

EUTHANASIA STIPULATED BY ROMANIAN CRIMINAL LAW, MITIGATING CIRCUMSTANCES VS. OFFENCE

MONICA POCORA*

Abstract

This paper aims to be a scientific approach to the issue of euthanasia, bringing into the debate current and future controversies raised by euthanasia, as a result of the introduction into the Romanian penal law of the criminal offence of homicide by request of the victim. The study represents an approach to moral, religious, constitutional, civil, criminal procedure debates and last but not least to criminal debates regarding the legalization of the euthanasia, as the most difficult task lies with the criminal law.

Keywords: *life, death, assisted suicide, human rights, criminal sanction.*

Introduction

Between the protected rights by the Romanian Criminal law, there is the privilege of life of one fellow. Therefore, the title of this theme is recommended matters looking for protection of this privilege, as well as the situations appeared by a severe illness of one person. I've discussed about euthanasia, the etymology, those three familiar and well-known meanings, as well as appearing controversy regarding to this notion. This subject was concluded through conclusions and suggestions. The suggestions are reporting about the euthanasia. It should be express scheduled of Romanian penal law and considered offences of attempt for human being; or, the euthanasia should be extenuating circumstances of manslaughter when this is imposed by medicine reasons.

Some authors, based on the idea that suicide is a right of every individual claimed that anyone can send another person the right to take life. Last century was born a trend called "right of death" and that advertising for each individual the right to ask to be saved from death throes. This design is dedicated to any legislation, the legislators showing an understandable caution in allowing suppression of life at the request of a person no matter how motivated would be such a solution. For the first killing on request data been settled by German Penal Code which provide that person's request must be "explicit and serious" to be considered. Also, the Hungarian Criminal Code of 1980, regulate the killing on request, provided the existence of a "motivated and serious request." The same condition an advertisement and the Swiss Penal Code in 1916 in the sense of "urgent and serious request." In this category is included the German Penal Code of 1939, which regulate the agreed murder only if the request came from a man seriously ill or injured. Italian Penal Code is stipulated by Art. 579 provision for mitigating the penalty to "murder one who consents." The act was considered an offense on the person.

The main elements of novelty existing in the current criminal legislative reform are rendered by the repositioning of the values that the criminal law protects. Thus, the legislator aims to protect the most important social value, i.e. the person, fact that reflects the fundamental interests of the individual or of the society; this is justified by the fact that the person is, above all, subject to different types of assault into the daily life. Before being incriminated, these offences suppose an assessment of the danger they present. This assessment is made taking into consideration the interests of the society and not those of each individual. Thus, it is possible for a person whose honor has been insulted not to give importance to the offence committed against him/her or, even to judge it as favorable by comparison with a personal code of assessment, such as the biblical precepts. Then, the

* Senior Lecturer, Ph. D., "Danubius" University of Galati (email: monicapocora@univ-danubius.ro).

notion of “important” in terms of the social value system is different from a historical stage to another and from one country to another.

The people’s perception concerning the euthanasia is marked especially by the existing precepts in connection with the notions of “*life*” and “*death*”.

Often, it has been demonstrated that the theological vision can provide the sciences of law, sociology, medicine, with the correct premises, so that any person can claim a fundamental right of his/her own. Seen as a divine gift, life is the supreme value of man on Earth, as it is the support of the other values that express it and that impose it ahead them. In accordance with the fact that each human being belongs to the same human race, the right to life is shown to be the fundamental expression of the human existence. As a consequence, the *Christian religion* believes that nobody is allowed to attempt to take his/her peer’s life or his/her own life, as life is a divine gift. This view is joined by both *Buddhist and Jewish religions*, in the sense that euthanasia, irrespective of its form, should be banned. It was also considered that, if all international conventions on human rights were not premised upon the theological vision on human life and upon the right to life, then, they would risk turning man into a social individual, subject to arbitrary, loose, and unprincipled laws.

Equally, religion considers that we must respect each other, as well as we must respect the other’s wishes concerning the end of their life. Regarding this latter aspect, the following question can be raised: why doesn’t religion allow the last dying wish of a moribund person, namely that someone puts an end to the moribund person’s suffering? In the attempt to provide an answer, we consider that the intrinsic value of that human being is a priority, in disfavor of his/her will.

Legal beliefs

Within this paper, case study and observation method were those that allowed the debate of some of the most controversial issues related to euthanasia, the judicial practice serving as the empirical basis for drawing up conclusions.

Numerous studies approaching the issue of euthanasia have been published, but socio-human realities constantly stir debate and controversy about the assisted suicide. Euthanasia was practiced in ancient times, because it was considered that life should not be preserved at all costs. Later, in countries such as Switzerland, the Netherlands, Australia, the USA, euthanasia was legally practiced¹.

Some authors, starting from the idea that the suicide is a right of every individual, have upheld the idea that anyone can transfer to another person the right to take his/her life. Thus, authors such as K. Binding and A. Hoche pleaded since 1920 for the legalization of euthanasia², in the sense that they attempted to prove that legalizing euthanasia was not inhumane, whereas compelling the patient to die in agony was, when there existed the possibility to get rid of the ordeal by accelerating the patient’s death. Then, the establishment of a special commission was proposed, commission that had to be composed of physicians and lawyers who had to decide upon the desperate condition of the patient.

The human, creating himself, acquired thought and feeling that, although seem to be independent, have been limited by the restrictions and prescriptions imposed by society. In this sense, in the relation individual- society, the concept of society reflects certain dominant fundamental rules and principles or systems of values that characterize social life.

A new path was opened for humanity, with multiple contradictory aspects in which the interests of science will inevitably collide with the ones of ethics, Christian morality and political interests of the states. The former president of the United States of America, Bill Clinton said: “We have to accept the serious ethical and moral issued raise by this extraordinary revolution”. Same as the former American president, the British premier Tony Blair underlined that “humanity has the

¹ <http://www.rmw.nl/english/dossier/Euthanasia>. (2010, June 26).

² O’Mathúna, Dónal P. *Human dignity in the Nazi era: implications for contemporary bioethics*. Germany: BMC Medical Ethics, 2006.

duty to use the new valuable information in a responsible manner and for the benefit of the entire humanity³.

The objective causes and especially the social ones determine the different human behavior and manners of actions so that the social restrictions acquire a mandatory normative aspect.

The general argument resulting from the relations of the individual with the society consists in the fact that society develops in a positive manner because, within the complex process of education, the individual integrates in the normative and evolutionary structure of society⁴.

Other authors have equally considered that homicide by request should not be treated in a different way than absurd murder, they being unable to accept the idea of a right to suicide. We can mention here the Spanish Penal Code, the French, the Belgian, the Canadian ones and also the Criminal Code of Luxembourg. Nevertheless, these very laws that regulate the possibility of consented homicide do not allow for it to remain unpunished. The homicide upon the patient's request was for the first time stipulated by the German Criminal Code which provided that the victim's request had to be "explicit and serious" in order to be taken into consideration. In order to exemplify this aspect of the need of the existence of a "serious and motivated request" made by the victim, we may cite the Hungarian Criminal Code, the Swiss Penal Code, and the Italian Criminal Code. Among the law systems devoted to not punishing the homicide by request, we could mention the Russian legislation.

The human body cannot represent an object of law and the human, assimilated to the physical person, cannot be but a subject of law and not an object of law⁵. In this context, the human body, complete and viable, in the actual conception of doctrine and jurisprudence, cannot be sold or donated because it would mean the reestablishment of slavery and transformation of the person in an object of patrimony rights, while the elements of the human body can, in exceptional cases, make the object of acts of dispositions, in the extent allowed by law, because they are not a person in the judicial sense of the word.

In the interwar Germany, it was even introduced a bill in Parliament, that stipulated that the one who wanted his/her own death had the possibility to address the court in order to obtain that. The court, on the basis of a medical assessment, could certify the thoroughness of the demand and could authorize a physician to put an end to the patient's life in a certain way. Subsequently, that bill was censored

The jurisprudence is not unitary either in solving victim consented homicide trials; most courts continue to consider these acts as murder. In some European countries, as well as in some of the American states, acquittal verdicts of defendants who committed acts of murder out of mercy or upon request were nevertheless pronounced. For example, the case of Dr. Herman Sander which used his medical profession in the USA (Eillott C., Quinn F. 2000). He was charged with the first-degree homicide of a cancer patient, a woman whose end was inevitable and who was terribly suffering, because the administration of painkillers did not have any effect at that stage of her disease. The doctor put an end to her suffering by injecting air into her veins.

Euthanasia in Romania – Past, present and future

Romanian legislation has adopted a resolute position with regard to punishing murder, even if it was euthanasia. The Romanian Criminal Code of 1936 incriminated distinctly the murder of a person if committed as a result of a tenacious, repeated and constant plea of the victim or if committed out of mercy in order to put an end to the agony of an incurable patient (article 468, paragraph 1)⁶.

³ Avram, A., *Revolutia genetica*, Jurnalul Cotidianul, 2000.

⁴ Tanasescu, I. et al. (2000). *Tratat elementar de drept penal si criminologie*. Craiova: Sitech.

⁵ Friedman, Y. (2008). *Building Biotechnology: Business, Regulations, Patents, Law, Politics, Science*. Logoss press.

⁶ Dongoroz V., colab. „*Noul Cod penal și Codul penal anterior*”. București: Editura Politică, 1969.

Initially, three meanings of euthanasia were accepted. Euthanasia was seen: as the suppression of physically or mentally disabled people's life, as the reduction of the final ordeal nevertheless without causing death, and as the acceleration of the death of people who do not have any chance of recovery. As one can see, the first two meanings are no longer justifiable in the meaning of criminal law, as there is no social group that dares to make use of them anymore, the reduction of the patient's ordeal without causing his/her death being now considered as a fundamental responsibility of the medical personnel⁷.

The individual behavior becomes more the result of learning rather than heredity so that, if under the aspect of the reaction pattern to external stimulations, it does not seem to have a special signification, regarding the creation of a behavioral prototype of a crowd, or society, it represents the basic rule according to which its members act relatively stable and constant. Within the human behavioral structure, both biological and educational elements are included. The behavioral phenomenon, structuring actions and individual reactions as a manner of human interaction, is protected under the aspect of dignity and identity of the human being⁸.

The Romanian legislation that is in effect does not allow murder upon request or by consent, considering that in this case only a judicial extenuating circumstance could be considered in favor of the author. Unlike that, the New Criminal Code begins with Title I "Crimes against the person", Chapter I "Crimes against life", the article 90 stipulating the "Homicide by request of the victim". According to this legislative stipulation, "*murder carried out at the explicit, serious, conscious and constant request of a victim suffering from an incurable disease or from a medically certified serious disability causing him/her permanent and unbearable suffering, shall be punished by imprisonment from 1 to 5 years*".

In terms of the criminal procedure law, starting from the limits of the penalty stipulated for the crime of homicide by victim's request, it may be presumed that the culprit can meet the circumstances of conditional suspension of sentence, so that he/she does not actually execute the penalty the court mete out to him/her, according to the stipulations of the article 81 of the Criminal Procedure Code. In Romania, the Latin principle of "*volenti et consentienti non fit injuria*" ("to a willing person, no injury is done" or "no injury is done to a person who consents") excluded the possibility of punishing the person who took the life of a victim upon his/her own request.

The Romanian criminal legislation stipulates, within the framework of homicide, the criminal offence of causing or aiding suicide, provided that the suicide had taken place. The penalty included both in the present law and in the New Criminal Code, is, for the simple version - imprisonment up to 7 years, and if *the victim is devoid of discernment*, the penalty is imprisonment of up to 10 years. Thus, a first question that could be raised would be whether in the case of euthanasia it is always presumed the fact that the victim has discernment. Could this situation be mistaken for causing or aiding suicide? We state that, because there may be an identity between the victim and the form of guilt in what concerns the author, namely the intention. The main distinction, though, consists in the penalty applied. As a consequence, maybe the suicide attempt should also be incriminated.

Moreover, the correct placement and assessment of euthanasia within the criminal law is relevant also in terms of civil law, namely in the matter of succession. Thus, were the euthanasia beyond the scope of any criminal penalty, any descendant looking for enriching his/her patrimony by means of legacy might claim this situation, easily arguing that the deceased has expressly requested the suppression of his sufferings.

The jurists have opposed to the accreditation of the right of the individual to dispose of their own body, motivating the fact that this type of recognition would lead to the self degradation of humans. The interdiction to commercialize the human body or parts of it is expressly provisioned by

⁷ Pocora, M. „Probleme legate de protectia dreptului la viata la inceput de mileniu III.” *Conferinta Internationala "Integrarea Europeana-Realitati si Perspective"*. Galati: Analele Universitatii Danubius, 2007.

⁸ Cosmovici, A. (1996). *Psihologie generala*. Iasi: Polirom.

the French law on bioethics as well as in the European Convention on human rights and Biomedicine adopted by the Council of Europe. Modern biotechnology has indicated that it can become one of the possible motors of the development of society in the third millennium, being compared with revolutionary methods that have changed human society forever such as the Great Industrial Revolution, the discovery of the atomic bomb or spatial research, promises a considerable medical progress and a possible improvement of the human condition but at the same time, has the potential to create unwanted or unpredictable problems with an impact that can be profound on the right to life, corporal integrity and health of individuals, human dignity but also on the structure of society as we know it now⁹. In its wider sense, the concept of “biotechnology” refers to the technologies using living organisms (virus, bacteria, animal or vegetal cells coming from simple or complex organisms) or their sub cellular components purified in order to obtain useful stocks of commercial products, in order to improve the characteristics of plants, animals or humans or to create microorganisms for specific purposes¹⁰.

Conclusions

Life is a “gift” that we receive only once and we must make everything humanly possible to enjoy this miracle. The *right to life* is an *inalienable human right* and it is beyond any individual’s attempt to dispose of it; nevertheless, one should not omit the distinction between *living* and *being alive*, the latter situation being only a purely biological phenomenon. It would be a mistake for us to consider the lives of moribund people as being worthless and to draw the conclusion that it would be better for them to die.

Not punishing the murder committed upon the request of the victim is also to be blamed, because it could lead to serious abuses, including the danger that under the guise of seeming acts of charity one could try to get rid of temperamental children or of the elderly who don’t suffer of any disease but who are in the care of others. Moreover, there is the opinion that, the fact of invoking an incurable state would render the use of scientific progress difficult and, in these cases the victim’s consent could hardly be acknowledged as being freely expressed. Therefore, we completely agree with the punishment of the murder upon the victim’s request, but not as a standalone crime, because the limits of the imprisonment penalty are reduced, but as extenuating circumstances of the crime of homicide, because the limits of its penalty are increased.

References

- Dongoroz V.,colab. „*Noul Cod penal și Codul penal anterior*”. București: Editura Politică, 1969.
- Bustamante, P. I. & Bowra, S. (2002). Biotechnology in developing countries: harnessing the potential of HIGH TECH SMES in the face of global competition. *Electronic Journal of Biotechnology*
- Eillott C.,Quinn F. *Criminal law*. London, 2000.
- <http://www.rnw.nl/english/dossier/Euthanasia>. 26 June 2010. (accesat January 2011).
- <http://www.rnw.nl/english/dossier/Euthanasia>. 26 June 2010. (accesat January 2011).
- O'Mathúna, Dónal P. *Human dignity in the Nazi era: implications for contemporary bioethics*. Germany: BMC Medical Ethics, 2006.
- Pocora, M. „Probleme legate de protectia dreptului la viata la inceput de mileniu III.” *Conferinta Internationala “Integrarea Europeana-Realitati si Perspective”*. Galati: Analele Universitatii Danubius, 2007.
- <http://www.rnw.nl/english/dossier/Euthanasia>. (2010, June 26)

⁹ Vasii, I. (2004). Manipularea genetica. Implicatii penale. *Revista de Drept Penal*.

¹⁰ Bustamante, P. I. & Bowra, S. (2002). Biotechnology in developing countries: harnessing the potential of HIGH TECH SMES in the face of global competition. *Electronic Journal of Biotechnology*.

- Avram, A., *Reolutia genetica*, Jurnalul Cotidianul, 2000
- Friedman, Y. (2008). *Building Biotechnology: Business, Regulations, Patents, Law, Politics, Science*. Logoss press.
- Tanasescu, I. et al. (2000). *Tratat elementar de drept penal si criminologie*. Craiova: Sitech
- Vasiu, I. (2004). *Manipularea genetica. Implicatii penale*. Revista de Drept Penal