

1961

Euthanasia under the Swiss Penal Code

Anton Pestalozzi-Henggeler

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Anton Pestalozzi-Henggeler, *Euthanasia under the Swiss Penal Code*, 15 Sw L.J. 393 (1961)
<https://scholar.smu.edu/smulr/vol15/iss3/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

EUTHANASIA UNDER THE SWISS PENAL CODE†

by

*Dr. Anton Pestalozzi-Henggeler**

THE Swiss Federal Penal Code (hereafter abbreviated PC), enacted on January 1, 1942, does not contain specific provisions concerning Euthanasia;¹ more particularly, the Code does not state that Euthanasia is *not* punishable. It is vain, therefore, to search in the Code for a definition of the term suitable for use in the present Article. The meanings given to the term "Euthanasia" differ considerably.² In order to make it easier to understand the following explanations we thought it helpful to define the term ourselves. This definition is given only for the present Article, and we are fully aware that it does not cover the great variations of phenomena that might fall within the term "Euthanasia" as it may be defined elsewhere. Euthanasia, as we understand it, is an act or an omission to act by which death of a human being who seems to be hopelessly sick is caused or accelerated, in order to free him from pain or helplessness.

The Code contains various provisions that might be applicable to a case of Euthanasia. However, the subject matters of the provisions which must be considered in this connection differ considerably from each other, and it is not possible, therefore, to discuss the problem in a general way. As far as the Code is concerned, the best course to follow in discussing Euthanasia seems to be to analyze separately the provisions that might be applicable to such cases.

I. HOMICIDE OF A SUFFERER UPON HIS OWN REQUEST

PC Section 114 provides: "He who kills a person upon his serious and urgent request, is punishable by imprisonment." It is under this

† The problem of Euthanasia is a current social question with grave legal implications. Therefore, this study of Swiss law is presented for comparative purposes. Treatment of the problem in American legal writing has not been extensive. See G. Williams, *The Sanctity of Life and the Criminal Law*, Ch. 8 "Euthanasia" 311-50 (1957); Earengy, *Voluntary Euthanasia*, 8 *Med. Leg. J.* 91 (1940); Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 *U. Pa. L. Rev.* 350 (1954); Wechsler & Micheal, *A Rationale of the Law of Homicide*, 37 *Colum. L. Rev.* 701, 739 n.148 (1937) (list of authorities); Lecture Series, Catholic Lawyers' Guild of Chicago, "The Natural Law & the Legal Profession," cited in MacKinnon, *The Effect of Religious Principles on Lawyers' Ethical Problems*, 10 *Vand. L. Rev.* 931 (1957). See also Roberts, *Euthanasia and Other Aspects of Life and Death* (1936); Sullivan, *Catholic Teaching on the Morality of Euthanasia* (1949); Hook, *The Ethics of Suicide*, 37 *Int'l J. of Ethics* 186 (1927).

* Dr. of Law & Economics, Zurich University; Member, Zurich and Swiss Bar Associations, Zurich Juristenverein, Swiss Juristenverein, International Law Association, International Fiscal Association; Patron, International Bar Association; Attorney at Law, Zurich, Switzerland.

¹ Webster, *New Collegiate Dictionary* 285 (1959), defines it as the "act or practice of painlessly putting to death persons suffering from incurable and distressing disease."

² E.g., Fritz Hauser, *Die Euthanasie im Schweizerischen Strafrecht* (1952).

provision that one who kills somebody upon his demand is punishable. However, the punishment is less severe than the punishments provided for other types of homicide. According to PC Section 36(1), the period of imprisonment in all cases in which the Code does not specify a longer period (as in Section 114), is not less than three days and not more than three years. The punishment for murder,³ which is defined as a homicide in which the killer evinces an especially detestable motive or extreme dangerousness, is reclusion for life. Intentional homicide⁴ is punishable by reclusion from five to twenty years; whereas homicide in a transport of passion⁵ is punishable by reclusion from one to ten years or imprisonment from one to five years.

In order to better understand the foregoing punishments, it should be explained that the Code provides three forms of imprisonment, *i.e.*, a severe form which is translated for our purposes by the expression "reclusion"⁶ and a less severe form for which the expression "imprisonment"⁷ will be used in the present summary. The third form,⁸ a very light form of imprisonment, will be translated by "detention."

As far as PC Section 114 is concerned, it must be borne in mind that this section is only applicable if the demand of the person who wants to be killed is a serious and urgent one. It is, therefore, by its terms, not applicable if the person in question merely agrees to be killed. It has been said that it must be the victim who takes the initiative.⁹ One author¹⁰ states that Section 114 can only be applied if the culprit had not been determined to kill regardless of the request. Furthermore, it seems clear that the state of mind of the person expressing the wish to be killed must be such that he recognizes the full import of his request. Some authors state that the person to be killed must have full capacity of understanding.¹¹ Hafter thinks that it is sufficient, if the culprit could, under the circumstances, assume that the request of the person to be killed was a serious one.¹² He seems to be of the opinion, therefore, that this is possible under certain

³ PC § 112 (meurtre, Mord).

⁴ PC §§ 111, 35(1) (assassinat, vorsätzliche Tötung).

⁵ PC §§ 113, 35(1) (meurtre par passion, Totschlag).

⁶ Réclusion, Zuchthaus.

⁷ Emprisonnement, Gefängnis.

⁸ Arrêts, Haft.

⁹ Logoz, Commentaire du Code Pénal Suisse, Partie speciale § 114 nn.2, 5a; 1 Hafter, Lehrbuch des Schweiz Strafrechts, Besonderer Teil 23.

¹⁰ Schwander, Das Schweizerische Strafgesetzbuch 237.

¹¹ *Ibid.*

¹² Hafter, *op. cit.* supra note 9, at 24-25.

circumstances even if a lunatic should ask to be killed. Germann seems to be of the same opinion.¹³

The wording of Section 114 clearly shows that this provision is not limited to cases in which a suffering person demands to be killed. It includes all cases in which a human being is killed upon his serious and urgent request. Only the case in which a suffering person is killed upon his request may qualify as a case of Euthanasia as defined above. However, it must be observed that other definitions of Euthanasia may be wider than ours and that, therefore, Section 114 may also be applicable to those other cases. On the other hand, if somebody is killed without a request, it is clear that Section 114 does not apply.

It is possible, therefore, that Section 114 of the Code may apply to Euthanasia. In such a case, the fact that the person killed is a sufferer, may bear upon the determination of the degree of punishment. According to PC Section 63, the judge is bound to fix the punishment, within the limits set forth by a given provision of the Code, with regard to the culprit's fault. In determining the fault of the culprit, the judge must consider the motives for the crime. In a case under Section 114, it would therefore be possible, if the judge found that the culprit's fault was not a grave one, to reduce the punishment to three days of imprisonment. Furthermore, if the culprit acted from noble motives, the judge would not be bound to fix the punishment within the limits stated by the provision in question, and would be allowed to sentence the culprit to detention or merely to fine him.¹⁴

As no precedent could be found, it is impossible to predict how a court would react in a concrete case of Euthanasia (upon the sufferer's demand).

It can only be said that the Code provides theoretically for the possibility that a person who kills for mercy upon the serious and urgent demand of the person killed could be punished by a short imprisonment of not less than three days, or by detention (one day to three months) or even merely by a fine.

II. HOMICIDE OF A SICK PERSON WITHOUT HIS DEMAND

As no special provision is contained in the Code, such a case would be judged by the general rules relating to homicide. These general rules would also apply to cases in which the sick person merely agreed

¹³ Germann, *Das Verbrechen im Schweizerischen Strafrecht* 227.

¹⁴ PC §§ 64(1), 65.

to be killed either without an urgent request or without the mental capacity to understand the meaning of his request.

According to the particular circumstances, the culprit would be sentenced for murder, homicide or homicide in a transport of passion. In such cases there would also be a possibility of fixing the degree of punishment with regard to the fault of the culprit as well as the possibility of reducing the punishment within the limits of PC Sections 64 and 65. It would be idle, however, to try to make any prediction as to whether a particular case would be treated as murder, homicide or homicide in a transport of passion, because there are too many possible variations of the fact situation.

However, it can be said that acts committed as acts of Euthanasia—as they were committed under the German National Socialist Regime—would most probably constitute murder under Swiss law. A Swiss court would hold that the culprit evinced an especially detestable motive or was extremely dangerous, which pursuant to the Code, would entail a sentence of reclusion for life. It seems also very unlikely that a court would find that the punishment should be reduced by application of PC Section 64; except perhaps in a case in which the culprit was directed by an order of a superior or of a person upon whom he was otherwise dependent.¹⁵

On the other hand, the case of a doctor who kills one of his patients in order to alleviate his suffering, would not necessarily constitute murder; such an act does not per se evince a reprehensible motive or extreme dangerousness, except, of course, in a case in which the doctor makes this a general practice. The punishment would then not be reclusion for life but only for five to twenty years. If mitigating circumstances in the sense of PC Section 64 were taken into consideration, the punishment could be reduced to one year of reclusion.¹⁶

It is doubtful whether the act of a doctor who kills his patient would qualify as homicide by transport of passion. It is not completely impossible, however, that other acts of Euthanasia, in which no doctor is involved, could qualify as homicide by transport of passion. The punishment would then be reclusion up to ten years or imprisonment between one and five years. If PC Sections 64 and 65 were then applied, the punishment could be reduced theoretically to three days of imprisonment.

In conclusion it may be said that in all cases in which the victim

¹⁵ PC § 64(1).

¹⁶ PC § 65.

is not killed upon his serious and urgent demand, the culprit probably would be severely punished.

III. ACCESSORY BEFORE THE FACT; INSTIGATION TO SUICIDE

PC Section 115 states: "He who, for self-seeking motives, instigates another to commit suicide or he who is an accessory to suicide, is punishable, if suicide is committed or attempted, by reclusion up to five years or by imprisonment." Euthanasia might also include a case in which a physician or other person supplied or made available to a sick person doses of soporifics or other drugs in quantities adequate to produce death. Such action, although constituting aid or instigation to suicide, is not specifically made punishable by Swiss law unless it falls within the purview of PC Section 115 by reason of self-seeking motives on the part of the supplier of drugs. "Self-seeking motives" are defined as motives of material, particularly financial, gain, and also hate, revenge, malice, etc. The motives to secure the victim from dishonour, disgrace or destitution have been deemed not to be self-seeking motives.¹⁷

A doctor or nurse would not be very likely (at least as a general rule) to help a patient commit suicide for self-seeking motives, and it would therefore be possible that acts of Euthanasia would not be punishable if committed within the limits of Section 115. However, it must be observed that the case of a doctor or a nurse, making drugs available to a patient or failing to prevent the taking of such drugs, might possibly be held to constitute negligent homicide in the sense of Section 117 of the Code, which provides as follows: "He who negligently causes the death of a human being is punishable by imprisonment or by fine."

IV. OMISSION OF MEDICAL TREATMENT OF A SICK PERSON

In principle, under the Code, a crime can be committed by an omission as well as by an act. One may cause the death of a sick person by neglecting to give the medical treatment needed for recovery or prolongation of life. Whether such an omission constitutes a punishable act depends largely upon the answer to the question whether the person who fails to act is bound by legal duty to act. If a person is only bound by convention or by the rules of morals, the omission to act according to such rules cannot constitute a crime.¹⁸

¹⁷ Cf. Hafter, *op. cit. supra* note 9, at 26-27; Germann, *op. cit. supra* note 13, at 228; Logoz, *op. cit. supra* note 9, at § 115 n.3; Thormann & Overbeck § 115 n.6.

¹⁸ Switzerland: Decision, Federal Supreme Court, 79 IV 147 (not a case of Euthanasia, however).

How far a person, in particular a doctor, is legally bound to act and to provide everything that may lead to recovery or to an extension of the duration of a patient's life, is a question that cannot be answered in a general way. In principle, a doctor who undertakes to treat someone enters into a contract with such a person, and it must be assumed that the terms of such a contract include the doctor's duty to save his patient. If a doctor does not perform his contract it is very likely that the non-performance would be considered not only as a breach of contract but also as a breach of his general duties as a doctor and as a breach of duty under the PC either as intentional homicide¹⁹ or negligent homicide.²⁰

V. CONCLUSION

The Code does not contain specific provisions relating to Euthanasia. Acts of Euthanasia, if committed would, according to the concrete circumstances, be punishable as murder, homicide, homicide upon request, instigation or aid to suicide, and the punishments would vary (if the provisions of the Code for reduction of punishment are taken into consideration) from very short periods of imprisonment to reclusion for life. In this connection it may be observed that the Code does not provide for capital punishment. Also instigation or aid to suicide would not be punishable in the absence of self-seeking motives unless held to constitute negligent homicide.

The problem of Euthanasia is periodically discussed in Switzerland in literature or by film, but very little material with respect to the relation between the substantive law and Euthanasia can be found. The reason for this may be less, as Hafter states, the fact that no acts of Euthanasia are committed, than the fact that such cases are very unlikely to come before a court.²¹

¹⁹ PC § 111.

²⁰ PC § 117.

²¹ Hafter, *op. cit.* supra note 9, at 24; accord, Schwander, *op. cit.* supra note 10, at 237-38.

Southwestern Law Journal

STUDENT EDITORIAL BOARD

Editor in Chief

ROBERT C. L. MOFFAT

Managing Editor

THOMAS D. REAGOR

Recent Case Notes Editor

DON W. JACKSON

Comments Editor

STEVEN K. COCHRAN

Leading Articles Editor

HERSHEL R. PAYNE

Research Editor

C. JACK PEARCE

Business Manager

FRANK W. WEATHERS, JR.

E. BRUCE EBERT

OLIVER KELLEY

JAMES C. SLAUGHTER

Faculty Advisor

ALAN R. BROMBERG

Member, National Conference of Law Reviews

Copyright, 1961

BY SOUTHERN METHODIST UNIVERSITY