Criminal Aspects of Euthanasia in the Republic of Serbia

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Abstract

The question of legal and medical regulation of the right to euthanasia, although the action itself has been performed since the existence of humanity, was raised in the 20th century. Then the regulation of this issue begins, bearing in mind that it was actually implemented, and that it could lead to abuses and extermination of certain nations. With the legal regulation of this issue, discussions begin, primarily legal and medical, but also philosophical, moral, sociological and religious. And while some states regulats, whether they expressly prohibit or allow it, certain states do not regulate the legal aspect of euthanasia. Certainly, any regulation is better than the absence of any legal norms governing this issue, which leave room for arbitrariness and abuse. In the paper, I emphasize the connection between the right to life and the right to die, individual and general interest. In addition to the above, I point out the arguments for and against euthanasia, clarify the concept of euthanasia and the forms of euthanasia, emphasize the criminal law aspect of euthanasia, as well as how this issue is legally regulated in the law of the Republic of Serbia.

Key words: Euthanasia, criminal law, criminal offense, comparative law, Republic of Serbia

Criminal Aspects of Euthanasia in the Republic of Serbia

The concept of euthanasia

Euthanasia can be considered as taking the life of a human being at his own request. This mainly refers to those who, for example, incurable patients, they want to end an unbearable life, but unlike suicide, they ask someone else (usually a doctor) to help them in this. Therefore, it is not the (theoretical) right of a person to kill himself, but the responsibility of another person, who contributed to the death at the request of the deceased (Dimitrijević et al., 2007, p. 153). In the legal literature, it is defined as assisted suicide or as the killing of a person by mild means, for reasons of humanity and, as a rule, with the consent of that person. Of course, one should always keep in mind the division of euthanasia into active (a positive act, any act and intervention that ends the life of a dying patient) and passive (failure to perform, not to apply, to do nothing, to miss all methods of treatment, so as a consequence of such an act, death occurs, but also eg turning off life support) euthanasia.

There are also various syntagms used to denote euthanasia. A synonym, syntagma, which is also used for euthanasia is mercy killing.

Criminal and legal aspects of euthanasia in theory

The legal aspect comes down to the problem of responsibility for decisions that are in the borderline area of the patient's life and death. The consent of the injured party was studied especially when it was related to the crime of murder. Thus, euthanasia or killing by consent has become simultaneously a psychological, legal, moral, ethical, religious and medical problem. Of course, it is primarily a legal and medical phenomenon. In older legal literature, this problem was discussed in connection with murder in a duel, and it was emphasized that a murder committed in a duel is not a criminal offense, provided that the duel was carried out according to the rules with the consent of both participants (Čejović, 1996, p.236). Euthanasia in the legal sense is a criminal act of murder and is subject to criminal responsibility and

punishment. Due to the fact that, unlike murder, the main motive here is compassion, it is evident that in judicial practice, murder is derived from euthanasia, punished more lightly or the person is exempted from punishment. In principle, the issue of euthanasia can be solved in three ways: (I) to foresee it as a criminal offense of murder, (II) to foresee it as a criminal offense of privileged murder, (III) to legalize it under precisely defined conditions (Šantrić, 2004, p. 182).

The first and most common possibility of legal treatment of euthanasia is its identification with ordinary murder. Regardless of the effort to legalize euthanasia, the fact is that nowadays the attitude of most countries towards it is negative, so in most cases it is treated as ordinary murder. However, regardless of this treatment, when choosing a punishment and determining its height, motives that are humane and altruistic are not out of the court's eyes, so a lighter punishment is almost always given, because the motives are different than in ordinary murder. Iin ordinary murder, e.g. we have self-interest, and here we have compassion as a motive (Ilić, 2018, p. 17).

Another variant of the legal status of euthanasia is that it must be considered a criminal offense of a special type, i.e. that it is a privileged murder. Supporters of the opinion that euthanasia should be considered a separate criminal offense, distinguish between two cases, when euthanasia was performed at the request of a person who is terminally ill, and another case, when euthanasia is the result of a request from the patient's family, but against the patient's will. According to supporters of this distinction in euthanasia, the perpetrator would have to be punished only in another case, namely for the crime of murder. In the first case, one could not talk about the existence of criminal responsibility, or one could say that euthanasia is a special crime, with a lighter punishment. This opinion is justified by the fact that every individual is authorized to dispose of his life and that it is unpunishable to deprive oneself of life (suicide). If someone demands another to take his life, then that other cannot be punished for an act for which even a suicide would not be punished. Punishment could exist only in the case when such an injury to one's own body would offend some general, higher interests eg. the rights of another (Čejović, 1996,

p.238). It is considered that, in addition to our own interest in preserving life, there is a general interest of society in the life of each of us. Society can protect certain goods even against the will of the person to whom they belong, so his consent to the violation of those goods is not relevant from a legal point of view to remove the character of a criminal offense from the violation of goods. This would mean that no matter how much the sick person's approval was given to another person, that approval cannot remove the perpetrator's responsibility, because it is not just their private matter. However, the fact is that there is a difference between murder and euthanasia, and that these acts cannot be equated. That is why it seems acceptable that euthanasia be provided as a separate criminal act, i.e. privileged murder, with special (lesser) punishments. It is considered, therefore, that this is the first step towards the legalization of euthanasia, which our legislation could also accept, especially taking into account the legal systems of Italy, Austria, and Norway, which treat euthanasia as a privileged murder (Petrović, 2010, p. 41).

The third possibility, which is spreading more and more, is that euthanasia is not considered a criminal act of murder, but that it becomes a legal institution. This trend of legalization exists mostly only in the West (Belgium, Netherlands). In Eastern European countries, developing countries, the question of legalization is not raised much, which is a result of the existence of other problems, and the fact that in these countries public interest is more important than individual interest. In those countries, there is also a fear that life can escape state control, which would only be a prelude to seeking more complementary rights. In the West, the right to die is becoming part of the spectrum of human rights. It is considered that part of every human freedom is the right to die by choice, when life has lost its meaning, and the patient, whose life is at stake, decides. Otherwise, the state interferes in an unacceptable way in the life of an individual, who has lost all value. Not allowing someone to die if he already wants it, and that life is not worth living, is a kind of violence that will disappear with the democratization of the world (Ilić, 2001, p. 16). The following attitudes and solutions can serve as a basis for legal regulation of euthanasia: (1) give the right to the

patient to decide whether his life and medical (unpromising) treatment will be terminated; (2) absence of criminal prosecution and accountability of medical personnel; (3) the duty of the staff to implement the serious decision of the patient. As the way in which euthanasia would be performed, its passive vision, with the maximum fight against pain, as well as its active vision, also with the aim of fighting against pain, are stated. Those who fight for the legalization of euthanasia do not recognize the legality of higher, state interests that deny individuality. A system that, through measures of repression and prohibition, ensures the protection of free and sane individuals from itself, becomes an end in itself and is not in the function of providing protection to a person who is in trouble (Pravni portal, 2018).

Finally, it must be pointed out that the media also have a special importance and role when it comes to this form of social phenomenon. The media has much more influence on the issue of security culture in general (Bjelajac, Marković, 2024, p. 49)

The issue of euthanasia according to the Criminal Code of the Republic of Serbia

Article 119 of the Criminal Code of Serbia sanctions the criminal offense of inducing suicide and assisting in suicide, for which, depending on the form, a sentence of 3 months to 10 years can be imposed. Also, the Criminal Code of Serbia (National Assembly of the Republic of Serbia, 2019, art. 117) does not decriminalize euthanasia, but foresees it as a separate and lighter crime compared to murder. The law stipulates that whoever takes the life of an adult out of compassion due to a serious health condition in which that person is, and at his serious and explicit request, will be punished with imprisonment from 6 months to 5 years. Anyone who helps another to commit suicide under the same conditions will also be prosecuted, and the penalty is up to 3 years (Article 119, paragraph 2), which means that the so-called passive euthanasia. Mercy killing in Serbia is still at the level of proposals. Although the right to a dignified death is provided for in the draft of the Civil Law from 2015, it has not been adopted to date, and every form of euthanasia in Serbia is considered a criminal offense, bearing in mind

that even the ethics committee of the medical society does not approve of opening a discussion on the legalization of euthanasia. Article 117 of the Criminal Code of the Republic of Serbia provides for a criminal offense called - Deprivation of life out of compassion, as follows: "Whoever takes the life of an adult out of compassion due to a serious health condition in which that person is, and at his serious and express request, will be punished imprisonment from six months to five years." As we can see, Serbian criminal law does not recognize the term "euthanasia", similar to other legal systems in the world, but uses the term "deprivation of life out of compassion." Deprivation of life out of compassion (as a form of privileged murder) is incriminated among the group of crimes against life and body (Art. 113-127). It contains all the constitutive elements of the criminal offense of murder (Art. 113). The action of the criminal offense is the same as in the case of the criminal offense of murder. This means that the action consists in taking the life of another person, most often by doing it, and exceptionally by not doing it. Bearing in mind the objective interpretation, the act of execution is limited, however, by the will of the passive subject. If someone demands to be deprived of life in one way (e.g. by giving an excessive dose of medication), and the perpetrator does it in a completely different way (e.g. by shooting a firearm), it should be considered that there is an ordinary murder and not this crime (Stojanović, 2012, p. 411). In theory, the execution of this criminal act by inaction is disputed, because we believe that the boundaries between certain forms of active and passive euthanasia are not clear. The essence of the criminal offense consists in depriving the life of an adult out of compassion at his serious and explicit request, due to the serious health condition in which that person is (Stojanović, 2012, p. 412). The reason for the exclusion of illegality in connection with the criminal act of deprivation of life out of compassion should be the consent of the injured party. The consent of the injured party in criminal law refers to the serious, free, conscious consent of the injured party to the injury inflicted on him (Čejović, 1974, p. 233). It follows from this definition of consent of the injured party that it must fulfill the following conditions in order to be valid as an institute of criminal law

dogmatics: 1. that the consent was undoubtedly given, ie. that it objectively exists; 2. that it was given before the commission of the criminal offense or during the commission of the criminal offense, and not afterwards; 3. that the person giving consent is capable of giving consent; 4. that the consent is serious and given freely. When it comes to life, the consent (Čejović, 1974, p. 233) of a passive subject (patient) under Serbian criminal law cannot rule out illegality. There is a strong reason for this. First of all, it is the protection of human life, as a specific object of attack. Society has an interest in protecting the life of its citizens as the highest legal good, which is why the taking of life is illegal, even if it was carried out at an express request. The legislator, therefore, enters the subjective sphere of the individual in order to better protect him, in order to somehow promote general and social interests. Thus, some authors talk about the fact that a person does not have the right to freely dispose of individual goods, the maintenance of which rests on the interest of society, and therefore the existence of the criminal offense under Art. 117 (Kurtović & Petrić, 2000, p. 658).

Deprivation of life must occur as a result of a serious and express request of a passive subject. A serious request will exist if it is a real will and a free will. If the passive subject is unable to make decisions on his own due to illness, there is no free will, as is the case when the capacity is reduced. It is considered that consent does not exist even in cases where the request was given under duress, threat, in error, or in general if it was coerced in any other way. In that case, it should be considered that there is a criminal offense of murder and not taking life out of compassion. The request is considered explicit (Novoselac, 2005, p. 216) if it is formulated clearly and concretely. A written request is not required (although it is desirable), but a conclusive action is sufficient, but which objectively and clearly exists. The request must also be clearly addressed to a specific person, the perpetrator of the crime. In theory, the prevailing opinion is that you cannot make a "blank request" that would be "valid for the future" (eg a statement by a person that in the event that he falls ill sometime in the future from an incurable disease, or is no longer conscious, etc.). The request must

therefore be clearly formulated towards the perpetrator of the crime immediately before the commission of the crime and must not be revoked before the commission of the crime (Rešetar, 2017, p. 113). A criminal offense can only be committed against an adult. It is considered that majority is required not only at the time of committing a criminal offense, but also when giving consent (Stojanović, 2012, p. 411). In addition to the age requirement, the law mentions another important condition. It is a serious health condition of a passive subject. We believe that the phrase is very broad and vague, and looking at comparative legal solutions, such a health condition could be: the last stage of an incurable disease, suffering unbearable pain that causes obvious suffering, a certain fatal outcome in the near future. The passive subject must be deliberately deprived of life (Korošec, 2004, p. 191). The perpetrator of the crime is aware of all the features of the crime and wants to commit it. Deprivation of life with intention is indisputable, because the perpetrator made the decision on the basis of an explicit and serious search for a passive subject. This additional subjective element of the being of the criminal offense is motive. It is considered that the motive for taking life out of compassion is an altruistic act, something that is actually positively socially and morally valued (Stojanović, 2012, p. 412).

Article 119 of the Criminal Code of the Republic of Serbia provides for a criminal offense called – Inducing suicide and assisting in suicide. Suicide is not a crime in today's legal systems. It is the same in the Serbian legal system. The decriminalization of the crime of suicide began in the 18th century, and some countries only relatively recently decriminalized it (England since 1961 (Stojanović & Perić, 2003, p. 105), Ireland only in 1993 (Grozdanić, 2009, p. 60). However, bearing in mind the social danger of assisting and inducing suicide, it is completely justified to incriminate them as a criminal offense, which the Serbian legislator does in Art. 119. CC: "Whoever induces another to commit suicide or assists him in committing suicide, whether this is committed or attempted, shall be punished by imprisonment from six months to five years." Whoever helps another commit suicide under the conditions of Art. 117 of this Code, if this is done or attempted, it will be punished

by imprisonment from three months to three years. Who deed from para. 1. of this article against a minor or against a person who is in a state of significantly reduced sanity, will be punished by imprisonment from two to ten years. If the work from para. 1. of this article committed against a child or an insane person, the perpetrator will be punished according to Art. 114 of this Code. Whoever acts cruelly or inhumanely with a person who is in a relationship of subordination or dependence towards him, and as a result of such behavior commits or attempts suicide which can be attributed to the negligence of the perpetrator, shall be punished with imprisonment from six months to five years." From Art. 119 of the Criminal Code of Serbia, we see that a criminal offense consists of one basic form (paragraph 1), one privileged form (paragraph 2, which is related to art. 117 – deprivation of life out of compassion), two qualified forms (paragraph 3. and para. 4) and one special form (para. 5) Criminal act for para. 1–4. is inducing suicide and assisting in suicide. The act of a criminal offense can be committed in different ways. Inducing someone to commit suicide means influencing another person to commit suicide in various ways, i.e. with the intention of influencing the very will of another person to make a decision to take his life. Assisting in suicide means providing help to a person who has already made the decision to commit suicide (Grozdanić, 2009, p. 60). Paragraph 5. It has a specific execution action, because it is required that the perpetrator acts inhumanely towards the person who committed or attempted suicide, and is in a subordinate or dependent position towards the perpetrator. For each form from Art. 119. it is necessary that there is a causal connection, i.e. "that the act of leading caused or strengthened the decision of a person to commit suicide, and that the act of helping contributed to the commission of suicide" (Stojanović, 2012, p. 416). The consequence can be both suicide and suicide attempt. If a minor is induced to commit suicide or is assisted in committing suicide or a person whose consciousness is significantly reduced to understand the importance of suicide, it is not necessary to punish the perpetrator that the suicide was committed, but it is sufficient that it was only attempted. This is the first qualifying form of the crime. If a child or a person who is not capable of reasoning on their own is

induced to commit suicide or is assisted in committing suicide, i.e. to understand the importance of suicide and absolutely not control his will, the act qualifies as the most severe form and is equated with aggravated murder. A special form is in situations where, due to inhumane, cruel treatment of a person who is in some relationship of dependence or subordination to the perpetrator, the passive subject kills himself, or attempts suicide. It can be about various types of mental and physical abuse, harassment, bullying, etc. There must be a causal connection between such a way of acting by the perpetrator and the suicide of the passive subject (Stojanović, 2012, p. 417). The consent of the passive subject does not exclude illegality, for the same reasons that were already mentioned earlier in the case of the criminal offense from Art. 117. although, under certain conditions, we can say that the common denominator of both criminal acts is precisely the consent of the injured party (patient). In practice, the demarcation of these two criminal acts can be done by whether the act of taking life is undertaken by the doctor (or another person) or by the patient (passive subject) (Đurđević, 1996, p. 231). As long as the last free decision is in the hands of the patient, the doctor's actions can only be characterized as assisted suicide. On the other hand, if the decision is completely in the hands of the doctor, it is a criminal offense under Art. 117. The difference between active assistance in dying and assistance in the suicide of a terminally ill patient basically corresponds to the difference between the perpetrator of a criminal act and an accomplice (Đurđević, N., 1996, p. 233). Criminal acts from paragraph 1-4. require intention, while the special form in para. 5 requires only negligence as a degree of guilt. The threatened punishment for the basic form is from 6 months to 5 years in prison. For the qualified form, the penalty is from 2 to 10 years in prison. For the most severe form, the prison sentence is a minimum of 10 years, or from 30 to 40 years. For the privileged form, the prison sentence is from 3 months to 3 years. For a special form, the prison sentence is 6 months to 5 years. It is interesting to note at this point that the German Criminal Code does not recognize this crime and does not prescribe it as a punishable offense. According to the German authors, the reason is purely technical – rational in nature. As German criminal law does not

recognize the crime of suicide, according to the authors, there should not be a criminal offense of aiding and abetting suicide (Rešetar, 2017, p. 116).

It is important to state that the patient's right to consent to a medical measure also includes the patient's right to withhold consent to a medical measure, that is, the right to refuse medical treatment. The Law on Patients' Rights stipulates that, as a rule, no medical measure may be taken on him without the patient's consent (National Assembly of the Republic of Serbia, 2013, Article 15). It follows that the patient has the right to refuse "aimless" life-sustaining measures (as well as all other medical measures recommended to him) directly, if he is capable of reasoning at the time of making the decision, or indirectly, through a person who is authorized in advance by the patient to make decisions on consent to the medical measure on his behalf. In this case, the doctor must respect the will of the patient. According to this law, the doctor would have to refrain from further life-sustaining measures. However, if he disconnected the patient from the ventilator, it is questionable that he would "deprive another of his life" and then there would be a risk of liability for the criminal offense of murder (Đurđević, 2020, p. 263). If the patient exercises his right to refuse medical treatment, but without making an express request that goes in the direction of taking life, then the termination of medical measures could not be qualified as taking life out of compassion. Although the Criminal Code of the Republic of Serbia does not recognize the consent of the injured party as a basis for excluding the illegality of the criminal act, and the interruption of medical measures itself could not be brought under the institute of extreme necessity, even less necessary defense and acts of little importance, domestic criminal law theory speaks of the consent of the injured party as on the basis of exclusion of the illegality of a criminal offense that is not provided for by law (Stojanović, 2009, p. 124). All of this leads us to the conclusion that passive euthanasia, in some way and under certain circumstances, is still decriminalized in the Republic of Serbia.

Conclusion

Aspirations for patient and physician autonomy are equally valuable goals. Long-standing principles of law not only allow patients not to be treated without consent, but allow them to refuse any medical treatment. On the other hand, there is an equally long-standing custom of the medical profession to do everything possible to sustain human life. This custom is supported both in legislation and in judicial practice. It goes a long way in preventing patients from refusing life-saving medical measures, as doctors are at risk of being punished if they allow a patient to die because they do not consent to medical intervention. Today, the prevailing legal order distinguishes between passive and active euthanasia. In principle, the law recognizes passive euthanasia. However, legislators are reluctant to accept the patient's right to self-determination in relation to his own life and death. The discrepancy between the legal prohibition of active euthanasia and the actual tolerance towards such a procedure is considered a shortcoming of any legal system. It is true that euthanasia is still considered a criminal offense in the majority of legislations, but with reservations regarding the motives that drive it. Again, the number of countries that have enacted laws on euthanasia or advocate for its liberalization is growing day by day.

Like all other unresolved issues, the question of euthanasia leaves behind many dilemmas, sharply polarizing the world into those for and those against. Both sides have arguments, and it is unlikely that a consensus will be reached. It will probably be a long time before the differences between these two camps are bridged. Only then will it be obvious whether the struggle for the legalization of euthanasia was a prophetic announcement of a significant social change for the better, or a deterioration that only draws us deeper into the vortex of decadence and decay. Perhaps euthanasia will be legalized everywhere in the future, allowed in cases of permanent vegetation. But dying is a part of life and it should, like everything else in life, be lived in the best possible way. Just as we all have the support of the environment at the beginning of life, we also need that support in the moments of death. In the future, palliative medicine and the possibility of pain relief should

primarily be developed, but euthanasia should also be legally regulated, and doctors and lawyers should be familiarized with this problem in detail. Those who suffer from an incurable disease and who plead for their lives to end quickly, may still, after careful examination and reflection, be subjected to euthanasia. It is the best way for a person to get rid of the suffering that he cannot or does not want to endure. A medically indicated act that shortens a person's suffering and enables a dignified death should not be condemned either from a moral or legal point of view. Man's right to master not only the body, not only life, but also death should be respected. This is what philanthropy consists of, which should not be alien to laws either.

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Krivičnopravni aspekti eutanazije u Republici Srbiji

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Sažetak

Pitanje pravnog i medicinskog regulisanja prava na eutanaziju, iako se sama radnja vršila od postojanja čovečanstva, postavlja se tek u XX veku. Tada kreće regulisanje i „uređivanje" ovog pitanja, imajući u vidu da se faktički sprovela, te da je moglo dovesti do zloupotreba i korišćenja za suzbijanje određenih nacija. Sa uređivanjem ovog pitanje kreću i rasprave, pre svega pravne i medicinske, ali i filozofske, moralne, sociološke i religijske. I dok neke države uređuju ovo pitanje, bilo da izričito zabranjuju ili dozvoljavaju, određene države ne regulišu pravni aspekt eutanazije. Svakako da je bilo kakvo regulisanje bolje od nepostojanje zakonskih normi koje uređuju ovo pitanje, koje ostavljaju prostor za proizvoljnost i zloupotrebe. U radu prikazujem vezu između prava na život i prava na smrt, pojedinačnog i opšteg, društvenog interesa. Pored navedenog, ukazujem na argumente za i protiv eutanazije, pojašnjavam sam pojam eutanazije i oblike eutanazije, naglašavam krivičnopravni aspekt eutanazije, kao i kako je ovo pitanje pravno regulisano u uporednom pravu i pravu Republike Srbije.

Ključne reči: Eutanazija, krivično pravo, krivično delo, uporedno pravo, Republika Srbija