

IMPLICATIONS OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY TO THE RIGHT TO LIFE

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Abstract

The right to life is an inherent right of every human being and it is a prerequisite for ensuring all other rights throughout the architecture of protecting the human rights. The defence of human life by any means, including through criminal law, is one of the main duties of any state.

International conventions and practice have thus established the general rules on the protection of the right to life and they have developed some issues that have won the attention of international states and community, as a result of progress.

Despite the undeniable value of the right to life, this remains uncertain because, although the international texts state the right to life, they do not define “life”. In this paper, we will try thus to assess the role of the principles of subsidiarity and proportionality within the subject of the right to life, in terms of conceptual boundaries of this right.

Keywords: the right to life, subsidiarity, proportionality, human rights

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The right to life is an inherent right of every human being and it is a prerequisite for ensuring all other rights throughout the entire architecture of protecting the human rights³.

The defence of human life by any means, including through criminal law, is one of the main duties of any state, and the right to life, as a fundamental right, is protected and ensured in the Romanian Constitution (Article 22), which is why all citizens should show respect to the life of every member of the society⁴.

The European Convention on Human Rights guarantees every individual the right to life, but covers at the same time the cases where it may be prejudiced. The right guaranteed by Art. 2 of the Convention is essential in the system of fundamental rights and freedoms protected by the European Convention in question, because in the lack of actual commitment and protection of this right, the protection of any other rights would be objectless.

Thereby, the Contracting States should refrain from causing death intentionally and unlawfully, as well as ensure a legislative framework to guarantee the effective prevention and discourage any activity that would jeopardize the individual's life.

Moreover, the European Union Charter of Fundamental Rights stipulates in Article 2 having the marginal name of right to life that "Everyone has the right to life" and in the second paragraph – "Nobody can be sentenced to death or executed".

If we are guided by the provisions of the Charter preamble, which emphasizes that the Charter "reaffirms, by observing the powers and tasks of the Union, and the principle of subsidiarity, the rights resulting mainly from the constitutional traditions and international obligations common to the Member States of the European Convention for Protecting the Human Rights and the Fundamental Freedoms, from the Social Charters adopted by the Union and the Council of Europe, as well as the law of the Court of Justice of the European Union and the European Court of Human Rights", the considerations on the observance of the principle of subsidiarity and proportionality within the offences against the human being consider not only the policy of the Council of Europe but also the one of the European Union.

Moreover, by Article 6 of T.U.E. (The Treaty on the European Union), as amended by the Treaty of Lisbon, the principle of protecting the human rights is reaffirmed as a fundamental principle of the Union.

Article 22 of the Romanian Constitution establishes the "right to life and physical and mental integrity. No one shall be subjected to torture and any kind of punishment or inhuman or degrading treatment". Corresponding to these constitutional provisions and as a result of Romania's accession to the Convention against torture and other inhuman or degrading treatment⁵, changes were made to

³ Raluca Miga Beșteliu, Catrinel Brumar, *The International Protection of the Human Rights: class notes*, Bucharest, Universul Juridic Publishing House, 2008, p. 111.

⁴ Petre Dungan, Tiberiu Medeanu, Viorel Pașca, *Manual of Criminal Law. Special part*, volume I, Bucharest, Universul Juridic Publishing House, 2010, page 15.

⁵ New York, the 10th of December 1984.

the Criminal Procedure Code by introducing in this respect the principle of “respect for human dignity”.

The actual regulatory field of this right belongs to the criminal law, because, according to art. 1 of the Criminal Code, the Romanian criminal law aims at “protecting (...) the human person and the rights thereof ...”

In applying these rules, in Title II of the Criminal Code, the offences against human beings are mentioned, including the right to life, protected from Chapter 1, entitled “Crimes against life, physical integrity and health.”

The observance of the right to life inevitably comes in contact with the criminal law of every society. The rules and sanctions, procedures and institutions of criminal law can have major consequences on the individual’s life. The international law seeks to ensure the circumscribing of the criminal law procedures and institutions to what is essential to achieve the justified objectives of the law⁶.

If we consider how today the distances between states decreased by creating means of international cooperation and by taking into account also the free movement of European citizens, we can easily reach the conclusion that for combating the crimes against the individual, the simple individual action of the states is no longer sufficient, imposing thus a superetatic action by creating a common legal framework.

The subsidiarity principle is a logical corollary of the primacy of the government’s action from the lower level, when it is centrally possible and efficient that nothing more than what is necessary should be done for achieving the goal⁷.

The subsidiarity principle is a form of control over the powers of the superetatic organization by creating a presumption in favour of an action of the Member State and is founded on respect for sovereignty of states, standing at the basis of the division of jurisdiction between the international and national level, in terms of protection of human rights⁸.

The subsidiarity of guaranteeing the human rights refers to the fact that the international structure interferes only as a last resort in the human rights violations, if the mechanisms of the states are not satisfactory. In this sense, art. 35 par.1 of the Convention precisely expresses this principle, and requires two conditions of admissibility of individual applications – the exhaustion of domestic remedies and the rule of six months after the last judgment given in the national system⁹. The Convention assigns first the task of ensuring the rights and freedoms covered by the

⁶ Ion Diaconu, *The Right of Human Being in the Contemporary International Law*, Bucharest, Lumina Lex Publishing House, 2001, page 139.

⁷ Jacques Pelkmans, *The European Integration. Economic Methods and Analyses. Second Edition, translation by Filip Gădiuță, Bucharest, The European Institution in Romania. Regia Autonomă a „Monitorului Oficial Publishing House, 2003, page 52.*

⁸ Marin Voicu, *The European Court of Human Rights: 50 years of existence*, Bucharest, Universul Juridic Publishing House, 2009, page 67.

⁹ Corneliu Bârsan, *The European Convention on Human Rights. Remarks on articles. Volume II. The procedure before the Court. The exercise of decisions*. C.H. Beck Publishing House, Bucharest, 2006, page 243.

Convention to the national court of law, which is also the common law judge of the Convention¹⁰.

In a constant law, the Court recalled that, in accordance with the subsidiarity principle, the same cannot take the place of national courts regarding the actual findings and the interpretation of domestic laws¹¹.

The exercise of fundamental rights and freedoms must not violate the order existing in society. The coexistence of rights and social protection are two commands underlying the limits laid down by the positive law. The interest is focused on identifying solutions to harmonize the public interest with the particular one and to guarantee all fundamental rights and freedoms in situations in which the exercise thereof could be limited or restricted¹².

The importance of the principle of proportionality is even greater as the European control of the national latitude tends to diminish; in fact it is considerably reduced, which sometimes causes some imprecision in the European law¹³.

We shall try below to provide a dual perspective on the principles of subsidiarity and proportionality on the right to life and from the perspective of the area of freedom, security and justice, especially if we consider that the way for cooperation within the right to life raises the attention of both the European Union and the Council of Europe.

Among the social values protected by the criminal law, an important place is occupied by the protection of individual and the rights thereof. This is done by enforcing a broad and varied framework of indictments, underlying the criminal liability for the infringements which affect or directly or indirectly endanger the rights or interests of the individual.

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¹⁰ Frédéric Sudre, *European and International Law of Human Rights*, translation by Raluca Bercea, Violeta-Irina Avram, Magdalena Roibu, Flaminia-Nera-Flavia Stârc-Meclejan, Andreea Verțeș-Olteanu, Iași, Polirom Publishing House, 2006, page 159.

¹¹ See: ECHR, decision of the 18th of March 2001 in this respect Lautsi și alții c. Italiei; ECHR, decision of the 24th of November 2009, in this respect J.H. și alți 23 c. Franței

¹² George Coca, *The General Interest and the Fundamental Human Rights*, Bucharest, Universul Juridic Publishing House, 2009, page 199.

¹³ Jean-François Renucci, *Treaty of European Law of Human Rights*, translation by Cătălina Constantin, Elena Bodea, Annelise Popa, scientific control Mona-Maria Pivniceru, Bucharest, Hamangiu Publishing House, 2009, page 114.

¹⁴ Ion Diaconu, *op. cit.*, p. 139.

If the Romanian criminal legislator of all times paid attention to the main European reformist trends, currently the harmonization of the Romanian criminal law with the European regulations becomes mandatory not only from the perspective of our country's accession to the European Union, but also as of the enforcement thereof on the line claimed by the transition from a totalitarian regime to a democratic and open society¹⁵.

The right to life generates the human rights inventory in the major international instruments in this field. What can be guaranteed by the right to life is the physical inviolability against any attempt to bring illegal damage. The holder of the right to life is the individual, as biological or legal entity. It should be noted that the holder is a human being and not one of the conditions of citizen, foreigner or stateless citizen. We're talking about a person, regardless of nationality, race, language, sex or religion¹⁶.

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The Frontiers of the Right to Life

We can talk about the violation of the right to life only if there is a right to life. This leads to the requirement to determine the specific timing when the right to life begins.

While the American Convention on Human Rights stipulates that the right to life must be protected "generally as of its conception", the other international instruments in this field remain silent, not considering the human being who is to be born.

The European Court of Human Rights avoided a conclusive position on this problematic issue, limitedly preferring to show that where a certain protection of the foetus could be considered as covered by the guarantees of Art. 2 of the Convention, the interference may be justified in certain circumstances¹⁷.

The Court showed that the starting point of life¹⁸ is related to the appreciation of the states, which should be recognized even in the context of an evolving interpretation of the Convention.

The issue of legal protection of the human embryo is the starting point of all laws relating to abortion, so the act of voluntarily interrupting a pregnancy is decriminalized in most European criminal laws. The problem which remains is that of the criminal protection granted to the embryo in the situation of involuntary

¹⁵ Ortansa Brezeanu *The Historical Dimension of Harmonising the Romanian Legislation with the European Union Regulations*, in the Criminal Law Magazine, no. 3/2009, R.A. „Monitorul Oficial” Publishing House, page 72-81.

¹⁶ Nasty Marian Vlădoiu, *The Constitutional Protection of Human Life, of Physical and Psychological Health. Doctrine Study and Law*. Bucharest, Hamangiu Publishing House, 2006, page 113; Ioan Muraru, Elena Simina Tănăsescu, *Constitutional Law and Political Institutions*, 14th Edition, volume I, Bucharest, C.H.Beck Publishing House, page 167.

¹⁷ Mihaile Udroui, Ovidiu Predescu, *The European Protection of Human Rights and the Romanian Criminal Process*, C.H.Beck Publishing House, Bucharest, 2008, page 67.

¹⁸ ECHR – The Decision of the Great Chamber on the 8th of July 2004 in this respect: Vo versus France.

interruption of pregnancy, i.e. the foetal harm despite the will of the mother, who wants to protect the pregnancy until birth¹⁹.

Thus, in the *Vo v. France* decision, the Court notes that “there is no European consensus on the scientific and legal definition of the beginning of life”. The starting point of the right to life is clearly left to the appreciation granted to the State in this respect.

The Court has found thus the existence of both a legal impossibility and an ethical impossibility to rule on this matter, given the lack of a common or prevailing definition at the European level for the notion of person and the appreciation of states.

Regarding the moment when, according to the criminal law, the right to life is born, the literature considers that “there is no right to life on the moment of conception or when the child engages in the process of birth, but only from the moment when this process is finally over, and the child is born and starts its life outside the womb”²⁰.

The Criminal Code in force considers that the Romanian legislator understood, however, to grant some protection to the foetus by criminalizing as aggravated murder, the death whose passive subject is the pregnant woman (art. 176 para. 1 letter e), regardless of the pregnancy stage or by incriminating the abortion (art. 185 of the Criminal Code), where the legislator has sought both the protection of life, limb or health of the pregnant woman and the foetus protection.

With reference to this issue, the EU Member States adopted the most varied solutions, i.e. the full protection from the conception to the lack of recognition of the right to life throughout the intrauterine life.

The Criminal Code incriminated, before the adoption of Decree-Law no. 1/1989, the abortion induced by woman. Thus, before the adoption of the decree mentioned above, this act was a criminal deed under article 186 of the Criminal Code, and had the legal purpose of protecting both the life and health of the pregnant women and the intrauterine foetal life and the material subject of the crime consisted not only in the pregnant woman's body, but also in the product of conception – the foetus.

However, the passive subject of the offence was considered the society, and not a pregnant woman or the foetus. It was the society, considering that the “protection of the social values meant the protection of the society, the latter being concerned with the fact that the nation should not be weakened by the forced decrease of the normal number of births”²¹.

¹⁹ Bertrand Mathieu, *Le droit à la vie: dans les jurisprudences constitutionnelles et conventionnelles européennes*, Editura Consiliului European, Belgium, 2005, page 35.

²⁰ Octavia Loghin, Tudorel Toader, *Romanian Criminal Law. Special Part*. 4th Edition, Casa de Editură și Presă Șansa, Bucharest, page 87.

²¹ V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănescu, V. Roșca, *Theoretical Explanations on the Romanian Criminal Code. Special Part*. Volume III, Bucharest, Academiei Române Publishing House, All Beck Publishing House, 1970, 2003, page 251.

In the new Criminal Code, a new offence – the foetal injury (art. 202) - comes to supplement a legal void. This indictment provides the protection of the emerging life, on a period remaining empty in the current criminal law. We're talking about the time interval between the inception of the birth process, time as of which the act cannot be classified as a crime of abortion, and the time when this process ends, time as of which there is a passive subject of crime against the individual.

The experience has shown that many crimes can be committed within this period, resulting in the foetal death or injury, from medical negligence cases in assisting the birth, resulting in foetal death or injury, to intentional actions.

At the same time, the acts of violence on the mother during pregnancy have been incriminated, which were not committed with intent to cause abortion nor they have had this result, but resulted in injuring the foetus and, finally, in the bodily injury or even death of the child after birth. This new indictment is able to resolve as well the issues raised by the hypothesis of aggression committed on a pregnant woman or directly on the foetus after completing the first six months of intrauterine life. These problems are related to the fact that, in terms of medico-legal abortion, we can speak of abortion only in the first 24 weeks of pregnancy; as of this moment, the expulsion of the conception product, for any reason whatsoever, is a premature birth, not an abortion.

The right to death - euthanasia and medical assisted suicide

Alongside the right to life there is the question of a concomitant right to death. Thus, the doctrine deems necessary to establish a right to death, not to be in favour of crime and suicide, but only to protect the freedom of the terminally ill to refuse to continue to live and to extend an interminable agony²².

Hence, an interesting problem that arose - and always rises - in connection with the human rights, i.e. the right to life, is the one on the lawful or unlawful character of euthanasia.

The origin of the concept is rooted in the Greek words "EU", which mean "good, right" and "Thanatos", which means "death". In a free translation, euthanasia would be inducing an easy death, shortening the suffering, sometimes terrifying, of the physical end²³.

The main arguments used by lawyers who refuse to raise the criminality of death upon request are the ambiguous concepts of "mercy" and "consent to euthanasia", considering that such recognition of the right to euthanasia can lead to many abuses²⁴. Euthanasia is defined as the decision and the process by which a doctor helps a patient requesting to die easily.

The difference between euthanasia and medically assisted suicide resides in how this action is performed: in euthanasia, the physician administers the lethal medication himself, while in the case of assisted suicide the patient is the one doing this, by administering this medication recommended by the doctor for this purpose²⁵.

As regards the law of the Court in Strasbourg related to whether art. 2 of the Convention includes the right of an individual to die, obviously in relation to euthanasia or medically assisted suicide, the European Court has granted states some latitude in the matters of enforcing (prohibitively or permissively) the euthanasia or assisted suicide²⁶.

In 1999, the Assembly of the European Parliamentary Council adopted the Recommendation no. 1418/1999 on the protection of human rights and the right to dignity of terminally ill and dying, an act that emphasizes the importance of making a medical decision in the terminal phase of life and encourages Member States to provide in their domestic law provisions that protect the dignity of terminally ill and dying, in all aspects, especially by maintaining an absolute prohibition of intentionally putting an end to their lives, given that the right to life is guaranteed by art. 2 of the Convention, and that the wish to die expressed by them can never be a

²² Dana-Luiza Tămășanu, *Euthanasia in the Romanian Criminal Law*. Dreptul Magazine, no. 5/2005, Bucharest, Uniunea juriștilor din România, 2005, p. 163-179.

²³ Alexandru Boroi, *Crimes against Life*, Bucharest, All Beck Publishing House, 1999, page 31.

²⁴ Victor Duculescu, *The Legal Protection of the Human Rights*, Bucharest, Lumina Lex Publishing House, 2008, page 316.

²⁵ Adrian-Milutin Truichici, *Theoretical and Practical Aspects of Comparative Law regarding Euthanasia*, Dreptul Magazine, no. 11/2007, Bucharest, Uniunea juriștilor din România, C.H. Beck Publishing House, 2007, page 238-245.

²⁶ Radu Chiriță, *The European Convention of the Human Rights. Comments and Explanations*. Volume I, C.H. Beck publishing House, 2007, page 97.

basis in law for death caused by a third party and cannot serve as legal justification for the measures designed to generate death²⁷.

The right to life ceases with the generation of death. The final moment of a person's life is thus a problem, if we consider that, except in rare cases, the death of the individual is not like a flash, life doesn't suddenly leave the cerebral hemisphere and even less the other organs or tissues²⁸.

The instantaneous, brutal death, which ends all vital functions, is exceptional. In general, especially in pathological cases, death occurs over time²⁹. In forensic medicine, the stages of death are determined as the following: agony, clinical death and biological death. The agony is a struggle between the cortex and the subcortical layers. In this stage, respiratory, circulation and central nervous system troubles occur.

The clinical death begins by stopping the breathing and the circulation. The clinical death takes as long as the brain can keep alive in the lack of oxygen - 3 to 5 minutes.

Biological death begins after the 5 minutes and is characterized, at onset, by stopping the breathing, the circulation and the central nervous system³⁰.

De lege lata, the existing Criminal Code contains no separate provision for euthanasia. Thus, the person accused of euthanasia practices shall answer for the offence of simple or qualified murder, even where the acts or omissions thereof were committed out of a sense of mercy, in order to end the prolonged suffering of the victim, as long as the person was not brain dead.

We can identify provisions relating to euthanasia, however, in the medical ethics code³¹ and we refer to art. 121 which states that "euthanasia is strictly forbidden, i.e. the use of substances or methods to cause death to a patient, regardless of the severity and prognosis of the illness, even though it was urged by a fully conscious patient", and art. 122 of the same code which states that: "The doctor will not assist or urge to suicide or self hurting through advice, recommendations, lending tools, empowering. The doctor will refuse any explanation or help in this respect".

De lege ferenda a new indictment is added, "Death upon the request of the victim" (article 190 of the new Criminal Code). This indictment is actually a return

²⁷ Adrian-Milutin Truichici, *Discussions on the Legal Limits of the Right to Life of the Individual*, Dreptul Magazine, no. 12/2007, Bucharest, Uniunea juriștilor din România, C.H. Beck publishing House, 2007, page 187-198.

²⁸ Ion Dobrinescu, *Crimes against Human Life*. Bucharest, Academiei Republicii Socialiste România Publishing House, Romania, 1987, page 23.

²⁹ Gheorghe Scripcaru, Vasile Astărăstoiaie, *Legal Medecine*, Bucharest, Didactică și pedagogică Publishing House, 1993, page 66.

³⁰ Dana-Luiza Tămășanu, *op. cit.*, p. 163-179.

³¹ Decision no. 3 of the 25th of March 2005, on enforcing the statute and the Medical Ethical Code of the College of Doctors in Romania, Appendix no. 2 regarding the Medical Ethical Code of the College of Doctors in Romania, published in the Official Gazette no. 418 of the 18th of May 2005.

to an offence existing in the Criminal Code of 1936 (Art. 468 para. 1 and 3) where two mitigating options of intentional death were provided.

The regulation of the new Criminal Code actually prohibits explicitly euthanasia, emphasizing the social importance of human life regardless of the conditions and also gives a warning to those who want to end life. The provision of this mitigating option to the crime of murder does not fall only under our criminal law tradition but also under a tradition of European criminal codes.

A complete lack of sanctioning this act could leave room for abuses and violations of the individual rights to life; a more lenient sanction was however necessary given the seriousness of this act.

The proportionality and subsidiarity principles influence, undoubtedly, the regulations of various states on the right to life. Being a very sensitive field, we can see the broad discretion left to the states, which is why there are fairly large discrepancies between different regulations.

We cannot help but ask ourselves whether, if a future European Criminal Code is enforced, this will set a common standard on the limits of the right to life.

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