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# Secção I

## Investigação Científica\*

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# The empathic genesis of the Right to Euthanasia

## A génese empática do Direito à Eutanásia

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**ABSTRACT:** Euthanasia is an ancient theme that, especially since individual autonomy became the health paradigm in contemporary societies, has aroused deep reflections and declared dissensions between socio-ideological quadrants. The relationship between Empathy and Morality has been addressed several times over recent centuries. Studies and opinion articles present disparate conclusions regarding this relation, mainly because a heterogeneous, nebulous and somewhat maladjusted conceptual approach to human nature has prevailed. In this article, we argue that considering diversity as the fundamental axiological axis of a democratic rule of Law, Empathy is essential to respond appropriately to the most diverse circumstances in which an ethical-legal decision is pending, as in Euthanasia.

**KEYWORDS:** Constitution, empathy, ethics, euthanasia, Law, morality.

**RESUMO:** A eutanásia é um tema milenar que, sobretudo a partir do momento em que a autonomia individual se tornou o paradigma em saúde nas sociedades contemporâneas, tem despertado reflexões profundas e dissensões declaradas entre diversos quadrantes socioideológicos. Por sua vez, a relação entre a empatia e a moralidade tem sido abordada inúmeras vezes ao longo dos séculos recentes. Os estudos e os artigos de opinião apresentam conclusões díspares relativamente a esta temática, sobretudo porque tem prevalecido uma abordagem conceptual heterogénea, nebulosa e algo desajustada da natureza humana. Neste trabalho defendemos que, no seio do respeito pela diversidade como o eixo axiológico fundamental dos Estados de Direito democráticos, o modelo de empatia apresentado é fundamental para responder de forma adequada às mais diversas circunstâncias em que uma decisão ético-jurídica está pendente, como na eutanásia.

**PALAVRAS-CHAVE:** Constituição, empatia, ética, eutanásia, Direito, moralidade.

### Introduction

The avoidance that the subject of Death commonly arouses is rather curious. Being the only certainty in Life from which no one can escape, it would be expected that Death would be widely discussed in an open and uncomplicated way in its most diverse aspects and areas of interest, as in Euthanasia.

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However, more or less strangely, and to a greater or lesser extent, depending on the culture we refer to, it is still a taboo subject about which one tries to talk as little as possible. It is also interesting that the degree of consensus on Death varies according to the context and nature of the discussion. For example, the abolition of the death penalty in Portugal (1867)<sup>4</sup> enjoyed broad parliamentary agreement and multiple national and international reactions of praise. It was understood that the purpose of a sentence should be to correct the guilty party and not to avenge the victim. Undeniably, penal codes have two primary goals: to prevent misconduct, deter wrongdoing, and punish the offender. However, we must always bear in mind that human nature is dichotomous.

The pure evil of a human being exists; that is, there are "normal" people (without any psychiatric disorder and with comfortable socio-economic conditions) who derive genuine pleasure from gratuitously inflicting suffering on others. On the other hand, the avid and happy perpetrators of criminal atrocities are not all "recoverable". Humanity's history, personal experiences and various professional activities (such as psychiatry, the judiciary or the police) repeatedly reveal some sinister facets. Thus, subjects such as the death penalty or life imprisonment should be thoughtfully and realistically discussed without taboos, with an awareness of the dichotomy of human nature, the irreversibility of the lives taken (and the suffering of loved ones) and the imperiousness of determining the appropriate legal proportionality of a sentence for someone who, without any remorse whatsoever, murders innocent people (once or repeatedly and indiscriminately). Although we do not defend the death penalty (if only because the condemned may be innocent), we mention it in order, on the one hand, to allude to the somewhat outdated justification of dichotomous human nature that was at the basis of its abolition [the "moral correction of the guilty subject"<sup>5</sup>], and, on the other hand, to point out some differences in the way in which Death is interpreted when discussing Euthanasia. Although this is a very different situation, where Death is not a penal consequence but is requested by the individual because he suffers from a terminal illness or finds himself in humanly unbearable living conditions, there is no consensus on Euthanasia. Opponents define the practice as a step backwards in civilisation. Amidst

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<sup>4</sup> FERNANDES, R. (1971), *A Pena de Morte em Portugal*, Lisboa, Ordem dos Advogados.

<sup>5</sup> GOUVEIA, A. (1863), *Eliminação do salário do carrasco*, Lisboa, Assembleia da República.

primitive and demagogic discussions, confusion has increased over what is really at stake: Is there a right, based on personal ideological or metaphysical beliefs, to force another person, physically incapable of ending their Existence, of living against their will? What will the role of the Law be regarding this?

### **Empathy: the heart of morality**

Empathy comes from Edward Titchener's translation (1904) of the German word "Einfühlung".<sup>6</sup> The concept of "Einfühlung" was developed in German philosophical aesthetics in the late 19th / early 20th century. It refers to individuals projecting onto another body or environment (including inanimate objects) to understand what it is like to be outside of themselves. In the artistic field, considering that works are human artefacts and translate human thoughts, emotions and ideologies, there is a parallel between this "aesthetic" and interpersonal Empathy. In fact, in both, there is the fundamental role of the capacity to take perspective, incorporate the situation of others and integrate their affective effects. There is here an essential dimension of understanding, which, as Jaspers stated, is the way to access the mental states of others.<sup>7</sup> Through it, we subjectively use what is made available to us and spontaneously reinterpret it, thus perceiving what it is like to be in another one's shoes. According to Jaspers, this so-called "phenomenological observing" is not provided to us by the senses or logical reasoning but instead comes from a direct and immediate understanding of the other's state of mind. Empathy may be more embracing than it is too many times defined. It is commonly limited to an exclusively emotional and interpersonal dimension and divided into various subtypes, thus creating a conceptual and methodological difficulty for an adequate clarification of its meaning and importance for human behaviour in general and for morality in particular.

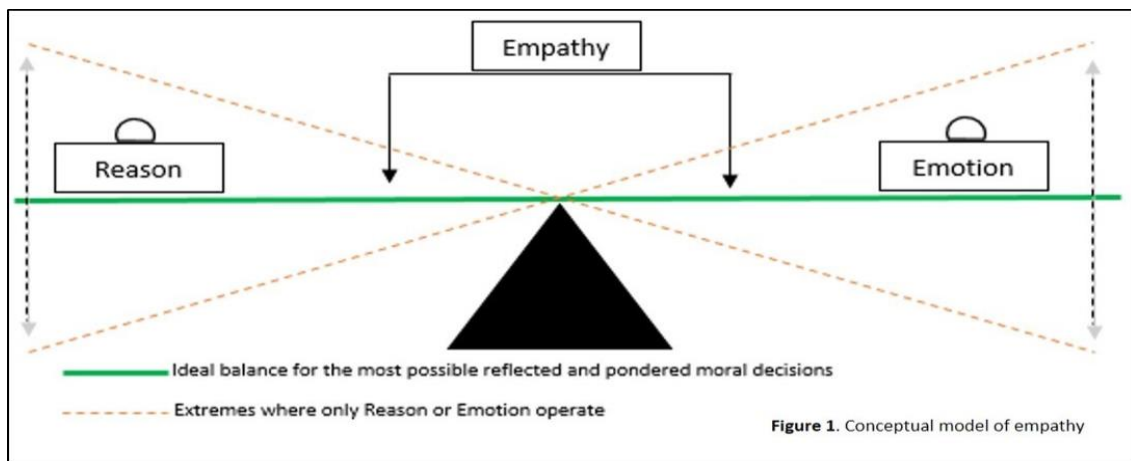
Hence, we consider Empathy erroneously defined as an exclusively or predominantly emotional mechanism and artificially divided into subtypes that seek to identify its alleged components (e.g. emotional, cognitive). We argue that it is not an emotion or divided into subtypes. Moreover, we do not find

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<sup>6</sup> GANCZAREK, J., et al. From "Einfühlung" to Empathy: exploring the relationship between aesthetic and interpersonal experience. *Cogn Process*. 2018 May;19(2):141-145.

<sup>7</sup> JASPERS, K. (1913). *General Psychopathology*. Johns Hopkins. University Press.

support for empathy's subtypes in cerebral studies, nor can it be stated that a specific brain area is associated with Empathy.<sup>8</sup> Therefore, we define Empathy as a neuropsychological capacity that balances the scales on the plates of which are Emotion and Reason, enabling moral decisions to be as reflected and pondered as possible in the most diverse circumstances and contexts (Figure 1).



There is an ideal where Empathy promotes a perfect balance between Reason and Emotion, originating a moral decision that is as reflected and pondered as possible (green line in Figure 1), and the extremes (red dashed line in Figure 1) where without Empathy there is a dramatic oscillation between Reason and Emotion that instigates an absolute dominance of one over the other and a judgment and a decision that is volatile and uncertain as to its morality. In these extremes, what determines the predominance of one dimension over the other is the specific situation individuals are faced with, as well as their personality. So, for example, a psychopath utterly devoid of Empathy makes excessively rational or emotional moral decisions, depending on the circumstance. He may have the brutal coldness to premeditatedly, and in a planned manner, murder several individuals for his financial gain or the impulsiveness to be suddenly violent with someone in his sphere of personal relations who insults his 'honour' [determined by his idiosyncratic moral code].

<sup>8</sup> DECETY, J., COWELL, JM. The complex relation between morality and empathy. *Trends Cogn Sci.* 2014 Jul; 18(7): 337-9. doi: 10.1016/j.tics.2014.04.008.

Between the ideal (green line in Figure 1.) and the extremes (red dashed lines in Figure 1.), there is a whole empathetic spectrum (blue dashed arrows in Figure 1.) that contributes to more or less thoughtful and reflected moral decisions. The ideal does not mean immaculate answers with no ethical doubts or distress but the empathic ability to balance Reason and Emotion as best as possible to arrive at a moral solution to an individual's concrete problem. There are many potentially irresolvable ethical dilemmas, that is, without unquestionable and universal moral answers. That is why any moral decision may simultaneously include acceptable and unacceptable aspects.

This model of Empathy is not limited to responding to moral judgements within the scope of interpersonal relationships but includes a solution for the dimension of the concept of "Einführung" derived from the word Empathy.<sup>9</sup> Empathy is also essential for moral decisions involving non-humans. Given an inanimate object (e.g. a painting, a watch), if endowed with the Empathy we advocate, an individual will be able, to a greater or lesser degree, to assess whether destroying or stealing it is morally licit. The balance between Reason and Emotion fostered by Empathy will enable one to determine if the action is morally wrong in itself (e.g. even if there are no severe consequences for anyone, perhaps it will be better to take a found object to a lost and found and keep it only if no one claims it) or because it will indeed represent harm (emotional, financial or otherwise) to someone. In the extremes (without Empathy), the decision will be volatile (and may not be the most appropriate - we are left entirely to the moment's chance) as it will be based on excessive rationality or emotionality.

In short, our model understands Empathy as a neuropsychological capacity that seeks to balance Reason and Emotion to make a moral decision as reflected and pondered as possible, recognising that, in many circumstances, there are no immaculate moral judgements. On the other hand, the subject of an ethical decision may be a person, an object, an animal or nature itself. Like any other ability, we are born with an empathic potential, which may be more or less developed in a close and continuous inter-influence between genetics and the environment.

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<sup>9</sup> GANCZAREK, J., et al. From "Einführung" to Empathy: exploring the relationship between aesthetic and interpersonal experience. *Cogn Process*. 2018 May;19(2):141-145.



### **The internal origin of morality**

The human brain enables complex and unique functions, including abstract, reflective and philosophical thinking. In addition, it endows humans with the potential to develop a singular personality in a continuous close relation with the external environment.<sup>10</sup> However, due to Cartesian dualism, which still hangs significantly over civil and medical-scientific societies, there is still a specific resistance to attributing an organic substratum to personality, behaviour and emotions.

At the bottom, there is a general lack of understanding and refusal to tacitly assume that human beings are (in the sense of Being, of existing) brains. Our personality and, therefore, the way we act, react and get emotional is a result of the functioning of this organ. This does not mean that social experiences do not influence us. What makes the brain idiosyncratically complex and distinct is that its development is affected by life events.<sup>11</sup> For example, a hepatocyte will not see its function or development directly compromised if a child witnesses frequent and violent arguments between parents during their growth. Nevertheless, depending on the individual's genetic resilience, neuronal development may be more or less affected, conditioning the construction of a personality with more or less fragility.<sup>12</sup> That is why a healthy socio-familiar environment during infancy and adolescence is so crucial for later in life, a person to be mentally capable of dealing with the hardships of Life, minimising the probability of the emergence of a psychiatric illness.<sup>13</sup> We die when there is brain death precisely because it is only then that our personality (our "self") definitively disappears.

The lack of understanding of the brain as the substratum of our Being and our capacity, through reflective thought, to extrapolate the most diverse ethical-philosophical, esoteric and mystical theories and considerations may make it

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<sup>10</sup> TOST, H., CHAMPAGNE, F., MEYSER-LINDENGERG, A. Environmental influence in the brain, human welfare and mental health. *Nat Neurosci* 18, 1421–1431 (2015).

<sup>11</sup> RICCELLI, R., et al. Surface-based morphometry reveals the neuroanatomical basis of the five-factor model. *Social Cognitive and Affective Neuroscience*; 25 Jan 2016

<sup>12</sup> FAIRCHILD, G., et al. Mapping the brain's structural organisation in conduct disorder: replication of findings in two independent samples. *Journal of Child Psychology and Psychiatry*; 16 June 2016.

<sup>13</sup> WILLE, N., et al. Risk and protective factors for children's and adolescents' mental health: results of the BELLA study. *Eur Child Adolesc Psychiatry* 17, 133–147 (2008).

difficult to understand that there is no evaluation of what is morally acceptable outside the internal space of the human person. Morality is an internal ethical judgement that stems from the individual's relations with everyone and everything around them, whose ultimate goal is to guide human action toward harmony within diversity. Empathy, in turn, according to the conceptual model previously presented, is an essential process for the determination of this morality.

### **The Empathy of Justice**

Human beings write laws with a regulatory purpose. They are, in essence, rules with two essential goals: (1) to promote the proper and harmonious functioning of civilisations through a punitive act proportional to the misconduct in question and (2) to prevent (by seeking to deter the individual) behaviour that destabilises the healthy community balance.

The punishments are gradual, that is, hierarchical according to the gravity of the illicit behaviours and based on concepts rooted in the human condition. In this way, acts with more serious consequences are subject to more severe penalties. At the top of the vilification is homicide, the crime usually punished most severely by the penal codes of democratic states.

The objectivity and the proportionality of laws are derived from the human idiosyncrasy of the empathic process, which properly balances Reason and Emotion. The application of faithful Justice is inseparable from the need for the presence of Empathy, which is the basis of the blindness of Justice concerning races, ethnicities, genders, sexual orientations or socio-economic classes.

Recognising Empathy as a fundamental element of judicial reflections is necessary for the courts to refrain from establishing themselves as mere places to ensure compliance with the Law instead of centres for the application of faithful Justice.

### **The Constitutional View of Euthanasia**

Portugal is a State of Law, constitutionally consecrated as secular. This secularity goes beyond the mere spiritual domain. It translates the principle of respect for diversity as the fundamental axiological axis of a democratic society, inclusive and open to the most varied worldviews. One of the noblest objectives of Democracy is the protection of the most disadvantaged and safeguarding minorities' rights. Therefore, articles 13 and 41 of the Constitution of the

Portuguese Republic (CPR)<sup>14</sup> establish that freedom of religion and conscience must be respected in all circumstances, and no one may be subjected to a decision determined by the religious beliefs of others, just as no one may be forced to commit or be subjected to certain acts that conflict with their ethical, moral and religious conscience. On the other hand, no constitutional principle overrides the others, so there may be circumstances in which dilemmas result from the confrontation between two or more articles of the CPR and situations that require an adequate and complex ethical assessment in addition to legal interpretation. For example, Article 24 of the CPR states that Life is unbreakable. However, should an individual be convicted for killing in self-defence or a war? Or should individuals be forced to stay alive under any circumstances and against their will?

In March 2021, the Constitutional Court<sup>15</sup> declared unconstitutional the draft law of the Assembly of the Republic that proposed to legalise Euthanasia because it violated the principle of determinability. However, it concluded that Article 24 of the Constitution "does not constitute an insurmountable obstacle," and the President of the Court declared that "the right to life cannot be transformed into a duty to live under any circumstances". Now, this pronouncement follows from the analysis arising from the unique empathic capacity of the human being. Without it, article, 24 would be interpreted literally and unanimously, closing the door to Euthanasia in all circumstances.

Later, in November of the same year, the President of the Republic vetoed the reformulated Law.<sup>16</sup> The reasons invoked were formal (related to incomprehensible poor drafting by the deputies!) and practical. Regarding the latter, it can be read in item 12: "For the decision, I took I did not consider any personal religious, ethical, moral, philosophical or political position...but only...the judgement I make about what I consider to be the dominant evaluative feeling in Portuguese society". Firstly, it is complicated, if not impossible, to approach Euthanasia without ethical, moral or philosophical judgements. That would be to contradict and deny the evaluative demand that the nature of the

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<sup>14</sup> DECRETO de 10 de abril de 1976. 8ª versão (Lei 1/2005, de 08/12). Constituição da República Portuguesa.

<sup>15</sup> ACÓRDÃO nº 123/2021. Processo nº 173/2021. Tribunal Constitucional Português.

<sup>16</sup> CARTA enviada ao Presidente da Assembleia da República: "Palácio de Belém, 29 de novembro de 2021. [https://www.presidencia.pt/media/uhjckew3/carta\\_ar\\_20211129.pdf](https://www.presidencia.pt/media/uhjckew3/carta_ar_20211129.pdf)

problem evokes since there are no judgements of this nature dissociated from Empathy and the internal, intimate morality of each human being. Secondly, if, on the one hand, without a referendum, we are not sure that the position against Euthanasia is the evaluative feeling of Portuguese society, on the other hand, even if it was, a majority position on matters of individual conscience and self-determination should not, in a democracy, be imposed on minorities who legitimately think otherwise.

Consequently, when a specific incurable clinical condition, whose suffering cannot be mitigated by science, itself violates Article 24 of the CPR and gives rise to an insidious and painful process of Death, irreversibly desecrating the moral and physical integrity of the individual (no. 1 of article 25 of the CPR) and subjecting them to a kind of permanent torture (no. 2 of article 25 of the CPR), what should we (Society/State) do? When a person in these conditions, lucid, conscious and unable to "take matters into his/her own hands", calls for someone to do so, what should the response be? Should we comfort them with words that do not comfort them? To beckon them with a non-existent or unattainable purpose? To ignore them?

The right of self-determined individual to decide about themselves is constitutionally enshrined. The Law allows a patient to refuse treatment with curative potential, guaranteeing that the right of access to all available and appropriate palliative treatment, if so desired by the patient, is not jeopardised. It also ensures the right to choose not to be subjected to resuscitation manoeuvres or that legal representatives turn off the life support machines of family members in certain clinical conditions.

Articles 13 and 41 of the CPR state that freedom of religion and conscience must be respected in all circumstances, and therefore, no one can be subjected to a decision determined by the religious beliefs of others, just as no one can be forced to commit or be subjected to certain acts that conflict with their ethical, moral and religious conscience.

Article 64 of the CPR states that "everyone has the right to the protection of health and the duty to defend and promote it". However, an incurable disease can irreparably debilitate individuals to such an extent that it becomes impossible to defend or protect their health, leaving only (and this is no small thing, on the contrary) to try to safeguard their human dignity.

Finally, who is and what is the State's duty? Is the State a merely abstract entity, or are they real people? Firstly, it is important to mention that States under the Rule of Law are not watertight. They show a constant dynamism arising from cultures and temporal epochs, reflecting them. Secondly, it seems unequivocal that the State is the people, represented in the functions that fall to each one, in bodies such as the Assembly of the Republic, the Government or the Presidency of the Republic.

Within the democratic rules, we all must assume the reality and give a response to the people in the extreme situations described here. Ignoring the irreversibility of suffering and the resulting despoliation of human dignity will never be a solution. Of course, the complexity and seriousness of the subject require that the discussion is not be held hostage to dogmatic worldviews of any kind and be socially broadened, varied, enlightened and mature. Everyone has the duty and the right to express their opinion. However, even after all the debate, there will still be a reality to which an explicit solution must be given.

Assuming the impossibility of immortality and the curative and palliative limits of science, should a law not be made available to citizens which, while respecting constitutional principles and the human rights of all, gives a concrete answer to the problem, avoiding undue and arbitrary practices? Euthanasia (a Greek word made up of "I" (good) and "*Thanatos*" (Death)), in the conditions described here, is a barbarity or the ultimate act of Humanity?

Finally, it is of the utmost importance to emphasize that under no circumstances should the investment in palliative care be neglected. Several countries (e.g. Belgium and the Netherlands) where Euthanasia is decriminalised have the most developed palliative care in the world.<sup>17</sup>

### **Locked-in syndrome: Empathy and self-determination**

Locked-in syndrome<sup>18</sup> meets particular conditions for the debate on the legitimacy of Euthanasia. It is a rare neurological disorder in which there is paralysis of all voluntary muscles. There are three forms: pure, in which the patient loses control of all body movements, except blinking; incomplete, when

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<sup>17</sup> WOITHA, K., et al. "Ranking of Palliative Care Development in the Countries of the European Union." *Journal of pain and symptom management* vol. 52,3 (2016): 370-7.

<sup>18</sup> SAHOO, S., PEARL, PL. *Locked-In Syndrome*. *NORD Guide to Rare Disorders*. Lippincott Williams & Wilkins. Philadelphia, PA. 2003:554.

movements other than blinking are preserved; and total, where there is a complete loss of motor function.

Patients with this disease are bedridden and utterly dependent on others. However, their cognitive function is unaffected, so they are alert and aware of everything around them. They hear, see, have a preserved sleep-wake cycle and understand the people who speak to them. This condition is often described in the literature as "the closest thing to being buried alive". The prognosis depends on the cause and form of the disease, as well as the degree of support and care patients receive. Recent studies show that some patients report living a happy and meaningful life, especially when they have appropriate social services and technology to improve their adaptability to their circumstances. They can live, with proper care, for 10 to 20 years.

The question that Locked-in Syndrome raises within the discussion on Euthanasia is the following: Is it ethically and legally legitimate to oblige someone in these circumstances, without the possibility of ending their own Life, to remain alive when they request Euthanasia (or if this is not possible, have expressed this wish in an advance directive)?

### **The Health Professional as Euthanasia "Performer"**

It is argued that the participation of health professionals in Euthanasia is not admissible because, for example, in the case of doctors, it contravenes the Hippocrates' ethical code of the profession. In this regard, three points seem essential for reflection.

Firstly, the historical context in which Hippocrates drew up the oath as the basis for Western medical ethics was extraordinary. In ancient Greece, murders by poisoning were commonplace, and the practice of Euthanasia was generally well accepted by doctors and society. Thus, several translators of Hippocrates' text seem to agree that what he intended to avoid was that a doctor could be instrumentalised as a vehicle to murder someone by using his privileged relationship of trust with a patient.<sup>19</sup>

Second, there are no immaculate and temporally and culturally static ethical judgments. Ethics, as a science, must accompany the inevitable human

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<sup>19</sup> VAN HOOFF, A. "Ancient euthanasia: 'good death' and the doctor in the graeco-Roman world." *Social science & medicine* (1982) vol. 58,5 (2004): 975-85.

evolution in all fields (e.g. technological, social, scientific) and contribute to an adequate and secular moral reflection. An excellent example is the shift from medical paternalism to complete patients' autonomy in the post-World War II period.

Finally, ethical-deontological orientations should consider Empathy as a fundamental instrument of moral deliberation, assume morality as an internal human judgement and consider the profound scientific and social transformations that occur continuously and the cultural plurality of contemporary societies. Making room for various worldviews and respecting the individuals' self-determination should be the axiological framework of a secular and reliable ethics.

Gonçalves found that 37% of oncology physicians would be willing to practice Euthanasia.<sup>20</sup> This clearly shows that this issue deals with deeply personal reflections and convictions and is averse to any unanimity, even in the universe of the medical class.

## **Conclusion**

Ethics and Law do not always go "hand in hand" and sometimes present strange dissonances. Nonetheless, the decision of the Portuguese Constitutional Court to admit, within the scope of the evaluation of the euthanasia bill, that article 24 of the CPR, which consecrates the inviolability of human Life, is not an insurmountable obstacle, alludes to an essential premise that should be transversal to both disciplines. There are no absolute principles or norms. That is why, in Law too, Empathy, as we have presented it here, is fundamental for legislative drafting congruent with the vicissitudes of human nature and a contextually sober, serious and ethical application of the laws. Justice is incompatible with judgements based on feelings, prejudices or conflicts of interest arising from undue proximity to the accused or the magistrate's sympathies with similar situations that they have experienced. However, without the lucidity and secularity of Empathy, it is impossible, in matters such as Euthanasia, to legislate or judge properly. If the inviolability of Life were interpreted literally and took precedence over other constitutional norms and ethical principles, not even

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<sup>20</sup> GONÇALVES, F. Attitudes toward assisted Death amongst Portuguese oncologists. *Support Care Cancer*, v. 18, p. 359-366, 2010.

someone who had killed in self-defence could be judicially acquitted. Respect for diversity is the fundamental moral aggregating axis of Law in the constitutional protection of liberties that, in a democracy, the discipline must confer secularly on every citizen.

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