

MEDICALLY ASSISTED SUICIDE AT THE LIMIT BETWEEN CRIME AND LAW

Lamya-Diana HĂRĂȚĂU*

Alin-Sorin NICOLESCU**

Mircea-Constantin SINESCU***

Abstract

One of the most debated topics in the world is the legalization or non-legalization of euthanasia and medically assisted suicide, a fact that has given rise to many questions starting from extreme situations, whom both legislators and health professionals, as well as patients tried to give answers of the most diverse seemingly, but which have in view only a few attributes that are reduced to ethics, morality, religion. This analysis is therefore interdisciplinary, for the elucidation of which it is necessary that professionals of several professions express their point of view. Last but not least, we appreciate that the one who must be the center of the analysis is the patient, the one who is in a desperate and unsolved medical situation and needs this last release.¹

Keywords: *medically assisted suicide, right to die, law, criminal liability.*

1. Brief considerations on the etymology of the word „euthanasia”

According to the explanatory dictionary of the Romanian language¹, the word „euthanasia” has its origins in the Greek „I” which means *good*, and „*thanatos*” which means *death*. Thus, we can define euthanasia as a *painless death*, as well as *the method of provoking (by the doctor) a painless early death to an incurable patient, in order to end a long and hard suffering*.

Starting from these origins, the Romanian legislator criminalized from a criminal point of view, euthanasia as, according to the provisions of art. 190 of the Criminal Code, *the murder committed at the explicit, serious, conscious and repeated request of the victim who was suffering from an incurable disease or a serious illness certified medically, causing permanent and unbearable suffering*. However, we will frame this method under the aspect of a common medically assisted suicide and in the provisions of art. 191 Criminal Code as the act (...) of facilitating the suicide of a person by the help that a doctor would give to a patient.

It is important to note that there are two kinds of euthanasia. Namely, active by committing acts with a

view to causing death such as decommissioning of a device, administration of a drug in a lethal dose, administration of lethal dose of a medicine, as a result of a repeated request and a long reflection of a patient. Passive euthanasia involves not giving or stopping the treatment knowing that this will result in the death of the patient in question, especially if there is a possibility of keeping a patient alive through aggressive and unnecessary treatment - a practice otherwise condemned by medical ethics, the more the person in question refused this treatment.²

2. Incidental medical legislation in Romania

From the point of view of medical legislation, there are two instruments to be listed, namely the Romanian Code of Medical Deontology³ and Law no. 46/2003 on patient rights.⁴

With reference to the Romanian Code of Medical Deontology, we present a first observation, namely that it does not include precise references regarding the doctor's obligation to prolong the patient's life in any circumstance on one hand, and on the other hand we note the provisions of art. 22 letter a) and of art. 11 of the above-mentioned instrument, which, together with those in the law on patient rights, we reproduce below.

* Lecturer, PhD, Faculty of Law, “Nicolae Titulescu” University of Bucharest (e-mail: lamya@haratau.ro).

** Assistant Professor, PhD, Faculty of Law, “Nicolae Titulescu” University of Bucharest (e-mail: alin.nicolescu@univnt.ro).

*** Lecturer, PhD, Faculty of Law, “Nicolae Titulescu” University of Bucharest (e-mail: mircea.sinescu@sinescu-nazat.ro).

¹ In the same note: J. Keown, *Euthanasia examined – ethical, clinical and legal perspectives*, Cambridge University Press, reprinted version, 1999.

² Romanian Language Dictionary, 2nd ed., Univers Enciclopedic Publishing House, Bucharest, 1996, p. 352.

³ L.M. Stănilă, *Drept penal partea specială, Infrafracțiuni contra persoanei, Infrafracțiuni contra patrimoniului*, Universul Juridic Publishing House, Bucharest, 2018, p. 22.

⁴ Published in the Official Gazette of Romania no. 298/7 May 2012.

⁵ Published in the Official Gazette of Romania no. 51/29 January 2003.

Art. 11. Granting and withdrawing consent (Romanian Code of Medical Deontology)

(1) No health intervention may be performed until the data subject has given his or her free and knowingly consent.

(2) Under the same conditions, the consent may be withdrawn at any time by the data subject.

(3) The provisions regarding the withdrawal of consent are also valid with regard to the consent expressed, in accordance with the law, by a person or institution other than that person.

Art. 22. Non-deontological facts and acts (Romanian Code of Medical Deontology)

The following acts, in particular, are contrary to the fundamental principles of the medical profession:

a) practicing euthanasia and eugenics⁵; (...)

Art. 13. The patient has the right to refuse or to stop a medical intervention assuming, in writing, the responsibility for his decision; the consequences of refusing or stopping medical treatment must be explained to the patient. (*Law no. 46/2003 on patient rights*)

Art. 14. When the patient cannot express his will, but an emergency medical intervention is necessary, the medical staff has the right to deduce the patient's consent from a previous expression of his will. (*Law no. 46/2003 on patient rights*)

Art. 15. In case the patient needs an emergency medical intervention, the consent of the legal representative is no longer required. (*Law no. 46/2003 on patient rights*)

Art. 16. If the consent of the legal representative is required, the patient must be involved in the decision-making process as far as his understanding ability allows. (*Law no. 46/2003 on patient rights*)

From the analysis of the legal provisions given above, especially those that regulate patient rights, we find a situation that may arise in practice, namely when the patient is unable at a particular time to express his will in his process of treating one/some condition he expressed in the past a number of different views on his willingness to intervene urgently to save his life.

The question arises to which option should the doctor choose in this case, or more precisely what and how exactly this agreement of the patient should be deduced.

We appreciate that the wording of this text of the law should be revised because at present it is susceptible to different interpretations to the detriment of both the doctor and the patient.

We also appreciate the fact that the provisions of art. 15 of the same law can create confusion in practice as long as, however, for an emergency intervention the doctor can act as he considers without the consent of the legal representative.

So, reading these provisions, we notice how the two actually differ (art. 14 from art. 15) because they rather regulate similar situations separately. Of course, a concrete review and analysis based on the cases of doctors who have faced such situations would only be welcomed, and thus would accurately address possible cases of malpractice occurring from the application of these provisions in the treatment / healing / rescue of a patient process.

Although, it is still important to make the same statement, as other researchers that, euthanasia is the deliberate act of ending a patient's life with the intention of ending his suffering. However, medically assisted suicide is a *distinct euthanasia procedure* and consists of **self**-inflicting the death (self-killing) of a patient with the direct help of a doctor. The legalization of euthanasia, but also of medically assisted suicide, provokes heated ethical, medical, legal and religious debates, practically questioning the extent to which the protection of the life right must be exercised.⁶

3. Brief considerations about „suicide”

We note that this term was introduced into the Oxford Dictionary by the doctor and philosopher Walter Charleton (1619-1707). However, it was actually used in France in 1737 by the abbot Desfontaines (1685-1745), originally a historian and journalist.⁷

According to the Explanatory Dictionary of the Romanian language, this word comes from the French language, from the verb *suicider* which translates to *taking one's own life, to kill oneself*. As pointed out by experts, two words actually merge into one, namely *self*, that is, actually the self, the physical, spiritual entity in particular, and *to kill*. Likewise, *the suicider* is the one who took or only tried to take his own life.

Studying the Dictionary of Psychology we find the definition of suicide as being a specific *form of deviant self-destructive behavior, which does not aim so much death, self-destruction*⁸, but especially the *escape from life, the way it presents itself in the given*

⁵ According to DEX, *eugenia* is the discipline that study the practical application of the biology's heredity in the genetic improvement of the individual; the set for methods that underlie this discipline.

⁶ L. Stănilă, *Therapeutic obsession. Pros and cons of euthanasia – new challenges of Romanian legislation*, published in Project ID 133255 (2014), co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.

⁷ T. Butoi, V. Iftenie, A. Boroi, M. Costescu, A. Butoi, C. Iftenie, *Sinuciderea, subtila enigmă a unui sumbru paradox*, ProUniversitaria Publishing House, Bucharest, 2019, p. 9.

⁸ P.P. Neveanu, *Psychology Dictionary*, Albatros Publishing House, Bucharest, 1978, p. 661.

conditions. The Health Dictionary⁹ also offers a definition by which suicide is the disorder of the conservation instinct, by which the person destroys himself, choosing a physico-chemical method (hanging, drowning, electric shock).

Another definition is given by the World Health Organization, as it is states in the Dictionary of Psychiatry¹⁰, *so suicide is the act by which an individual seeks to destroy himself, with more or less genuine intention to lose his life, being more or less aware of his reasons.*

From a criminal point of view, as mentioned above, the incidental provisions regarding suicide are those stipulated by the provisions of art. 191 of the Criminal Code, as well as those of art. 218 para. (4) Criminal Code and art. 219 para. (3) Criminal Code, which we will report below:

Art. 191 Determining or facilitating suicide

(1) The act of determining or facilitating the suicide of a person, if the suicide took place, shall be punished by imprisonment from 3 to 7 years.

(2) When the deed provided in para. (1) was committed against a minor aged between 13 and 18 years or against a person with diminished discernment, the punishment is imprisonment from 5 to 10 years.

(3) The determination or facilitation of suicide, committed against a minor who has not reached the age of 13 or against a person who could not realize the consequences of his actions or inactions or could not control them, if the suicide took place, is punishable by imprisonment from 10 to 20 years and the prohibition of the exercise of certain rights.

(4) If the acts of determination or facilitation provided in para. (1)-(3) were followed by a suicide attempt, the special limits of the punishment are reduced by half.

Art. 218 para. (4): If the deed resulted in the death of the victim, the punishment is imprisonment from 7 to 18 years and the prohibition of the exercise of certain rights.

Art. 219 para. (3): If the deed resulted in the death of the victim, the punishment is imprisonment from 7 to 15 years and the prohibition of the exercise of certain rights.

Of course, these regulations cannot miss the appreciation that the criminal law specialist Vintilă Dongoroz made in his paperworks, according to which, *suicide is the act by which a lucid man, being able to live, causes his own death, out of any ethical obligation.*

Analyzing the above provisions, it appears that medically assisted suicide is that type of suicide in which a medical staff intervenes for medical reasons, of course, the quality of life becoming non-existent.

For our scientific approach, which only involves analyzing the national and international legal framework in which this type of suicide can take place without the intervention of criminal liability, it is important to emphasize, as other authors did, that, by incriminating the murder at the request of the victim, “the legislator responds to an effervescent controversy regarding the availability of the life right and the legal significance of active euthanasia as a particular form of murder on demand”¹¹.

We can observe that the adopted text of the law had as a source of inspiration the provisions of art. 468 Criminal Code 1936, but also the dispositions of other states such as Germany - para. 216 German Criminal Code., Austria - para. 77 Austrian Criminal Code, Spain - art. 143 para. (4) Spanish Criminal Code, Portugal - art. 134 Portuguese Criminal Code, Switzerland - art. 114 Swiss Criminal Code, Norway - para. 235 Norwegian Criminal Code¹². We also appreciate the fact that by analyzing the typicality of the deed, the text moves away from a simple murder at the request of the victim and is, as already mentioned, **an attenuated form of active euthanasia.**

4. In pursuit of our scientific purpose, a few references to the jurisprudence of the ECtHR

Thus, the ECtHR established in its decisions two categories of cases, on one hand those in which the complainants or their relatives claimed the right to die under the Convention, and on the other hand the cases in which the complainants challenged the administration or permanent cessation of a treatment.

We also list by way of example some cases in which the plaintiffs invoked incurable diseases claiming the right to a dignified death: the case of *Sanles Sanles v. Spain*, the plaintiffs invoking art. 6, 8, 9, 14 of the Convention; *Pretty v. the United Kingdom*, the applicants relying on art. 2, 3, 8, 9 and 14 of the Convention; *Haas v. Switzerland*, the applicants relying on art. 8 of the Convention. In all these cases, the European Court did not find any right to be infringed¹³.

With regard to the *right to life*, the ECtHR has emphasized that *the recognition of this right cannot*

⁹ *Health Dictionary*, Albatros Publishing House, Bucharest, 1978.

¹⁰ O. Gorgos, *Psychiatry Dictionary*, vol. II, Medical Publishing House, Bucharest, 1988.

¹¹ S. Bogdan, D.A. Șerban, G. Zlati, *Noul cod penal. Partea specială. Analize, explicații, comentarii – perspectiva clujeană*, Universul Juridic Publishing House, Bucharest, 2014, p. 33.

¹² Please see V. Dobrinou, N. Neagu, *Drept penal. Partea specială, Curs Universitar*, Universul Juridic Publishing House, Bucharest, 2014, p. 26.

¹³ https://www.echr.coe.int/Documents/FS_Euthanasia_ROM.pdf.

confer a diametrically opposite right, namely the right to die; that it cannot create a right to self-determination according to which an individual could choose death instead of life.

Moreover, the Court has ruled that *states nevertheless have a margin of appreciation in regulating euthanasia or medically assisted suicide.* This observation comes from the Court's conclusion that "in the medical field, refusal to accept a particular treatment could inevitably lead to a fatal outcome, but the imposition of medical treatment without the patient's consent, if he is an adult and in complete mental faculties, would be equivalent to a violation of the physical integrity of the person concerned, which may call into question the protected rights of the patient, art. 8 para. (1) of the ECHR. As it has been accepted in domestic case law, a person may claim the right to exercise his or her choice to die, refusing to agree to a treatment which could have the effect of prolonging his or her life. The dignity and liberty of a person represent the essence of the Convention itself. Without denying in any way the principle of the sacred character of life, protected by the ECHR, the Court considers that the notion of quality of life acquires meaning from the perspective of art. 8. In a time when we are witnessing an increase in the complexity of medicine and life expectancy, many people fear that they will not be forced to stay alive until a very old age or in a state of advanced physical or mental degradation, in contrast to the firm perception they have of themselves and their personal identity¹⁴".

What is also important to mention here is the Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe *regarding the protection of the human rights and human dignity of the incurable and dying people*¹⁵, sounding the alarm for Member States to consider creating a legal framework to protect these categories of patients from dangers or fears such as the artificial prolongation of the disease course.

Furthermore, it is recommended that the dignity of terminally ill or dying patients be respected by advocating a ban on the intentional suppression of their lives, outlining the fact that a person's desire to die is not a legal ground for the death caused by a third person.

Of course, our scientific approach has to present some references to euthanasia and medically assisted suicide from the perspective of other states in the world.

Thus, we observed, for example, that voluntary euthanasia has been legalized in countries such as the Netherlands (2002)¹⁶, Belgium (2002), Luxembourg (2008), Canada (2016).

In Colombia, for example, in May 1997, the Constitutional Court allowed voluntary euthanasia of ill patients who demanded to end their lives.

Medically assisted suicide is legal in countries such as Canada, the Netherlands, Luxembourg, Switzerland, the Australian state of Victoria and parts of United States. In the United States, there are assisted laws or court decisions that are limited to terminally ill adults¹⁷, such as Oregon, Montana, Washington, Vermont, Maine, New Jersey, Hawaii, California, Colorado, Washington DC¹⁸. The legislation of these states requires that the patient's attending doctor certify the existence of the patient's discernment.

Spain is the latest country to legalize euthanasia and medically assisted suicide, the patient being able to administer the lethal dose needed to interrupt his life. Spanish law provides two alternative situations that may justify this choice, namely *the serious incurable disease or the chronic pain that puts him in a situation of incapacity* and that wants to stop *an intolerable suffering*. Also, the Spanish legislature established that the person requesting this procedure must be *able and aware* when making the request, without *external pressure*, and that it is necessary that the original request be renewed after fifteen days. Another interesting and noteworthy provision is the doctor's possibility of refusing to comply with the patient's request, either for reasons related to non-compliance with the law conditions, either for reasons of ethics, morals or conscience. He cannot be sanctioned for his choice not to end the life of the dying requester. The patient's claim will follow a double-checked procedure if we can call it like that, because after the "doctor's approval", the request will be submitted for approval by another doctor, as well as by an evaluation committee. The Belgian legislature adopted a similar procedure.

5. Instead of conclusions

What we deduce from the above statements is that the issue of euthanasia or medically assisted suicide is

¹⁴ Also M. Udriou, *Sinteze de drept penal. Partea specială*, C.H. Beck Publishing House, Bucharest, 2020, p.58.

¹⁵ Case Lambert v. France, 5 June 2015, para. 147.

¹⁶ In the Netherlands, it can be claimed by anyone who has reached the age of 12 and who has „unbearable suffering with no prospect of improvement”. However, parental consent is required for children under the age of 16.

¹⁷ Detailed in A.G. Svenson, *Physician-Assisted Dying and the Law in the United States: a perspective on three prospective features*, in the volume edited by M.J. Cholbi, *Euthanasia and Assisted Suicide, Global views on choosing to end a life*, Praeger Publishing House, an imprint of ABC-CLIO, 2017, p. 19.

¹⁸ D. Humphry, *Final exist. The practicalities of self-deliverance and assisted suicide for the dying*, 3rd ed., Dell Publishing, New York, 2002, p. XVII.

still considered beyond the rules of ethics, given the fact that a multitude of states have understood to regulate these incidents that can occur in the life of any person when facing an incurable disease.

The aim of this paper is to bring back to the attention of the scientific community an issue that is becoming more pressing, especially since Romania is facing legislative lacuna, suitable for various interpretations regarding the qualification of patients' rights and to what extent and medical decisions must be made when a person's health is endangered.

Moreover, we cannot ignore a report of the Ministry of Health from 2020¹⁹ which shows that 4.3 million Romanian citizens care for a person, a patient suffering from an incurable disease in advanced or final stages. So, we can easily deduce what the approximate number of these patients would be.

Of course, a standardization of domestic law based not only on legislative instruments, but also on effective judicial practice with reference here to cases

of malpractice incident to the legal provisions referred to above, but also to the circumstances which gave rise to the criminalization of killing at the request of the victim, in conjunction with the study of the population's perspective on the legislation of medically assisted suicide would be the most valuable ways in which the legislator could respond to this issue as painful, as necessary.

Finally, of course, we cannot ignore the religious part, with a view to which a researcher emphasized its essence in a few words, as follows: *The question facing Christian ethics is one facing other ethical approaches as well, namely, "What exceptions to our moral rules and our traditional moral understanding - our common agreements on such issues - are possible when modern technologies have made dying difficult and have interfered with natural death?" This question will continue to be significant for Christian ethics as well as for religious ethics grounded in other traditions and secular-philosophical ethics.*²⁰

References

- J. Keown, *Euthanasia examined – ethical, clinical and legal perspectives*, Cambridge University Press, reprinted version, 1999;
- *Romanian Language Dictionary*, 2nd ed., Univers Enciclopedic Publishing House, Bucharest, 1996;
- L.M. Stănilă, *Drept penal partea specială, Infrațiuni contra persoanei, Infrațiuni contra patrimoniului*, Universul Juridic Publishing House, Bucharest, 2018;
- L.M. Stănilă, *Therapeutic obsession. Pros and cons of euthanasia – new challenges of Romanian legislation*, published in Project ID 133255(2014), co-financed by the European Social Fund withing the Sectorial Operational Program Human Resources Development 2007-2013;
- T. Butoi, V. Iftenie, A. Boroi, M. Costescu, A. Butoi, C. Iftenie, *Sinuciderea, subtila enigmă a unui sumbru paradox*, ProUniversitaria Publishing House, Bucharest, 2019;
- P.P. Neveanu, *Psychology Dictionary*, Albatros Publishing House, Bucharest, 1978;
- *Health Dictionary*, Albatros Publishing House, Bucharest, 1978;
- O. Gorgos, *Psychiatry Dictionary*, vol. II, Medical Publishing House, Bucharest, 1988;
- S. Bogdan, D.A. Șerban, G. Zlati, *Noul Cod penal partea specială, analize, explicații, comentarii – perspectiva clujeană*, Universul Juridic Publishing House, Bucharest, 2014;
- V. Dobrinioiu, N. Neagu, *Drept penal partea specială, curs universitar*, Universul Juridic Publishing House, Bucharest, 2014;
- M. Udroi, *Sinteze de drept penal, partea specială*, C.H. Beck Publishing House, Bucharest, 2020;
- A.G. Svenson, *Physician-Assisted Dying and the Law in the United states: a perspective on three prospective features*, in the volume edited by M.J. Cholbi, *Euthanasia and Assisted Suicide, Global views on choosing to end a life*, Praeger Publishing House, an imprint of ABC-Clio, 2017;
- D. Humphry, *Final exist. The practicalities of self-deliverance and assisted suicide for the dying*, 3rd ed., Dell Publishing, New York, 2002;
- Lloyd Steffen, *Christian Perspectives on Assisted Dying: an issue for religious ethics*, in the volume edited by de M.J. Cholbi, *Euthanasia and Assisted Suicide, Global views on choosing to end a life*, Praeger Publishing House, an imprint of ABC-Clio, 2017;
- https://www.echr.coe.int/Documents/FS_Euthanasia_ROM.pdf;
- <https://www.ms.ro/wp-content/uploads/2017/12/Referat-paliatie.pdf>.

¹⁹ <https://www.ms.ro/wp-content/uploads/2017/12/Referat-paliatie.pdf>.

²⁰ L. Steffen, *Christian Perspectives on Assisted Dying: an issue for religious ethics*, in the volume edited by M.J. Cholbi, *Euthanasia and Assisted Suicide, Global views on choosing to end a life*, Praeger Publishing House, an imprint of ABC-Clio, 2017, p. 121.