

KILLING COMMITTED AT THE VICTIM'S REQUEST

*Mariana-Narcisa RADU**

Abstract

A person's right to live is, according to constitutional dispositions, guaranteed. As a consequence, the Romanian lawmaker has made killing a person, even if the murder is requested by the victim, illegal, as the consent of the victim does not provide appropriate justification. We must specify that in the previous regulation, this act was classified as murder, with juridically mitigating circumstances considered however.

Multiple conditions must be met for the assumption of killing committed at the victim's request to be made, and they are stated by the lawmaker, conditions that concern both the victim's request and their state of health.

Although we appreciate that the lawmaker punishes this crime with a less severe sentence than it does murder, we believe that, realistically, it is difficult to find their delimitation from one another, with judicial authorities being tasked with this difficult mission.

This paper will approach, among others, the analysis of the necessary conditions for the existence of killing at the request of the victim, the sphere of subjects and its relationship with other crimes against life.

Key Words: *Killing / request / incurable disease / severe infirmity / insufferable pain / consent*

JEL Classification: [K14]

1. Introduction

The right to life is guaranteed by the constitutional dispositions in art. 22, par. 1. As a consequence, the Romanian lawmaker has incriminated murder even if committed at the victim's request, because the victim's consent, in this hypothesis, does not justify the crime, as art. 22, par. 2 of the Romanian Criminal Code states: "the consent of the injured party does not have effect in the case of crimes against life or when the law rules out its purpose of justification."¹ However, the impossibility of justifying killing with the consent of a victim suffering from a severe disease has fueled numerous controversies. Thus, a first opinion shows that any person has the right to live and die with dignity, as he or she is the only individual who has the right to appreciate their quality of life and decide to die dignified.² Another opinion states that the right of a person to decide

* Assistant Academic Lecturer, Doctor of Law, "Dimitrie Cantemir" Christian University, the Faculty of Law, Cluj-Napoca, narcisaradu@gmail.com.

¹ In accordance to the dispositions of art. 22, par. 1 of the Criminal Code, "an act stipulated by criminal law is justified when committed based on consent from the victim, if said victim had legal authority over the injured or threatened social value."

² See *Unele idei noi în doctrina și legislația penală*, in *Revista de Drept Penal (The Penal Law Journal)* no. 3/2013, p. 20. Also see: the for and against opinions on euthanasia presented by C. Albert-Lorincz,

their own life as they see fit cannot be recognized, as life, which is a transcendental reality, cannot be left to be freely measured by the person, even if he or she has an incurable disease.³ As we have seen on a legislative level, in our country, the prevailing opinion, however, is that the consent of the titular over their right to live cannot justify the act of the person who ends it even if the victim is in insufferable pain.

The person's right to life is also guaranteed by the European Convention on Human Rights⁴, the Universal Declaration of Human Rights⁵, the American Convention on Human Rights⁶, the International Covenant on Civil and Political Rights⁷, etc. Furthermore, the issue on the right to live and a possible "right to die"⁸ have been under the attention of the European Court of Human Rights, which, because of the differences in lawmaking between the member states of the European Union, has exercised caution in what regards euthanasia and assisted suicide.⁹ Thus, in the case of Diane Pretty v. the United Kingdom, the European Court of Human Rights has established that it is not persuaded that the right to life

Pros and cons of euthanasia. a qualitative study, in Revista Română de Bioetică (The Romanian Journal of Bioethics), vol. 13, no. 3/2015, available at: <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/906>, accessed on May 5th, 2016; D. Perju-Dumbravă, S. Morar, I. Fulga, A. Avram, D. Todea, C. Siserman, *Eutanasia în dreptul penal românesc*, în Revista Română de Bioetică (The Romanian Journal of Bioethics), vol. 6, no. 2/2008, p.11, available at: <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/76>, accessed on May 12th, 2016.

³ For further details, see I. Molnar, *Consimțământul persoanei vătămate (Comentarii)*, in G. Antoniu, T. Toader (coordinators), *Explicațiile noului Cod penal*, vol. I, Universul Juridic Publishing House, Bucharest, 2015, p. 234; M.M. Pivniceru, F.D. Dăscălescu, *Eutanasia: unde se sfârșește protecția dreptului la viață?*, in Revista Română de Bioetică (The Romanian Journal of Bioethics), nr.2/2004, available at: <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/318/506>, accessed on May 12th, 2016.

⁴ Art. 2 states that: "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."

⁵ Adopted by the U.N. General Assembly on December 10th, 1948, which states in art. 3 that "everyone has the right to life, liberty and security of person."

⁶ Adopted on November 22nd, 1969 in San Jose (Costa Rica), underlining in art. 4 that: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

⁷ Art. 6 states that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

⁸ For details concerning a possible "right to death," also see: I. Tipa, *Conținutul dreptului la viață și coraportul acestui drept natural cu eutanasia și dreptul la moarte*, in Administrarea publică (Public Administration), no. 2/2012, p. 71, available at: <http://bsclupan.asm.md:8080/xmlui/bitstream/handle/12345678/504/8.pdf?sequence=1>, accessed on May 8th, 2016.

⁹ L.M. Stănilă, *Provocările bioeticii și răspunderea penală*, Universul Juridic Publishing House, Bucharest, 2015, p. 130. L.M. Veny, *Law and ethics. The belgian law on euthanasia and minors... A bridge too far for the current decade?*, in Fiat Iustitia Magazine, no. 1/2015, p. 201.

guaranteed in art. 2 can be interpreted with a negative aspect, that it could also mean the right to death.¹⁰

On a national level, the charge of killing at the request of the victim, as a slighter incarnation of murder, is part of a legal tradition in our country, as regulation in this sense can be found in art. 282 of the Transylvanian Criminal Code¹¹ and art. 468 of the 1936 Criminal Code – the Carol II Criminal Code.¹²

As seen in the memorandum of reasons of the Bill concerning the Criminal Code, the reintroduction of this text seemed imperative as a consequence of the new climate of mitigating consequences instated by the General Part of the Penal Code.¹³ Indeed, if in the regulation of the previous Criminal Code, the circumstance cited by art. 190 could be used as a legal mitigating circumstance¹⁴, leading thus to a sentence under the special minimum amount, in our current regulation, even if there will be a judicially mitigating element, the applied sentence will no longer necessarily be under this minimum. That is why, in order to allow for a penalty to fit the degree of social danger of the act, a distinct legal regulation was taken under consideration. At the same time, the Romanian lawmaker has preferred the marginal denomination of killing at the request of the victim and not the one of murder at the request of the victim in order to exempt this act from the legal antecedents of aggravated first-degree murder as described in art. 189 letter e of the Criminal Code.¹⁵ The act is incriminated as a lesser form

¹⁰ The European Court of Human Rights has established in this cause that it is not “convinced that the right to life guaranteed by art. 2 can be interpreted as having a negative aspect,” that art. 2 “could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die” and “that the right to die was not possible to deduce from art. 2 of the Convention, be it by the hand of another person or through assistance from a public authority.” Also see: *Gross v. Switzerland*. The information is contained within *Fișă tematică- Dreptul la viață*, pp. 17-18, available at: http://www.echr.coe.int/Documents/FS_Life_ROM.pdf, accessed on May 12th, 2016.

¹¹ Art. 282 states that “he who, through the unassailable and serious desire of a person, was determined to kill him or her will be punished with confinement for up to 3 years.”

¹² Art. 468: “He who kills a man or woman, after his or her persistent and repeated wish, commits the crime of requested murder and is sentenced to prison between 3 to 8 years.

The same punishment applies to the person who determines another to commit suicide or encourages their decision to commit suicide or facilitates, in any manner, execution, if the suicide has taken place.

The punishment is correctional prison from 1 to 5 years, when the act was committed, under the conditions underlined by the previous paragraphs, under the impulse of pity, in order to end the physical suffering of a person ill with an incurable disease and whose death was inevitable because of it.”

¹³ See V. Cioclei, *Infrațiunile contra persoanei în Noul Cod penal – principalele modificări față de reglementarea actuală*, Curierul Judiciar (The Legal Courier) no. 11/2012, p. 2.

¹⁴ For the analysis of euthanasia in our previous legislation, see: D. Perju-Dumbravă, S. Morar, I. Fulga, A. Avram, D. Todea, C. Siserman, *op. cit.*, pp. 8-10, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/76>.

¹⁵ N. Neagu, *Uciderea la cererea victimei (Comentariu)*, in V. Dobrinou et al., *Noul Cod penal Comentat, vol. II, Partea specială*, Universul Juridic Publishing House, Bucharest, 2012, p. 32.

of murder in other penal legislations as well, such as art. 216 of the German Criminal Code, art. 77 of the Austrian Criminal Code, art. 143 par. 4 of the Spanish Criminal Code, art. 132 of the Portuguese Criminal Code, art. 235 of the Norwegian Criminal Code¹⁶ or art. 148 of the Criminal Code of the Republic of Moldova.¹⁷

The issue of euthanasia has been debated for a long time and a distinction was made between active and passive euthanasia, as well as between euthanasia and assisted suicide. As we can see in the specialized literature, euthanasia is a crime committed in the name of compassion, which means to cause someone's death with their consent.¹⁸ Active euthanasia means committing acts to cause death as a result of repeated request and a lengthy reflection on the matter by the patient, in other words, it means a deliberate interruption of the natural course of life.¹⁹ Passive euthanasia entails not administering or interrupting a treatment, having full knowledge that doing so will cause the death of the patient, especially if there is a chance that the patient can be kept alive through an aggressive and pointless treatment.²⁰ Passive euthanasia entails thus the deliberate omission of granting medical assistance to the patient. We must mention that in the specialized literature, some authors consider that there is no real difference between killing and letting die and so, the distinction between active and passive euthanasia is irrelevant, as the person behind the euthanasia through positive action or intentional omission is responsible for the result, with causality present in both cases.²¹

Euthanasia is different from assisted suicide, as the latter involves the medic or another member of the medical staff helping the patient to commit suicide at his or her repeated and well considered request.²² According to the opinion of

¹⁶ See: S. Bogdan, D.A. Șerban, G. Zlati, *Noul Cod penal. Partea Specială*, Universul Juridic Publishing House, Bucharest, 2014, p. 32.

¹⁷ Also see: I. Tipa, *op. cit.*, <http://bsclupan.asm.md:8080/xmlui/bitstream/handle/123456789/504/8.pdf?sequence=1>.

¹⁸ See: M.M. Pivniceru, F.D. Dăscălescu, *op. cit.*, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/318/506>; G. C. Curcă, *Eutanasia: O radiografie în interiorul profesiei medicale- studiu comparativ la studenți la medicină și la medici*, in *Revista Română de Bioetică (The Romanian Journal of Bioethics)*, vol. 6, no. 2(2008), pp. 24-25, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/74/78>.

¹⁹ M.M. Pivniceru, F.D. Dăscălescu, *op. cit.*, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/318/506>.

²⁰ For further details, see: L. M. Stănilă, *op. cit.*, p. 119; C. Albert-Lorincz, *op. cit.*, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/906>.

²¹ See the opinions presented by C. Albert-Lorincz, *op. cit.*, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/906>.

²² See G. C. Curcă, *op. cit.*, p. 25, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/74/78>; M.M. Pivniceru, F.D. Dăscălescu, *op. cit.*, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/318/506>. Also see: L. M. Stănilă, *op. cit.*, p. 119. The doctrine states that, in such cases, the patient is given a medical prescription with a lethal substance, is shown how to stop the resuscitation devices on their own or is given a mask with a tube of gas that leads to death.

other authors after a careful analysis of the typicality of the act of killing at the request of the victim, we can see we are in the presence of a mitigated incrimination of active euthanasia and not a requested killing in a larger sense.²³

2. Killing at the victim's request in the regulation of the current Romanian Criminal Code

Killing at the victim's request is regulated in art. 190 of the Romanian Criminal Code, which states that killing done at the explicit, serious, conscious and repeated request of the victim suffering of an incurable disease or a severe infirmity that is medically attested and causes permanent and insufferable pain is punished with a one to five year prison sentence.

We, along with other authors, consider that, in the way that it is incriminated, the act is a milder form of murder, justified by the specific circumstances in which it is committed.²⁴

The juridical object of the crime is the right to life of the individual, as the lawmaker chooses to protect the life of every person, even with their consent for it to be ended. As we have seen, consent does not result, as we have seen, in the effect specific to the justifying circumstances, but will only lower the author's penal liability.²⁵

The material object is the body of the live person who is killed by their request, under the conditions stated by the Romanian lawmaker.

The active subject is an issue on which the doctrine is split in terms of definition.

One opinion states that the crime in question can be committed by a physical person who is criminally responsible.²⁶ Other authors²⁷ claim that any physical or juridical person, criminally liable, can hold this position, as the juridical person can

²³ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 33. The authors claim that “we would have been in the presence of a milder form of accountability in the case of a requested murder proper if the element that justifies the mitigated treatment had exclusively been the existence of a request from the victim.” Other authors also consider that killing at the request of the victim represents an incrimination of active euthanasia. See: T. Toader, M. Safta, *Uciderea la cererea victimei (Comentarii)* in G. Antoniu, T. Toader (coordinators), *Explicațiile Noului Cod penal, vol. III*, Universul Juridic Publishing House, Bucharest, 2015, p. 51; I. VasIU, *Drept penal. Partea specială*, Albastră Publishing House, Cluj-Napoca, 2014, p. 48.

²⁴ Also see: V. Cioclei, *op. cit.*, p. 2; S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 33; N. Neagu, *Uciderea la cererea victimei (Comentariu)*, *op. cit.*, p. 25.

²⁵ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 33.

²⁶ Al. Boroî, *Drept penal. Partea specială*, C.H.Beck Publishing House, Bucharest, 2014, p.55; N. Neagu, *Uciderea la cererea victimei (Comentariu)*, *op. cit.*, p. 26.

²⁷ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 33. There are, however, authors who believe the act can be committed by “any person.” See: T. Toader, M. Safta, *Uciderea la cererea victimei (Comentarii)*, *op. cit.*, p. 52; M. Udroui, *Fișe de Drept penal. Partea specială*, second edition, Universul Juridic Publishing House, Bucharest, 2015, p. 32; I. VasIU, *op. cit.*, p. 49.

also be a clinic whose activity centers on killing at the request of the victim. We appreciate that, on a theoretical level, such an example can exist and motivate this claim, but, on a practical level, we cannot see how a medical institution can operate, while respecting the legal norms of our country, with this purpose. We do not, however, exclude that the juridical person should not be held legally responsible for this crime.

Thus, the author of the crime can be a medically trained individual, a family member, a friend, an acquaintance, etc. and is a person who agrees to the victim's request.

We consider that, in what concerns accomplice liability, this is only possible with the presence of a co-author, an instigator or an accomplice.²⁸

The passive subject of the crime is a special (qualified) one. Analyzing the legal text shows that the passive subject can be the physical person who asks for their own murder and cumulatively fulfills the following conditions:

- They have an incurable disease or severe deformity;
- The incurable disease or severe infirmity is medically proven;
- The incurable disease or severe infirmity causes permanent, insufferable pain.

Considering these conditions, we cannot trace, along with other authors, the preoccupation of the lawmaker with a more restrictive regulation on the applicability of the analyzed dispositions, because of "the agglomeration of attributes that must qualify the disease or infirmity of the victim."²⁹

We believe that these conditions can hinder the practitioners' application of the legal text. Thus, we consider that, for a just application, it is necessary to clarify what defines a severe infirmity and who decides whether it is severe.³⁰ As the incurable disease and the severe infirmity must be medically proven, we believe that the answer to our question must be given by the medical literature and practice. As such, the disease may be the premise of the crime in discussion only if it is incurable, with no possibility to return to full health, which does not have a successful treatment.³¹ The incurable, impossible to heal factor of the disease is

²⁸ Also see: Al. Boroi, *op. cit.*, p. 55; T. Toader, M. Safta, *Uciderea la cererea victimei (Comentarii)*, *op. cit.*, p. 52.

²⁹ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 35. Here is, for example, how the Moldovan lawmaker has regulated this act under the marginal denomination of "deprivation of life upon a person's wish (euthanasia):" "The deprivation of a person's life in connection with his/her incurable disease or unbearable physical pain, provided it is victim's wish or, in the case of juveniles, the wish of their relatives shall be punished by imprisonment for up to 6 years."

³⁰ See the opinions expressed by I.A. Barbu, *Uciderea la cererea victimei-variantă atenuată a infracțiunii de omor*, în *Revista Pentru Patrie (The Journal for the Mother Country)*, available at: <http://www.revistapentrupatrie.ro/proiecte/legisla%C8%9Bie/1288-uciderea-la-cererea-victimei-variant-atenuat-a-infraciunii-de-omor>, accessed on May 15th, 2016.

³¹ H. Diaconescu, R. Răducanu, *Infracțiuni contra vieții, integrității sau sănătății persoanei*, C.H. Beck Publishing House, Bucharest, 2014, p.100; M. Udroui, *op. cit.*, p. 32.

relative, as there is need for examination at the time of the killing to be carried out in relation to the possibilities, evolution and action of medical science, as we know that what is incurable at one point in time can become curable in the near future.³² The infirmity is a congenital or acquired physical defect.³³ Some authors have underlined the permanent character of the infirmity, believing that only such a hypothesis would embody the characteristics of the crime.³⁴ We believe that, as long as the lawmaker has not outlined this condition, it is not necessary, but it can be a factor in estimating the sentence for the author of the crime.

We can also notice that the incurable disease or severe infirmity must cause insufferable, permanent pain, conditions that must be cumulatively fulfilled. The lawmaker states that, if the incurable disease or permanent infirmity causes permanent pain, but is not insufferable or vice versa, the conditions necessary for the classification of killing at the request of the victim are not met and we are facing a charge for murder.

At the same time, we cannot help inquiring who decides and, implicitly, what are the criteria in use, if the pain is permanent and if it is insufferable. It is well known that each person has a threshold for pain (suffering) and it is possible for two people with the same incurable diagnosis to suffer the pain in different manners (tolerable for one, overwhelming for the other), but for both to desire their death. We also do not believe that, from a practical standpoint, the amount of suffering each person is going through can be calculated, with estimates that can only be general.

However, one author claims that the estimation of the severity of the victim's suffering can be made according to a subjective criterium, of the individual endurance of the victim in his / her concrete situation, and not based on objective criteria centered on a statistic ratio of pain endurance.³⁵

The criticism brought to the text concerns the permanence of the pain as well, and we support the authors who do not understand why, even if there are dormant periods or oscillations of the suffering, a lack of permanence should without a discussion exclude the applicability of the norm.³⁶ These authors ask if it is necessary in order for the charge to exist, for there to be present, active suffering when the victim asks for their killing or that, given their permanent condition, it can also anticipate the pain, which is imminent, probable.³⁷

³² H. Diaconescu, R. Răducanu, *op. cit.*, p.100.

³³ I. VasIU, *op. cit.*, p. 49.

³⁴ I.A. Barbu, *op. cit.*, <http://www.revistapentrupatrie.ro/proiecte/legisla%C8%9Bie/1288-uciderea-la-cererea-victimei-variant-atenuat-a-infraciunii-de-omor>.

³⁵ L. M. Stănilă, *op. cit.*, p. 128.

³⁶ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 35.

³⁷ Idem. The authors consider that "it would be more than cynical to ask the victim to suffer until they are allowed to formulate such a request."

We believe that, in order to correspond better, the text must be interpreted in a wider sense and it should be enforced even when, medically speaking, the incurable disease or permanent infirmity are known to cause permanent and insufferable pain.³⁸

Another question that needs an imperative answer is if the suffering can be only physical or if psychological suffering can also be taken under consideration. Lacking explicit provisions, we believe that permanent, insufferable pain can be both physical and psychological.³⁹

To solve some of these issues, the penal doctrine has proposed a second legislation that would contain the diseases and infirmities that fulfill the conditions underlined by the Romanian lawmaker.⁴⁰

The material element of the crime is embodied by the killing of a person, which, according to some authors, has the same significance as murder.⁴¹ Other authors, agreeing, show concretely that killing at the request of the victim can be done through both action and inaction.⁴² Thus, we believe that the act can be committed through inaction by the medic who does not administer a medication which prolongs the patient's life or does not offer resuscitation, should the other conditions be fulfilled.⁴³

Another opinion underlines that killing is the same as murder, but it should be highlighted that, given the particularity of the incrimination, art. 190 of the Romanian Criminal Code can only be enforced in the situation of action, not inaction concerning the killing at the victim's request (not intervening to save the victim's life).⁴⁴ Those who support the opinion show that, in this case, we would

³⁸ We must note here the fact that a study made in Romania and in which medics and Medicine undergraduates were interviewed showed that "euthanasia out of mercy is probably the most accepted moral value among the people interviewed: if the person is not in pain, an affirmative answer is impossible. For medics, the presence of pain is the most important in making this decision, for students it is reliance on life support: age shows in the urgency of the options." See G. C. Curcă, *op. cit.*, p. 33, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/74/78>.

³⁹ L. M. Stănilă, *op. cit.*, p. 128; N. Neagu, *Uciderea la cererea victimei (Comentariu)*, *op. cit.*, p. 26.

⁴⁰ See: S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 35.

⁴¹ N. Neagu, *Uciderea la cererea victimei (Comentariu)*, *op. cit.*, p. 27; T. Toader, M. Safta, *Uciderea la cererea victimei (Comentarii)*, *op. cit.*, p. 52.

⁴² L. M. Stănilă, *op. cit.*, p. 128; Al. Boroș, *op. cit.*, p. 55; I. A. Barbu, *op. cit.*, http://www.revistapentru_patrie.ro/proiecte/legisla%C8%9Bie/1288-uciderea-la-cererea-victimei-variant-atenuat-a-infraciunii-de-omor; I. Vasiliu, *op. cit.*, p. 50.

⁴³ L. M. Stănilă, *op. cit.*, p. 128. Another author claims that "the Romanian lawmaker, through this article, forbids absolutely any act committed through one or several actions or inactions in order to ease the great suffering of an incurable disease or severe infirmity that is medically attested." See M.C. Ivan, *Uciderea la cererea victimei*, available at: <http://www.universuljuridic.ro/uciderea-la-cererea-victimei/>, accessed on May 7th, 2016.

⁴⁴ S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 35. Also see: M.M. Pivniceru, F.D. Dăscălescu, *op. cit.*, <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/318/506>, according to which Recommendation no. 1418/1999 of the Parliamentary Assembly of the European Council

be discussing passive euthanasia, permitted in all European legal systems. Other authors also underline that passive euthanasia is not incriminated, namely “the manifested refusal towards the ailing person to continue their prescribed treatment in order to cause death.”⁴⁵ We must mention that some authors believe that the crime can be committed by illicit inaction as well when there is a legal or conventional obligation to act.⁴⁶

In our opinion, as long as art. 13 of Law 46/2003 concerning the rights of the patient⁴⁷ attests the patient’s right to refuse or interrupt a medical intervention, taking full responsibility, in writing, of their decision with the consequences of their refusal or interruption of medical care explained to him / her⁴⁸, the lawmaker has incriminated only active euthanasia through art. 190 of the Criminal Code.⁴⁹ Of course, the judicial authorities have, in this case, the role of establishing whether there has been a cumulative fulfillment of the conditions that would classify the act within the dispositions of art. 190 of the Criminal Code.

In order to view the act as stated in art. 190 of the Romanian Criminal Code, the killing must be made after the request of the victim. In order to frame the act within the analyzed dispositions, the request must be:

recognizes passive euthanasia (the interruption of or failure to administer treatment at the request of the patient), but underlines that the wish to interrupt treatment must not be influenced by pressure coming from third parties, nor should the decision come from economic reasons (the high cost of the treatment).

⁴⁵ M.C. Ivan, *op. cit.*, <http://www.universuljuridic.ro/uciderea-la-cererea-victimei/>.

⁴⁶ M. Udriou, *op. cit.*, p. 32.

⁴⁷ Published in the Official Gazette no. 51, January 29th, 2003. According to the dispositions of art. 13 from the Law, “The patient has the right to refuse or interrupt a medical intervention, assuming responsibility, in writing, for his or her decision; the consequences of the refusal or interruption of medical care must be explained to the patient.” Moreover, art. 4 from the Norm passed on April 7th, 2004 to apply the Law for the Patients’ Rights no. 46/2003 specifically claims that “in the situation in which medical care was refused by the patients who, in writing, assume responsibility for their decision, they must be notified of the consequences stemming from the refusal or interruption of medical care.”

⁴⁸ For details, see M.C. Ivan, *op. cit.*, <http://www.universuljuridic.ro/uciderea-la-cererea-victimei/>.

⁴⁹ We must note that there are legislations that allow euthanasia as long as it respects legal conditions, one example being the Belgian legislation. See the analysis by L. M. Veny, *op. cit.*, pp.197-212. Moreover, France has regulations that allow patients to solicit deep and continuous sedation associated with analgesia, which causes the alteration of consciousness until death, as well as regulations that grant them the right to refuse or no longer receive treatment, as the medic has the obligation to respect the person’s wish on the condition of informing them about the consequences and gravity of these decisions. In the case in which, through their wish to refuse or interrupt taking any treatment, they put their life in danger, the medic must postpone this decision for a later, more reasonable date. See the LOI dispositions no. 2016-87 du 2 février 2016 créant de nouveaux droits en faveur des malades et des personnes en fin de vie (1), available at: [https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=](https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031970253&categorieLien=id)

JORFTEXT000031970253&categorieLien=id, accessed on May 23rd, 2016.

a) explicit – meaning it must expressly punctuate the victim's will to suppress their life.⁵⁰

b) serious – meaning it must not be expressed in jest, during moments that the patient is upset or furious

c) conscious – in regards to this, it is considered necessary for the victim to realize the nature, significance and consequences of their request.⁵¹ Other authors point to the fact that, in order for the condition to be fulfilled, it is necessary for the request to be made by a person who has judgment.⁵² In this context however, there is the issue of establishing if a person without the capacity to exercise within civil law (minor or under interdiction) can formulate a request to die under the conditions of art. 190 of the Criminal Code.⁵³ Making a comparative analysis of the dispositions in the civil law concerning the capacity to enterprise acts of disposal to those within the penal law that acknowledge the efficiency of discernment even if it does not come from a person with full capacity to exercise according to civil law, the conclusion is that it cannot be, *de plano*, excluded that the person making the request to be without capacity to exercise from the perspective of civil law.⁵⁴ In our opinion, the charge is kept only if the person requesting the killing is not a minor and has discernment, as it is only thus that they have the capacity to understand the consequences of what they are asking and we are in the presence of a murder, domestic violence, in any other case.

d) repeated – at least twice, some authors claim⁵⁵, three times say others⁵⁶, in different circumstances such that it is excluded that the request is made during a period of depression, fury, hopelessness.⁵⁷

We believe that the condition is not met when it occurs again in the same circumstances.

The subjective part is characterized by committing the act with direct intention⁵⁸. The author must act motivated (determined) by the victim's request.

⁵⁰ According to some authors, the term “explicit” is understood as clear, unequivocal expression. See: .A. Barbu, *op. cit.*, <http://www.revistapentrapatrie.ro/proiecte/legisla%C8%9Bie/1288-uciderea-la-cererea-victimei-variant-atenuat-a-infraciunii-de-omor>.

⁵¹ L. M. Stănilă, *op. cit.*, p. 128. Also see: N. Neagu, *Uciderea la cererea victimei (Comentariu)*, *op. cit.*, p. 27.

⁵² Al. Boroî, *op. cit.*, p. 56; S. Bogdan, D.A. Şerban, G. Zlati, *op. cit.*, p. 34.

⁵³ S. Bogdan, D.A. Şerban, G. Zlati, *op. cit.*, p. 34.

⁵⁴ M.C. Ivan, *op. cit.*, <http://www.universuljuridic.ro/uciderea-la-cererea-victimei/>; S. Bogdan, D.A. Şerban, G. Zlati, *op. cit.*, p. 34.

⁵⁵ S. Bogdan, D.A. Şerban, G. Zlati, *op. cit.*, p. 34.

⁵⁶ M.C. Ivan, *op. cit.*, <http://www.universuljuridic.ro/uciderea-la-cererea-victimei/>.

⁵⁷ N. Neagu, *Uciderea la cererea victimei (Comentariu)*, *op. cit.*, p. 27; S. Bogdan, D.A. Şerban, G. Zlati, *op. cit.*, p.34; L. M. Stănilă, *op. cit.*, p. 128.

Some authors have claimed, however, that it can also be done with indirect intention⁵⁹. In the situation that the reason for which the author kills the victim is any other than the one indicated in art. 190 of the Criminal Code, the act will be classified as a murder, where the explicit request of the victim can act as legal mitigating circumstance (art. 75 letter b of the Criminal Code). The doctrine also shows that the act will be classified as murder even if the conditions of an explicit, serious, conscious and repeated request from the victim are met if the author of the crime was not made aware of it and made the decision to kill the victim for other reasons, such as material interest, in order to inherit their fortune.⁶⁰ However, if the request was known by the author, the doctrine shows that neither the purpose for which the act was committed, nor the motive that determined the author to act, for example, do not bear relevance or substance.⁶¹

The literature in the matter also raised the issue of establishing whether the killing at the victim's request can be made through suicide with the assistance of a medic ("the patient self-administering the lethal substance recommended by the medic"), implicitly if the medic can be held legally responsible as an accomplice for the crime of killing at the victim's request or as an author to the crime of determining or facilitating suicide, covered by art. 191 of the Criminal Code. It has been considered that, should the charge of determining or facilitating suicide be enforced, the passive subject, the reason of committing the act by the medic and the lawmaker's logic in incriminating the act of killing at the victim's request would be ignored.⁶²

A contrary opinion⁶³, to which we adhere, shows that, in the situation in which the medic's action is not direct, but only provides information on how the patient can commit suicide (shows him / her how to turn off a medical device) and

⁵⁸ Also see: M. Udriou, *op. cit.*, p. 33.

⁵⁹ Al. Boroii, *op. cit.*, p. 57; N. Neagu, *Uciderea la cererea victimei (Comentariu)*, *op. cit.*, p. 27; M.C. Ivan, *op. cit.*, <http://www.universuljuridic.ro/uciderea-la-cererea-victimei/>; I.A. Barbu, *op. cit.*, <http://www.revistapentrapatrie.ro/proiecte/legisla%C8%9Bie/1288-uciderea-la-cererea-victimei-variant-atenuat-a-infraciunii-de-omor>; S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 36. The authors demonstrate that the act can be committed with indirect intention when the victim asks a person to administer a certain painkiller, accepting that it will lead to their death. The author agrees and administers the medicine, also accepting that it may lead to death, which eventually occurs. In the opinion of other authors, "the subjective element is the same as in the charge of murder, with the difference that the intention with which the active subject suppresses the victim's life is based on the knowledge that the victim constantly and convincingly wants to have their life suppressed." See T. Toader, M. Safta, *Uciderea la cererea victimei (Comentarii)*, *op. cit.*, p. 52.

⁶⁰ N. Neagu, *Uciderea la cererea victimei (Comentariu)*, *op. cit.*, p. 33.

⁶¹ Idem.

⁶² M.C. Ivan, *op. cit.*, <http://www.universuljuridic.ro/uciderea-la-cererea-victimei/>.

⁶³ L. M. Stănilă, *op. cit.*, pp. 128-129; M. Udriou, *op. cit.*, p. 33.

the patient tries and succeeds in committing the act, the medic is accountable as author of the crime of determining or facilitating suicide.

In this context, the crime analyzed (killing at the victim's request) poses other problems as well which concern the limits between which the lawmaker sets its penalties.

Thus, for killing at the victim's request, the punishment set by the law is prison from 1 to 5 years, for determining or facilitating suicide, the punishment for this type of crime is prison from 3 to 7 years. We notice that, for the individual who kills the victim through a direct act, under the conditions of art. 190 of the Romanian Criminal Code, the sentence is more reduced than in the case of facilitating the suicide of an ill individual (as shown in art. 191 of the Criminal Code), for which the minimum is 3 years and the maximum is 7. Thus, we may conclude that it is best for the author to kill the victim than facilitate their suicide.⁶⁴

This observation was met with the request to incriminate the act of facilitating the suicide of the victim suffering from an incurable disease or severe infirmity under the conditions found in art. 190 of the Criminal Code, with smaller punishment limits, in order to avoid such situations, or to make an appropriate addition within art. 191 of the Criminal Code, reducing its limits in relation to the killing at the request of the victim.⁶⁵ We consider it fitting for the lawmaker to introduce a part. 2 to art. 190 of the Criminal Code to specify, as did the Code of 1936 (par. 3, art. 468), that *the act is incriminated as killing at the request of the victim even in the case when a person with a medically attested incurable disease or severe infirmity, causing permanent and insufferable pain, having requested their death explicitly, seriously, consciously and repeatedly, is determined to commit suicide or their suicide is facilitated by someone else.*

In relation to the charge of manslaughter, we can notice that the lawmaker, in this case as well, has set higher penalties than those for killing at the request of the victim.

Thus, for example, if a medic, as a consequence of not following legal dispositions or the measures specific to the practice of his / her profession, commits manslaughter and his or her patient is the victim, he / she will be responsible for manslaughter, which attracts a jail sentence between 2 and 7 years. If the same medic answers the request fulfilling the conditions mentioned in art. 190 of the Romanian Criminal Code, a request coming from a person suffering from a medically attested incurable disease or a severe infirmity, causing permanent, insufferable pain, will be responsible of killing at the request of the

⁶⁴ Also see: I.A. Barbu, *op. cit.*, <http://www.revistapentrupatrie.ro/proiecte/legisla%C8%9Bie/1288-uciderea-la-cererea-victimei-variant-atenuat-a-infraciunii-de-omor>.

⁶⁵ D. Șt. Paraschiv, G. Paraschiv, *Reflecții critice privind reglementarea pedepselor în Codul penal din 2009*, în I. Vasiliu, Fl. Streteanu (editori), *Preventing and Combating Cybercrime*, Accent Publishing House, Cluj-Napoca, 2016, p. 193.

victim, with a jail sentence between 1 and 5 years. Thus, we are again in the situation in which the lawmaker considers an unintentional act by a medic more severe than an intentional one, of killing at the request of the victim, under the conditions expressed in art. 190 of the Criminal Code.

Killing at the request of the victim occurs when the victim has died.

Attempted killing at the victim's request is not punished. In the hypothesis in which the action of killing has harmed the physical integrity or health of the victim, there is no cause for legal intervention, as the victim's consent acts as justification.⁶⁶

3. Conclusions

Although we appreciate the lawmaker's option to distinctly incriminate, as a lesser form of murder, the killing done at the victim's request, we believe that the analyzed dispositions are susceptible to hindering practice.

As we have shown, the Romanian lawmaker has set a series of conditions that, in our opinion, backed by other authors as well, renders difficult the applicability of the text. In this context, we consider that, in order to better enforce the dispositions of art. 190 of the Criminal Code, it is necessary for judicial authorities to use information from specialized medical literature and the expertise of specialists in the medical field.

On the other hand, we consider that the lawmaker must also intervene in harmonizing the prison sentence limit of crimes against life, in our opinion, and not only, as it is unconceivable, even given the circumstances of art. 190 of the Criminal Code, for an unintentional act to be punished more severely than a deliberate one.

Moreover, for the same reasons, we believe it to be opportune for the lawmaker to include determining or facilitating suicide at the request of the victim in art. 190 of the Criminal Code, which should read that *“the act is incriminated as killing at the request of the victim even in the case when a person with a medically attested incurable disease or severe infirmity, causing permanent and insufferable pain, having requested their death explicitly, seriously, consciously and repeatedly, is determined to commit suicide or their suicide is facilitated by someone else.”*

Lacking this provision, as demonstrated, leads to the situation in which the act of facilitating suicide to be more severely penalized than the deliberate act of killing a person that fulfills the conditions presented in this paper.

⁶⁶ Also see: S. Bogdan, D.A. Șerban, G. Zlati, *op. cit.*, p. 37.

Bibliography

1. Antoniu, G., 2013 *Unele idei noi în doctrina și legislația penală*, in Revista de Drept Penal (The Penal Law Journal), no. 3/2013.
2. Antoniu, G., Toader, T., (coordinators), 2015 *Explicațiile Noului Cod penal*, vol. III, Bucharest: Universul Juridic.
3. Albert-Lorincz, C., *Pros and cons of euthanasia. a qualitative study*, in Revista Română de Bioetică (The Romanian Journal of Bioethics), vol. 13, no. 3/2015, available at: <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/906>, accessed on May 5th, 2016.
4. Barbu, I.A., *Uciderea la cererea victimei-variantă atenuată a infracțiunii de omor*, in Revista Pentru Patrie (The Journal for the Mother Country), available at: <http://www.revistapentru-patrie.ro/proiecte/legisla%C8%9Bie/1288-uciderea-la-cererea-victimei-variant-atenuat-a-infraciunii-de-omor>, accessed on May 15th, 2016.
5. Bogdan, S., Șerban, D.A., Zlati, G., 2014 *Noul Cod penal. Partea Specială*, , Bucharest: Universul Juridic.
6. Boroi, Al., *Drept penal. Partea specială*, 2014, Bucharest: C.H.Beck.
7. Cioclei, V., 2012 *Infracțiunile contra persoanei în Noul Cod penal – principalele modificări față de reglementarea actuală*, Curierul Judiciar (The Legal Courier), no. 11/2012.
8. Curcă, G. C., 2008 *Eutanasia: O radiografie în interiorul profesiei medicale- studiu comparativ la studenți la medicină și la medici*, in Revista Română de Bioetică (The Romanian Journal of Bioethics), vol. 6, no. 2(2008), <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/74/78>.
9. Diaconescu, H., Răducanu, R., 2014 *Infracțiuni contra vieții, integrității sau sănătății persoanei*, Bucharest: C.H. Beck.
10. Dobrinou, V., ș.a, 2012 *Noul Cod penal Comentat, vol. II, Partea specială*, Bucharest: Universul Juridic.
11. Ivan, M.C., *Uciderea la cererea victimei*, available at: <http://www.universuljuridic.ro/uciderea-la-cererea-victimei/>, accessed on May 7th, 2016.
12. Paraschiv, D., Șt. Paraschiv, G., *Reflecții critice privind reglementarea pedepselor în Codul penal din 2009*, in Vasiu, I., Streteanu Fl., (editors), 2016 Preventing and Combating Cybercrime, Cluj-Napoca: Accent.
13. Perju-Dumbravă, D., Morar, S., Fulga, I., Avram, A., Todea, D., Siserman, C., *Eutanasia în dreptul penal românesc*, în Revista Română de Bioetică (The Romanian Journal of Bioethics), vol. 6, no. 2/2008, available at: <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/76>, accessed on May 12th, 2016.
14. Pivniceru, M.M., Dăscălescu, F.D., *Eutanasia: unde se sfârșește protecția dreptului la viață?*, in Revista Română de Bioetică (The Romanian Journal of Bioethics), no.2/2004, available at: <http://www.bioetica.ro/index.php/arhiva-bioetica/article/view/318/506>, accessed on May 12th, 2016.
15. Stănilă, L. M., *Provocările bioeticii și răspunderea penală*, Universul Juridic Publishing House, Bucharest, 2015.
16. Tipa, I., *Conținutul dreptului la viață și coraportul acestui drept natural cu eutanasia și dreptul la moarte*, in Administrarea Publică (Public Administration), no. 2/2012, available at: <http://bsclupan.asm.md:8080/xmlui/bitstream/handle/123456789/504/8.pdf?sequence=1>, accessed on May 8th, 2016.
17. Udroui, M., 2015 *Fișe de Drept penal. Partea specială*, second edition, Bucharest: Universul Juridic.

18. Vasiu, I., 2014 *Drept penal. Partea specială*, Cluj-Napoca: Albastră Publishing House.
19. Veny, L.M., *Law and ethics. The belgian law on euthanasia and minors... A bridge too far for the current decade?*, in Fiat Iustitia Magazine no. 1/2015.
20. *Fișă tematică- Dreptul la viață*, available at http://www.echr.coe.int/Documents/FS_Life_ROM.pdf, accessed on May 12th, 2016.