the 1935, but the movement began before -in the first years of the century- in Germany and in the U.S.A where, in 1903, a doctors’ group of the American Medical Association proposed the possibility of euthanasia in certain and specific cases. After the Second World War, the movement began to concern many other countries, both with law proposal and the creation of associations which, later, have converged in the World Federation Associations for the Right to Die that counts almost thirty societies in nineteen States.

Then we have to remember the law proposal presented to the House of Lords in 1969, rejected with 61 contrary votes against 40, and the referendum in the Washington State in 1991, when the law proposal to legalize euthanasia was rejected with the 54% of the votes against the 46%. Recently, in the other hand, a proposal for the lawfulness of the assisted suicide has been approved in Ohio. In the end, it is fundamental to underline that, from June 1st 1994, Netherlands is the only country in the world in which exists a juridical foundation that allow not to legally proceed against the physician that effects euthanasia in define conditions.[5]

CHAPTER 4 – THE NETHERLANDS’ EXPERIENCE

Talking about euthanasia it is impossible not to introduce what happened – and still happens- in the Netherlands.

Recent developments in the Netherlands regarding the legalization of euthanasia and other medical behaviour that abbreviates life are extremely interesting; the legal norms that currently seem to be acceptable have not emerged from an accurate legislation, nor from judicial decisions, but from the interaction between Medical Associations, the groups of voluntaries, the Government, the Parliament and multiplicity of social and religious organizations.

The long process of legalization can be summarised in four phases.

4.1. 1945-1970, when public debate began

We can identify the beginning of the first phase with this important event: on March 11, 1952 a doctor from Eindhoven stood a trial for killing his brother, who was suffering for advanced tuberculosis. During the weeks preceding his death, the ill man asked many times the brother to put an end to his sufferings and pain and, in the end, the doctor agreed; he gave his brother an mortal injection of morphine. Then he told the District Court that “it was impossible for him to ignore the claims of his conscience, which said him to comply with the wish of his brother”.

The District Court found the doctor guilty of killing on request (article 293 of the Criminal Code) but, after a series of considerations, decided to punish the doctor to one-year probation “because, as far as the Court is aware, this is the first time that a case of euthanasia has been subject to the ruling of a Dutch judge”[6]. However, this case does not have roused the public interests and it only was noted by the journal of Medical Association.

By the end of 1960 this lack of interest had entirely vanished. A psychiatrist published a book in which he
severely criticized doctors who prolong their patients’ life at all cost; thanks to him the dying process was discussed in Parliament and it was the subject of debates in TV and radio shows. In short time, active and passive euthanasia had become a subject of medical, ethical, legal and political debate.

In 1970, euthanasia became a very important topic, also because of the great developments in medical technology achieved in those years; in medical journals this question was initially asked with regard to resuscitation: should someone who is suffering severely and has no prospect of recovery be kept alive? Doubts concerning an absolute “duty to preserve life” became more insistent. If a doctor may decide not to engage in treatment, that would prolong the patient’s life because this is in his interest, but there is difference between acting and avoiding from action.

On March 1967 the Dutch were confronted for the first time with the situation of a patient in an irreversible coma and this case was widely discussed in the media. The patient was Mia Versluis and she has 21-years-old; she had had an operation under complete anaesthesia on April 1966 for excessive growth of the bone on her heels. During the operation she probably had had a cardiac arrest and she was resuscitated; after the operation she was in coma and it was probable that Mia had suffered severe brain damage, so a breathing tube was inserted in her windpipe.[7]

Initially the anaesthetist was optimistic about the possibility of recovery but, when September 1966 arrived, he had lost all hope and, according to the parents of Mia Versluis, proposed to remove the tube with the consequence to lead her to death. Her father filed a complaint with the Medical Disciplinary Tribunal against the anaesthetist who, in his judgment, had made mistakes during the surgery.

The Court of Appeals[8] in Amsterdam was interested in the final judgment that held that, when termination of life-support is considered after having consulted other colleagues, the situation must be discussed with the family. The doctor was found guilty of behaviour that undermines confidence in the medical profession.

This case produced a general debate on resuscitation and, especially, considerations from an acclaimed psychiatrist/neurologist, J.H. Van der Berg, who affirms:

“the ethical motto from the time of medical powerlessness ran thus <<. However, this is the motto of the new ethical code <<”[9]

According to Van der Berg, a doctor should passively or actively shorten life that is no longer meaningful; thanks to his book, which was reprinted twenty-one times within seven years, he starts a debate that permits to reach the second phase of the legalization’s process.

4.2. 1970-1982, when euthanasia became a debatable subject

Around 1970, questions concerning the legitimacy of prolonging life and the permissibility to terminating it became the topic of the public debate in the Netherlands. Public-opinion polls showed that a greater number of populations thought that life may sometimes be terminated and that euthanasia should be legal.

In that years there was not a clear use of the term euthanasia: it was initially used to describe a large and varied range of behaviour. In the middle of the 1970 it took place a process of conceptual clarification, dividing behaviour that generally are characterized as euthanasia, from other behaviour, most of which came to be regarded as normal medical practice.

It was arranged the Committee on Medical Ethics, which had the duty to define if euthanasia could be permitted and in what cases; this report stated that, if a competent patient, at the beginning of the dying process, requests the doctor to stop the treatment, this wish should be respected. [10]

However, the Committee on Medical Ethics of the Health Council did not complete its report when, on 27
November 1972, came out an article in some Dutch newspapers announced the preliminary review in a criminal prosecution for euthanasia.

It resulted that MD Postma had terminated her mother’s life with an injection of morphine, at the presence of her husband; the director of the nursing home where the mother lived presented the case to the attention of the Medical Inspectorate.

Ms Postma’s mother, a widow of 78 years old, because of a cerebral haemorrhage, that caused her the paralysis of one side of her body, had been in a nursing home. For this reason, she asked her daughter in several occasion to put an end to her life because she did not want to live anymore.

On 7 February 1973 Ms. Postma stood trial in Leuuwarden for “killing on request” (article 293 of the Criminal Code); nevertheless the Medical Inspector declared that the doctor in the Netherlands no longer considered necessary to prolong a patient’s life without a real reason. Though, this is possible only in determinate occasions, mentioned by the Inspector: when the patient is incurably ill, when he had expressed his wish to die and when he is in a terminal phase of his disease. [11] The Court pronounced sentence on 21 February 1973 and it affirmed that the Court agreed with the Inspector’s opinion, except for the last condition about the terminal phase of the illness[12]; for this reason, Ms. Postma was wrong to have used a lethal injection. So, she was given a conditional jail sentence of one week with one-year probation.

Unlike the earlier case of euthanasia in the 1952, the Postma case attracted a great deal of attention: the journal of the Medical Association, Medish Contact, gave space to this case and to a general discussion about euthanasia. In addition to the media attention, opponents and advocates of the legalization of euthanasia started to organize themselves; advocates focussed on societal acceptance of euthanasia and was founded an important organization that still existed, called the Dutch Association for Voluntary Euthanasia (NVVE). The association emphasizes the importance of the voluntary character of euthanasia and the need of legalization.

In the other hand, opponents organized themselves in associations as the Dutch Association of Physician and the Dutch Association of Patients; besides these organizations, there were also a number of religious sides, in particular the Roman Catholic Church and the Calvinist Churches.

The period from 1970 to 1982 saw, in addition to some medical disciplinary cases, the publication by various associations of their positions regarding euthanasia: the Humanist Society’s Executive Board declared that the law should allow room for doctors to give support in the dying process, according to medical professional standards.[13] A commission of the three major Christian Democratic parties thought that active euthanasia is unacceptable, but it recognized that there could be exceptional cases in which a doctor may feel obligated to perform it. [14]

In 1978 the NVVE’s Committee on Legislation also promulgated a report: it distinguished between passive and active, voluntary and non-voluntary euthanasia and also between direct and indirect euthanasia. Considering this last distinction, the Committee affirmed that “Active euthanasia requires intentional behaviour by a doctor that, whether directly or indirectly, leads to an earlier death of the patient. (…) The primary goal of indirect euthanasia is relief of the patient’s suffering; the primary goal of direct euthanasia is the termination of the patient’s life, in cases where this is the only way in which doctor can put an end to his sufferings”. [15]

However, while the frequent occurrence in medical practice of such-life shortening behaviour was a well-known fact, no case of passive euthanasia reached the courts: this seems indirectly confirm that passive euthanasia was not considered a criminal offence. Aside from restricting the meaning of the term, this decade saw the growth of a general consensus for euthanasia.
4.3. 1982-1986: the breakthrough in the meaning of “euthanasia”

In this period a number of doctrinal approaches were in theory available to legitimate behaviour that, on its face, violate articles 293 and 294 of the Criminal Code but, talking about doctors, it is necessary to underline that those articles simply are inapplicable to them. A second defence against a charge regarding articles 293 and 294 could be based on the doctrine of “absence of substantial violation of the law” and, in 1978, NVVE proposed to use this doctrine in cases of euthanasia. In the end, the third defence that could be used to justify euthanasia is the so-called overmatch[16]; this defence, in Dutch law, can mean the excuse of duress and the justification of necessity. In the case mentioned before, for example, Ms. Postma invoked the excuse of duress.

The first euthanasia case that reached the Supreme Court regarded the GP Schoonheim who, on 16 July 1982, has executed euthanasia on a 95-years-old patient –called Ms. B in the judgment- who, in some occasions, asked him to do so, because of a fractured hip for which she could no longer walk or sit and her eyesight and hearing were deteriorating. However, mentally she was in an excellent shape and, for this reason, she found humiliating her situation. [17] The doctor talked to her the last time on 16 July and the woman expressed again her wish to die at the presence of her son and her daughter-in-law; so Schoonheim injected her first with a drug that made her partly lose consciousness and then with a muscle relaxant that caused her death.

At the trial in April 1983 Schoonheim’s lawyer affirmed that there was an “absence of substantial violation of the law” and that Schoonheim acted in a situation of overmatch; the District Court, called Alkmaar, accepted the first defence and the doctor was acquitted. [18] Nevertheless the prosecution appealed but, the Court of Appeals, Amsterdam, rejected all of Schoonheim’s defences and found him guilty, but used its discretion not to impose any punishment. [19] On 27 November 1984 the Supreme Court ruled on Schoonheim’s appeal, affirming that the reasoning of “absence of substantial violation of law” was not a great defence. The following part is a piece of the judgment.

4.3.1 Schoonheim Case[20]


“Procedure

The appeal is from the Court of Appeals, Amsterdam (17 November 1983), which, setting aside the judgment of the District Court, Alkmaar (10 May 1983), found the defendant guilty of the offence charged: “taking the life of another person at that person’s express and earnest request” as prohibited by article 293 of the Criminal Code. Applying article 9a from the Criminal Code, the Court of Appeals imposed no punishment; The District Court had acquitted on the ground of “absence of substantial violation of law”.

The opinion of the Supreme Court

The defendant’s first argument was that he had not “taken Ms. B life” in the sense of article 293, since Ms. B had requested him to perform euthanasia. Neither the legislative history nor changes in public opinion provide ground for accepting the view that article 293 of the Criminal Code should be interpreted restrictively in such a way that a physician who, in the course of conscientious medical treatment, ends a patient’s life upon that patient’s request.

The second argument on appeal is that the defendant’s conduct did not amount to a “substantial violation of law” and therefore is not punishable. The Court of Appeals had rejected this view.

The Justification of necessity
By holding that “it has not been established with sufficient plausibility that defendant’s views on which his conduct was based pressed him so forcefully to commit the established deed, that it was impossible for him to abstain from doing so” the Court of Appeals has rendered a sufficiently motivated decision on the appeal to a claim of conscience as an excusing condition, but it has not done so with regard to the defence of necessity in the above-mentioned sense. (…) The Court of Appeals has not provided sufficient motivation for that rejection, since the considerations which follow must be included in the assessment of such a defence.

The Court of Appeals found that among other things the following facts had been established:

-That Ms. B was suffering terribly from the steady decline of her health and the absence of any prospect of substantial improvement;
-That in the weekend preceding her death she experienced a major collapse as a result of which she could no longer eat or drink and lost consciousness;
-That on Monday 12 July 1982 she was able to speak again and in possession of her faculties; that she stated that she did not want to experience something like that again and once more asked urgently for euthanasia;
-That on Friday 16 July 1982 the defendant decided to comply her wish “because, in his opinion, she experienced each day that she was still alive as a heavy burden under which she suffered unbearably”.

(…) From the latter conclusion of the Court leaves open the possibility that the euthanasia performed by defendant, according to objective medical opinion, must be considered justified, as having been performed in a situation of necessity.

**Judgment**

It follows from the above considerations that the decision of the Court of Appeals must be reserved, and the case be referred to another Court of Appeals for further consideration”. [21]

After those cases mentioned before, a general consensus had been reached concerning the legal acceptability of the so-called indirect euthanasia. The first step in this process was a new report of the Health Council in 1982; it concluded that only “intentionally terminating or shortening a patient’s life at his request or in his interest”[22] constitutes euthanasia.

Furthermore, a member of the Second Chamber of Parliament, Ms. Wessel-Tuinstra of the left-liberal party D66, decided that there was a very important question that needed to be discussed: in her opinion, both the person who requested euthanasia and the doctor who agreed with him, were exposed to a degree of legal insecurity that was no longer acceptable. In April 1984 she submitted a bill providing for changes articles 293 and 204 of the Criminal Code; [23] with this bill proposed to legalize euthanasia and physician-assisted suicide.

On October 1982 the State Commission on Euthanasia was installed and, in the summer of 1985, produced it report rejected any legalization of euthanasia.

After this decision, the State Commission proposed a legislative revision of the article 293, also because of the many complaint had in those years by the opponents; the revised article provides that euthanasia is legal when performed by a doctor in a medically responsible way; after having consulted with a doctor designed by the Minister of Heal, at the requests of a patient who is in a situation of “hopeless necessity”. The doctor who did not accomplished his duty, should be guilty of a specific criminal offence.

**4.4 1986-1997: attempts to legalize euthanasia**

In early 1986 the Government, a coalition of the Christian Democrats (CDA) and the right-of-centre liberal party communicated to the Parliament its tentative conclusions in light of the State Commission’s report: they
were trying to codify the results reached in the courts in the period before. In the end, the only legislation that passed did nothing more than place the already functioning reporting procedure.

We can recognize in the Stinissen case what I said in the lines above-mentioned: Ineke Stinissen had been in coma since 1974 as result of a medical mistake during a Caesarean delivery. Her husband requested the Court to order that the artificial feeding of his wife be stopped and he argued that medical treatments were futile. However, the Court of Appeals confirms the ruling that the artificial feeding should be considered as a medical treatment. [24]

The State Commission delivered its report in September 1991 and it appeared that about 1.7% of all the deaths (about 2300) per year were due to euthanasia; moreover, the research revealed that in 0.8% (like 1000 deaths), the life of a patient was ended without the patient having made an explicit request for this.

For the necessary external control over medical decisions concerning euthanasia, the Government proposed to maintain the existing provisions in the Criminal Code, as interpreted by the Courts.

In 1993 there were an important change: it were adopted a legislation, which is an amendment to the Law on the Disposal of Corpses[25], that is currently in effect in the Netherlands. Pursuant to the new law, a special form was provided for cases of euthanasia; this form[26] especially consists in a list of “points requiring attention” to be covered in physician’s report, which correspond to the various elements of the “requirements of careful practice”. In this way, the Dutch Parliament had addressed itself to the legitimacy of euthanasia and had ratified what the Courts had long since done.

4.5. The current legal situation

Article 293 of the Dutch Criminal Code affirms that “a person who intentionally terminates the life of another person at that other person’s express and earnest request is liable to a term of imprisonment of not more than four and a half years or a fine of the fourth category”[27]; this is what we can consider euthanasia in the Netherlands.

The doctrinal tool finally accepted by the courts is that of justification due to necessity, as provided for in article 40 of the Criminal Code; it provides that an actor is not guilty if it was the result of a force he could not be excepted to resist, and this is the definition of overmatch. The doctor confronted by the request of a patient who is terribly and unbearably suffering can, according to the Court, be regarded as caught in a situation of conflict of duties.

On the one hand, he has to remember that there is the duty to respect life, as formulated in articles 293 and 294; on the other hand, there is the duty to reduce suffering.

In those years, it has been formulated the essential conditions of legal euthanasia concern the patient’s request and the patient sufferings: the patient’s request must be explicitly made by the person concerned[28], the request must be voluntary and not the result of some external influence[29] and, in the end, the request should preferably be in writing or otherwise recorded. The patient’s suffering must be unbearable and hopeless, in the sense of “without hope for any improvement”; an exception is given by those patient’s sufferings based not on a somatic condition, but on a mentally condition and, in this case, there must be no realistic possibility of treatment. [30] In conclusion, only a doctor may legally perform euthanasia; this restriction is included in all of the statements of euthanasia law, as the State Commission of Euthanasia had decided.

As we have seen, the legal regulation of euthanasia has taken the feature of a justification, available only to doctors; for this reason, the patient, even if his case has all the requirements requested, has no right to euthanasia. If he finds a doctor who agrees with his decision and wants to perform it, the physician can legally do it, but there are no doctors that have the obligation to accept this request.
In the end, the last important aspect to consider concerns the doctor’s duty to give his patient accurate and full information; the Medical Association describes these duties as a “requirements of careful practice”, considering them equal to the requirements applicable to cases in which euthanasia is carried out.

This is the position of Netherlands regarding euthanasia; as we could have ascertained, it is given a great importance to the doctor’s role. As a matter of fact it is given the monopoly over euthanasia to the medical professionals.

There are some residual problems concerning the way in which “requirements of careful practice” is enforced (criminal or disciplinary proceedings), the scope of the idea of “help in dying” and some others, but I think that Netherlands’ solution can be the starting point to reflections because it tries to conciliate the ideas of people in favour of legalization and those of people against it. [31]

Now it is time to introduce the concept of euthanasia in the United States of America.

[1] The informations about the two mentioned cases was taken by magazines: (Weskin) Miami News, 3 July 1973, p. 3-a; (Price) New York Times, 26 December 1971, p. 47


[8] The case had been referred to this Court of Appeals by the Supreme Court after it had ruled on the case

[9] Van der Berg, Medical Power and Medical Ethics 1978:63


[12] The Court rejected this condition because it knew of the existance “of many cases of incurable illness
where the patient can continue living in this state for years.”, *Netherlandse Jurisprudentie* 1973, no. 183:560


[14] Schroten 1979


[16] Article 40 of the Criminal Code, appendix I-A

[17] Enthoven 1988:95


[19] *Netherlandse Jurisprudentie* 1984, no. 43

[20] Translate by D. Griffiths

[21] From the Netherlands’ situation, this is the only case that I almost enterely reported; all the other cases, from the introduction to the conclusion of this essay, are quoted only regarding the facts and the final judgment

[22] Gezondheidsraad 1982: 15


[26] *Staatsblad* 688, 1993, effective 1 June 1994

[27] Staatscommissie Euthanasie 1985: 40-43

[28] This requirement is to be found in all formulations of the law concerning euthanasia since the report of the State Commission in 1985

[29] Also this requirement is included in all of the formulations of the requirements for euthanasia, thanks to
the decision of the Supreme Court

[30] Decision of the Supreme Court in the Chabot Case

[31] To write the entire chapter four I consulted the following book: John Griffits, Alex Bood, Heleen Weyers, *Euthanasia and Law in the Netherlands*, Amsterdam University Press, 1998

Articolo pubblicato in: Diritto comparato, Diritto dei Paesi dell’UE, Diritto dei Paesi dell’America del Nord

TAG: Eutanasia, euthanasia

Avvertenza

La pubblicazione di contributi, approfondimenti, articoli e in genere di tutte le opere dottrinarie e di commento (ivi comprese le news) presenti su Filodiritto è stata concessa (e richiesta) dai rispettivi autori, titolari di tutti i diritti morali e patrimoniali ai sensi della legge sul diritto d’autore e sui diritti connessi (Legge 633/1941). La riproduzione ed ogni altra forma di diffusione al pubblico delle predette opere (anche in parte), in difetto di autorizzazione dell'autore, è punita a norma degli articoli 171, 171-bis, 171-ter, 174-bis e 174-ter della menzionata Legge 633/1941. È consentito scaricare, prendere visione, estrarre copia o stampare i documenti pubblicati su Filodiritto nella sezione Dottrina per ragioni esclusivamente personali, a scopo informativo-culturale e non commerciale, esclusa ogni modifica o alterazione. Sono parimenti consentite le citazioni a titolo di cronaca, studio, critica o recensione, purché accompagnate dal nome dell’autore dell’articolo e dall’indicazione della fonte, ad esempio: Luca Martini, La discrezionalità del sanitario nella qualificazione di reato perseguibile d’ufficio ai fini dell’obbligo di referto ex. art 365 cod. pen., in “Filodiritto” (https://www.filodiritto.com), con relativo collegamento ipertestuale. Se l’autore non è altrimenti indicato i diritti sono di Inforomatica S.r.l. e la riproduzione è vietata senza il consenso esplicito della stessa. È sempre gradita la comunicazione del testo, telematico o cartaceo, ove è avvenuta la citazione.