THE OFFENSE OF HOMICIDE BY REQUEST OF THE VICTIM INTRODUCED BY THE NEW ROMANIAN CRIMINAL CODE

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Abstract
Euthanasia is a murder committed under an impulse of mercy in order to end physical torments of a person suffering from an incurable disease, and whose death is, therefore, inevitable. However, there are differences between passive euthanasia and active euthanasia. The first is the withholding life-prolonging measures and resources when death is otherwise inevitable, while the second is the direct causing - death act of the incurable patient, with his consent, in order to avoid further suffering.

Does one have a right to take one's life? The right to have one's life terminated at will is subject to social, ethical, and legal strictures. In some countries it is legal and also, socially acceptable to have one's life terminated given a sufficient deterioration in the quality of life and the imminence of death.

In this article, the author examines the provisions of the new Criminal Code relating to the incrimination of murdering on victim's request in terms of legality, ethics and morality.

Keywords: the new Criminal Code; human rights; active euthanasia; passive euthanasia; the European Convention on Human Rights.

1. Preliminary considerations. Concept and definition. The offense of murder is criminalized in the new Romanian Criminal Code in Article 188, with the same wording and content. In addition, unlike the current Criminal Code which penalizes the offense of murder with the same penalty irrespective of the reason, the new Criminal Code criminalises the murdering on victim's request, as an alleviated variant of murder, rewritten thus, not only the traditional line of regulation existed in our law (Article 468 of the Romanian Criminal Code from 1936), but also the one of the most European codes [the German Criminal Code, the Austrian Criminal Code, the Spanish Criminal Code, the Portuguese Criminal Code, the Swiss Criminal Code, etc.].

The reintroduction of this text has been required above all, due to the new regime of the mitigating circumstances consecrated by the General Part. Indeed, if in the current regulation, the fact envisaged in Article 190 of the new Criminal Code can be harnessed as a legal mitigating circumstance, leading thus to the

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imposition of a sentence under the special minimum, according to the new regulation, even retaining a judicial attenuating, the penalty will not be applied necessarily under this minimum. Therefore, to enable the imposition of a sentence corresponding to the level of social danger of this act, it was necessary a different legal regulation.1

Through this article, the Romanian penal legislator explicitly express his attitude regarding the criminalization of euthanasia, as an attenuated form of homicide. There were many discussions on the compatibility of the euthanasia with the right of life, human dignity and the person’s right to dispose of itself, given that euthanasia was not included among the exceptions to the right to life and given that the attitude of the states is divided between criminalization and decriminalization of euthanasia, to finally conclude that the option in one way or another belongs to the national legislator. From all the data arising out of the international texts on human rights, and also from the practice of international courts, nothing suggests a clearly outlined opinion in one sense or another.2

According to Article 190 of the new Criminal Code, the offense of killing at victim’s request is "the 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 infirmity, causing him/her permanent and unbearable suffering" and it is punished by imprisonment from one to 5 years.

2. The object of the criminal offence. The generic juridical object of the criminal offence is the right to life, as protected by the Constitution3 and the Convention for the Protection of Human Rights and Fundamental Freedoms.4 The specific juridical object is being confused with the generic juridical object.

The offense has also a material object represented by the body of the person, that was alive at the time of the offense.

3. Subjects of the criminal offence. The active subject is not circumstantiated, it may be any person who fulfills the general conditions of criminal liability. Criminal participation is possible in all its forms: the instigation, complicity and the

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1 Statement of reasons on the new Criminal Code, p. 35.
2 N.M. Vlădoiu, op. cit., p. 20-21.
3 Article 22 of the Romanian Constitution – the right to life and physical and mental integrity: "(1) The right to life and the right to physical and mental integrity of the person are guaranteed".
4 Article 2 – Right to life
1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   a. in defence of any person from unlawful violence;
   b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   c. in action lawfully taken for the purpose of quelling a riot or insurrection.
participation as co-author. We mention that „co-authored” form assumes a indivisible activity, concomitantly, with the common intention to kill, even though only some actions of one’s author are lethal.

The passive subject is qualified, being thus about the living person who is suffering from an incurable disease or a serious infirmity, medically attested, causing permanent and unbearable distress.

4. The prerequisite condition. It is the existence of an incurable disease or a serious infirmity, medically attested, causing permanent and unbearable distress.

5. Constitutive contents.

A. The objective side of the criminal offence. The material element of the criminal offence provided for in Article 190 is concretized in the action or inaction of killing a living person, who is suffering from an incurable disease or a serious infirmity, medically attested, causing permanent and unbearable distress. The essential requirement attached to the material element is that the termination of a person’s life to be done at his will. The law defines the conditions that must be fulfilled by the victim’s request, namely:

- to be explicit, which means that it could not be interpreted, that it is clear and unambiguous
- to be serious; it is not serious the request that has been made jocandi causa, the request that was vaguely formulated or has been made with a mental reservation (reservatio mentalis), known by its addressee
- to be conscious, meaning that the person making the request is responsible at the time of demand; the responsibility is appreciated from person to person, in relation to his attitude and psycho-intellective power, taking into account the status quo of the victim at that moment
- to be done repeatedly

The immediate result consists in the victim’s death. The causality link between the act or omission constituting the material element and the immediate consequence must be proved.

B. The subjective side of the criminal offence. The guilt form under which such criminal offence is committed is the direct or indirect intention. We can speak about the existence of a mobile of the criminal offence in this case, consisting in the killing of a person under the impulse of mercy.

6. Forms, modalities and penalties. Preparatory acts and attempt, although possible, are left outside incrimination by the legislator. The act is being consumed at the time of the immediate result, namely at the moment of victim’s death. Modalities. The offense is regulated in a single variant. Penalties. The punishment provided by law is imprisonment from one to 5 years.
7. Explanations of practical interest. Euthanasia is a murder committed under an impulse of mercy in order to end physical torments of a person suffering from an incurable disease, and whose death is, therefore, inevitable. It is often distinguished between passive euthanasia or ototanasia and active euthanasia. The first represents the withholding life-prolonging measures and resources when death is otherwise inevitable, while the second is the direct causing-death act of the incurable patient, with his consent, in order to avoid further suffering.

The difference between euthanasia and assisted suicide is the way to accomplish this act. While, in the case of euthanasia, the doctor himself administers lethal medication to a person, in the assisted suicide, the patient is the one who administers himself the medication recommended by the doctor.

The feature that differentiate between the assisted suicide and other medical decisions of life termination is that, in the case of assisted suicide, the medication recommended by the doctor is able to precipitate death and reduce suffering as much as (e.g. not applying a therapy that would extend perhaps the life of a patient in terminal condition).

In relation to this issue, starting from the concept of law, some authors have concluded that we can not speak of a right to life in this situation, but it is rather a general obligation of all other persons not to affect an individual’s life.

In the specialized literature, the situation of euthanasia compatibility with Article 2 of the European Convention on Human Rights is controversial. Frequently, the right to decide the moment of death was linked to the right to dignity, a concept which does not appear in the text of the European Convention, but it has been enshrined in the latest legal instruments, as for example in the first article of the Charter of Fundamental Right of the European Union. The respect for human dignity should include thus the right to live with dignity and to terminate life by your own or ask the assistance of a third party in order to do it. In the view of those who see euthanasia as a way of not bearing the sufferings of an incurable disease or the technical means of life prolonging, the question can be put even in the realm of Article 3 of the Convention, which prohibits inhuman or degrading punishments or treatment.

We believe, however, that the use of the term „human dignity” is a trap, whereas precisely human dignity gives the sacred and inviolable character of the right to life. In this context, orchestrating the death of a person is an insult to the supreme attribute of man.

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6 Ibidem, p. 266.
The question is when exactly should be permitted euthanasia. Who can determine when the sufferings of a patient reached the limits that can justify such an intervention. Should be limited to a number of afflictions or can be left to the discretion of the doctor. Also, a delicate situation is the one of the existence of clearly and freely expressed consent, particularly regarding the euthanasia of children. The theorist and the legislator must give attention to the grounding of the right to resort to euthanasia. The right to dispose of own life should reflect the true values of society and should clearly define the role that dignity plays in the content of this right.

8. Conclusions. Finally, the general conclusion of the debate on euthanasia criminalization or not, is that the solution remains at the sole discretion of the national legislator. The practice of the international courts and the international specialized literature on human rights do not suggest any options clearly outlined in one way or another. Therefore, each state must decide whether the doctor who has resorted to such practices will be criminally responsible. If the answer is negative, the same legislator must fix the limits of such an act in order to prevent abuses.

The fact of criminalizing this extreme solution in the new Romanian Criminal Code is therefore in agreement with the solutions detached at international level. By regulating such an act in Article 190, the Romanian criminal legislator specifically expressed his attitude on the criminalization of euthanasia as an attenuated form of homicide.

References: