THE RIGHT TO LIFE AND EUTHANASIA IN THE LIGHT OF THE (EUROPEAN) CONVENTION FOR PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, OF THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND OF THE ROMANIAN CRIMINAL LAW

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Abstract

The authors use this study to make a critical analysis of the (European) Convention for Protection of Human Rights and Fundamental Freedoms, of other international documents regarding the freedoms of men, in particular the right to life, as well as of the way the requirements thereof are applied in practice by the Romanian criminal law. Furthermore, the authors make a comparative analysis of the way the law in certain European states approached this matter.

In this context, the study presents certain topics regarding determination of the right to life, in connection with both the moment when life starts, as well as, and in particular, the moment when life ends, fostering some reflections on the existence of a right to death, correlated with the right to life.

Keywords: *human rights and fundamental freedoms; right to life; start of life; end of life; euthanasia; legal practice; Romanian criminal law*

1. Preliminary considerations in connection with the right to life

The main objective of any criminal reform have to be represented by the observance of the human rights, with the Member States of the European Union (hereinafter the EU) having the duty to adapt their criminal legislations to the demands and requirements of the (European) Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention), whose provisions are the European standards for the domestic legislations[1].

Protection of the individual and of his/her rights ranks high among the social values defended by the criminal legislation, with a wide and diverse framework of criminalization, based on which the criminal liability for the illegal deeds which impair, directly or indirectly, on the multiple rights or interests of an individual, is triggered[2].

[1] See G. Antoniu and others, *Reforma legislaţiei penale*, Academiei Române Publishing House, Bucharest, 2003, p. S248.

[2] For instance, both the deeds which are directed against life, bodily integrity and health, freedom, sexual inviolability and individual dignity, as well as other categories of deeds which are liable to impair on the human interests (deeds against the private wealth, family, public health, deeds regarding assistance of the persons in danger), are criminalized.

The right to life[3], devoted under the major international instruments regarding human rights[4], is a fundamental principle and the prerequisite for the exercise of the other guaranteed rights[5], and, despite its importance, is subject to a double limitation: under art. 2 and art. 15, respectively, of the European Convention[6].

Unlike art. 6 item 1 of the Pact, art. 2 of the European Convention does not expressly recognize the right to life, but imposes to the national authorities an obligation to protect the right of everyone to life, as well as an interdiction to deliberately deprive of life[7]. The right guaranteed under art. 2 of the European Convention "appears as essential in the system of rights and fundamental freedoms defended under the applicable European Convention,, because, unless this right is devoted and effectively protected, the protection of the other rights would remain devoid of purpose".[8] Para. 2 of article 2 lists in a strict and exhaustive manner the cases in which it is allowed to intentionally cause death, the paragraph being strictly interpreted in the case law of the European Court[9].

The right to physical life should not be confused with the right to a safe life[10], the latter being an economic and social right[11].

The Romanian criminal legislation in-force protects the life of the individual by criminalizing, under a distinct section titled "Manslaughter", the deeds whereby the life of another person is suppressed. This protection starts from the very moment when the child is born and starts to exist independently of the mother's body and lasts until the life of the individual ends[12] (biological death)[13].

Killing of human beings with sever malformations[14] triggered controversies, with certain authors being of the opinion that killing them should not be classified as murder, while others consider that only those human beings who have such malformations that they could be considered humans can be killed without committing a murder[15].

In respect of the right to life, the state has both a negative substantial obligation and a positive substantial obligation, as resulting from the case-law of the European Court of Human Rights[16], the states

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[3] The right to life is the most important human right, being protected in all time and under all legislations; it is an absolute right, *erga omnes* binding, and all the members of the society have the obligation to observe it and refrain from any action which could impair on or endanger this supreme social value.

[4] Under art. 3 of the Universal Declaration of the Human Rights it is proclaimed that "Everyone has the right to life, liberty and security of person", while under art. 6 item 1 of the International Pact about the Civil and Political Rights (hereinafter the Pact) it is determined 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." Similarly, under art. 2 paras. 1 and 2 of the Charter of Fundamental Rights of the European Union it is articulated that "Everyone has the right to life" and "No one shall be condemned to the death penalty, or executed." At the same time, the right to life is the first substantial right stipulated in article 2 of the European Convention, guaranteed to any person, thus attesting one of the fundamental values of the democratic societies which form the European Council [See the European Court of Human Rights (ECHR), decision of 27 September 1995, in the case *McCann et.al. vs. Great Britain*, para. 147. Please note that all the resolutions or decisions referred to hereunder are available on the ECHR website, www.echr.coe.int].

[5] See J.-F. Renucci, *Droit européen des droits de l'Homme*, LGDJ, Paris, 2007, p. 77.

[6] *Ibidem*, pp. 88 and 89.

[7] See: L. Zwaak, *Right to life*, in P. van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, *Theory and practice of the European Convention on Human Rights*, 4th ed., Intersentia, Antwerpen-Oxford, 2006, p. 352, *apud* M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului şi procesul penal român*, C.H. Beck Publishing House, Bucharest, 2008, p. 63.

[8] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, vol. I, All Beck Publishing House, Bucharest, 2005, p. 156.

[9] See: ECHR, decision of 29 April 2002, in the case *Pretty vs Great Britain*, para. 37; ECHR, decision of 26 February 2004, in the case *Nachova et.al. vs Bulgaria*, para. 37, para. 92.

[10] For instance, to decent living conditions, the right to a certain standard of living or the right of the individual to the free development of his/her personality.

[11] See G. Guillaume, *Article 2*, in L.-E. Pettiti, E. Decaux, P.-H. Imbert, *La Convention Européenne des Droits de L'Homme. Commentaire article par article*, Editions Economica, Paris, 2000, pp. 147 and 148.

[12] Protection of the right to life is done relative to any individual, irrespective if the victim is young or old, healthy or ill, man or woman, was viable (had the capacity of living for many years) and was dying when killed.

[13] For details, see M. Udroiu, O. Predescu, *op. cit.*, pp. 62 and 63.

[14] For instance two-headed or armless individuals, etc.

[15] See G. Antoniu, *Ocrotirea penală a vieții persoanei*, in RDP no. 1/2002, p. 16.

[16] See: ECHR, decision of 17 January 2002, in the case *Calvelli and Ciglio vs Italy*, para. 8-49; ECHR, decision of 9 June 1998 in the case *L.C.B. vs. Great Britain*, para. 36; ECHR, decision of 28 October 1998 in the case *Osman vs. Great Britain*, para. 115 and 116; ECHR, decision of 7 February 2006, in the case *Scavuzzo-Hager vs Switzerland*, para. 51; ECHR, decision of 28 July 1998, in the case *Ergi vs. Turkey*, para. 79; ECHR, Great Chamber decision of 30 November 2004, in the case *Öneryildiz vs. Turkey*, para. 89 and 90; ECHR, decision of 9 November 2006, in the case *Luluiev vs. Russia*, para. 76; ECHR, decision of 28 March 2000, in the case *Mahmut Kaya vs Turkey*, para. 86; ECHR, decision of 7 February 2006, in the case *Scavuzzo-Hager vs. Switzerland*, para. 66; ECHR, decision of 6 October 2005, in the case *H.Y. and H.U.Y vs Turkey*, para. 104; ECHR, decision of 1 June 2006, in the case *Tais vs. France*, para. 84; ECHR, decision of 27 June 2000, in the case *Salman vs. Turkey*, para. 84; ECHR, decision of 18 June 2002, in the

being bound not only to refrain from illegally and deliberately causing death, but also to take measures to protect the life of the individuals under their jurisdiction[17].

2. Determination of the content of the right to life

The right to life stirred discussions in connection with the starting and ending moment of life (existence, correlated to the right to life, of a right to death), as, paradoxically, the right to life does not present the stability of well outlined determinations[18], in the context of the absence, in the international documents[19], of a legal definition which would be unanimously accepted regarding the concept of "life"[20].

A. Commencement of the right to life

Determination of the initial moment of life was subject to the case-law of the European Commission of Human Rights (European Commission)[21], in respect of abortion and the rights of the unborn child, namely that art. 2 of the European Convention does not afford to the fetus the absolute right to life, as the life of the fetus is organically connected to the life of the woman who carries it and it cannot be considered independently[22].

From the perspective of the human embryo, as a new life starts, according to the biological science at the same time with fecundation, we could speak about a relative[23] right to life of the embryo. The technical literature featured the opinion that recognition of the right to life of the fetus was a compromise between the life to be born and the right to abortion, as an expression of the interests of the pregnant women, with the scale being tipped in favor of the latter[24]. Nevertheless, the European Court displayed prudence and has never produced a peremptory answer in this matter[25]. Subsequently, the European Court determined that the embryos collected from the petitioner are not afforded protection in the meaning of art. 2 of the European Convention, having no right to life[26].

The EU Member States adopted different solutions, ranging from full protection from the very moment of conception[27] to not recognizing the right to life during the entire life in the uterus. In England, abortion is allowed up to the 22nd week since conception and the case-law allows abortion up to the validity limit without the fetus being afforded the status of born child. In Germany, the Constitutional Court decided in

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case *Orhan vs. Turkey*, para. 326; ECHR, the decision dated 10 April 2002, in the case *Tanli v. Turkey,* para. 143-146; ECHR, the decision dated 14 March 2002, in the case *Paul and Audrey Edwards v. the United Kingdom,* paras. 54-56, 60 and 61, 64; ECHR, the decision dated 23 May 2001 in the case *Denizci v. Turkey,* para. 376 and 377; ECHR, the decision dated 24 October 2002, in the case *Mastromatteo v. Italy,* para. 69-76; ECHR, the decision dated 9 June 1998, in the case *L.C.B. v. the United Kingdom,* paras. 36; ECHR, the decision dated 8 July 1999, in the case *Çakici v. Turkey,* para. 86 and 87; ECHR, the decision dated 9 May 2000, in the case *Ismail Ertak v. Turkey,* para. 132 and 133; ECHR, the decision dated 13 June 2002, in the case *Anghelova v. Bulgaria,* para. 130, *apud* M. Udroiu, O. Predescu, *op. cit.*, pp. 64 and 65.

[17] See A. Filipaş*, Drept penal român. Partea specială*, Universul Juridic Publishing House, Bucharest, 2008, pp. 95-96.

[18] See G. A. Cudriţescu*, Discuţii referitoare la limitele legale ale dreptului la viaţă*, in Dreptul no. 12/2007, p. 187.

[19] The international legal instruments limit to stating the right to life, without defining the term "life" and this triggers the uncertainty regarding the moment when protection of this right commences: since birth or since conception. Most of the international texts refer to a right which protects the living being, and not the one who is about to be born, except for the American Convention of Human Rights which, under art. 4, stipulates that the right to life must be protected since the very moment of the conception.

[20] See Fr. Sudre*, Drept european şi internaţional al drepturilor omului,* Polirom Publishing House, Bucharest, 2006, p. 213, *apud* M. Udroiu, O. Predescu, *op. cit.*, p. 66.

[21] See: the European Commission, the decision dated May 13, 1980, in the case *X. v. the United Kingdom,* paras. 19; to the same end, see also the Report of the European Commission dated 12 July 1977, in the case *Brüggemann and Scheuten v. Germany*, the European Commission, the decision dated 19 May 1992, in the case H. *v. Norway*.

[22] See M. Udroiu, O. Predescu, *op. cit*., p. 67.

[23] Legally, this right is a relative one as long as the right to dispose thereof is stipulated in certain legislations by not sanctioning interruption of the pregnancy until a certain age of the fetus.

[24] See G.A. Cudriţescu*, op. cit.*, pp. 188 and 189.

[25] See ECHR, the decision of the Grand Chamber dated 8 July 2004, in the case *Vo v. France,* paras. 84 and 85. The Grand Chamber of the European Court stated that the commencement of life rests with the appreciation margin of the state, without any European consensus regarding the nature and status of the embryo and/or fetus being reached, although they start to enjoy a certain degree of protection in the light of the scientific progress and of the potential consequences of the studies in the field of genetic engineering or medically-assisted procreation. The common denominator is represented at the most by the embryo and/or fetus belonging to the human species, without however making the embryo and/or fetus a person in the meaning of art. 2 of the European Convention, as, responding for the time being, to the question whether a child to be born is a person or not is neither desirable, nor possible.

[26] See ECHR, the decision of the Grand Chamber dated 10 April 2007, in the case *Evans v. the United Kingdom,* paras. 56.

[27] For instance, in Ireland.

favor of the protection of the human life in the making through the means of the criminal law, limiting abortion to the moment when the fetus is 12 weeks old so that the state would strike a fragile balance between the fundamental rights of the mother and the ones of the being to be born. In France, self-induced abortion was decriminalized, in the spirit of protecting women's health. Nevertheless, the French doctrine considers that, in case of the human embryo, not the right to life is protected, but an interest of the state in connection with a potential individual, deciding that involuntary interruption of the pregnancy amounts to manslaughter, subject to the viability of the fetus[28].

In Romania, *de lege lata*, the problem of the human embryo is not approached, which renders difficult to determine the starting moment of the right to life of an individual. In the Romanian criminal doctrine, the prevailing opinion reveals that the moment when an individual protected by criminalizing murder[29] appears is that of the complete separation of the fetus from the navel-string of the mother, namely the moment when the product of conception is no longer a fetus, but a new-born who starts living a life independently of that of the mother[30].

The problem of genetic manipulations represented a matter of concern in several international legal documents[31], the principles laid-down being though taken-over in the national legislation by only few states[32].

In our country, neither the Criminal Code in effect, nor the new Criminal Code[33] contains any provisions regarding criminalization of certain deeds in connection with genetic manipulations. *De lege ferenda*, it would have reflected on the introduction in the Law for application of the new Criminal Code of the relevant provisions from the former new Criminal Code[34], title I, chapter IV, entitled "Crimes and offences regarding genetic manipulation" (art. 193-195), which criminalized deeds, such as genotype alteration, illegal creation of human embryos and creation, by cloning, of genetically identical human beings, alive or dead.

B. Euthanasia[35]

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[28] G.A. Cudrițescu*, op. cit.*, pp. 188 and 189.

[29] Similarly, in case of infanticide, the killing of the new-born child is criminalized.

Nevertheless, in case of first degree murder [art. 176 para. (1) letter a) of the Criminal code] whose passive subject is the pregnant woman, irrespective of how advanced the pregnancy is, the legislative solution affords a certain degree of protection to the fetus under art. 2 of the European Convention, the first degree of the murder offence deriving from the circumstance that the perpetrator - who, being aware of the pregnancy, intends to harm the life of the pregnant woman - unavoidably harms the right to life of the fetus [see R.M. Stănoiu*, Omuciderea*, in V. Dongoroz and others, *Explicații teoretice ale Codului penal român. Partea specială*, vol. III, Academiei Publishing House, Bucharest, 1971, p. 199; G. Antoniu*, Omorul deosebit de grav*, in T. Vasiliu, D. Pavel (coord.) and others, *Codul penal, comentat şi adnotat. Partea specială*, vol. I, Ed. Ştiințifică şi Pedagogică , Bucharest, 1975, pp. 95 and 96].

In case of the illegal abortion, the opinion of the majority is expressed towards the fact that the main object of the offence is represented by both protection of life, bodily integrity or health of the pregnant woman, as well as protection of the fetus, to whom, under such circumstances is afforded protection under art. 2 of the European Convention, without however being secured any absolute right to life (see: R.M. Stănoiu*, Omuciderea, op. cit.*, pp. 254-257; V. Cioclei*, Drept penal. Partea specială. Infracțiuni contra persoanei*, Universul Juridic Publishing House, Bucharest, 2007, p. 141; R. Chiriță*, Dreptul constituțional la viață şi dreptul penal*, in SUBB no. 2/2001, pp. 134 and following.; T. Avrigeanu*, Provocarea ilegală a avortului*, in RDP no. 2/1997, p. 30; S. Bogdan*, Drept penal. Partea specială*, vol. I, Sfera Juridică Publishing House, ed. a 2-a, 2007, pp. 97 and 98, *apud* M. Udroiu, O. Predescu, *op. cit.*, p. 71).

[30] See: G. Antoniu*, Ocrotirea penală a vieții persoanei*, *cit. supra,* p. 13; V. Cioclei*, Drept penal. Partea Specială. Infracțiuni contra persoanei*, Universul Juridic Publishing House, Bucharest, 2007, pp. 13 and following; A. Petruş*, Debutul protecției dreptului la viață*, in CDP no. 4/2006, pp. 87-91; A. Filipaş*, Drept penal român. Partea specială*, *op. cit.*, pp. 95 and 96, *apud* M. Udroiu, O. Predescu, *op. cit.*, p. 70.

[31] For instance: The Universal Declaration of the Human Genotype and Human Rights; the European Convention for Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the Convention regarding the Rights of Man and Biomedicine and the additional Protocols thereto.

[32] For instance, France banned the experiments on human embryos, as well as obtaining such embryos for research purposes *(*G.A. Cudrițescu*, op. cit.*, p. 192), and the Swiss Constitution contains provisions regarding cloning *(*V. Duculescu, C. Călinoiu, G. Duculescu*, Drept constituțional comparat. Tratat*, vol. II, Lumina Lex Publishing House, Bucharest, 2002, p. 73); *in vitro* fecundation (the right to procreate and to assisted reproduction) is admitted, under certain conditions in France.

[33] See Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 510 of 24 July 2009, as subsequently amended and completed.

[34] See Law no. 301/2004, published in the Official Gazette no. 575 of 29 June 2004.

[35] Etymologically, the word euthanasia comes from the Greek εύ (which means "good") and τάναθος (which means "death") [see M. Pătraşcu, *Abordarea sfârşitului vieții – eutanasia umană sau intervenția nedreaptă a omului în planul lui Dumnezeu*, in Studia Universitatis Babeş-Bolyai, Bioethica no. 2/2010, p. 55, available also at http://www.studia.ubbcluj.ro/download/pdf/575.pdf (consulted on 4 October 2012)]. Euthanasia means death induced to a patient, on purpose of preventing submitting him/her to unbearable physical and mental suffering. For a medical, philosophical, theological and sociological analysis of euthanasia, see: C. Andre*, Euthanasie et droit pénal: la loi peut elle définir l'exception?*, in Revue de science criminelle et de droit pénal comparé no.

The problem which stirs discussions is represented by the extent to which art. 2 of the European Convention contains also the right to die, meaning active or passive euthanasia [36]or assisted medical suicide[37].

In connection with the ending moment of life, the European Court stated that art. 2 of the European Convention has no connection whatsoever with the quality of life or with what a person chooses to do with his/her own life, without risking to be interpreted as affording the right to die (opposite to the right to life); in this context, art. 2 could not create a right to self-determination, according to which an individual could choose death, rather than life[38], either with the help of a third party, either with the help of a public authority. In this context, certain authors, appreciated, from the perspective of the law concept, that we cannot speak about a right to life, but rather about a general obligation of the likes not to harm the life of a human being. The Arguments of those who supported this point of view originates in the fact that the holder of the right to life can neither dispose of this right and nor give it up under a legal instrument[39]. Therefore, we would be faced with an obligation to live, of the very holder of this right.

Similarly, the European Court leaves some room for the states to appreciate in terms of a permissive or prohibitive regulation of euthanasia or of the medically assisted suicide[40].

The Romanian criminal doctrine[41] has constantly argued that, by reference to the vital functions of the body (respiratory, cardiologic and circulatory and cerebral), the final moment of life coincides with the brain death.

The end of life is important in determining the legal classification of the deed which causes bodily harm to a person who has been in a vegetative state for a longer period of time[42], without however being a brain death state, and whose medical documents certainly indicate no chances of survival. In the current status of the criminal doctrine and case-law, although all medical documents would indicate death in the future, in absence of the possibility to use the passive euthanasia practices, until the moment when the brain death occurs, prosecution or judgment could only target an attempt of murder (murder, second degree murder or first degree murder - art. 174-176 of the Criminal Code) or the aggravated bodily harm, provided by art. 182 of the Criminal Code (in case the violent acts were aimed at suppressing life). *De lege ferenda*, the problem

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1/2004, pp. 44 and following.; I. Marin*, L'euthanasie, question éthique, juridique, médicale ou politique?*, Recueil Dalloz, hors-serie sur „Le corps saisi par la justice" May, 2001, p. 127 and following. For an interdisciplinary analysis of the euthanasia, see: P. Lettelier a.o.*, Ethical eye: Euthanasia: Ethical and human aspects*, vol. I, Council of Europe Publishing, Starsbourg, 2003; Y. Engler a.o.*, Ethical eye: Euthanasia: National and European perspectives*, vol. II, Council of Europe Publishing, Starsbourg, 2004; J. Pradel*, Droit pénal comparé,* 2e éd., Dalloz, 2002, pp. 194-197, as well as the compared law study *L' Euthanasie*, available at www.senat.fr., *apud* M. Udroiu, O. Predescu, *op. cit.*, p. 72

[36] Active euthanasia is the action of a person whereby the life of a patient is suppressed, with or without the consent thereof, for instance the action of a physician who gives a lethal injection to a patient in a terminal stage of the illness (see C. Andre*, op. cit.*, p. 44).

Passive or indirect euthanasia means causing the death of a patient by non performing an act or suspending performance thereof having as consequence the death, such as deliberate omission by the physician to given a certain treatment to an ailing person on purpose of causing death, interrupting operation of the equipments which kept a certain person alive [for an analysis of the forms of the passive euthanasia, see D. Bailleul*, Le droit de mourir au nom de la dignité humaine*, Jurisclassseur periodique, semaine juridique no. 79 (23)/2005, pp. 1055-1064].

The difference between the two names of the euthanasia was criticized in the doctrine for the inadequacy of the term "passive", as the interruption of the treatment generally implies a certain act and, consequently, entails an active attitude (see J.L. Baudouin, D. Blondeau, *Ethique de la mort et droit de la mort*, PUF, Paris, 1993, pp. 105 and 106, *apud* M. Udroiu, O. Predescu, *op. cit.*, pp. 72 and 73).

[37]Medically assisted suicide implies the help given by a physician to a patient who intends to commit suicide, by providing or indicating the lethal means. In case of the assisted suicide, the patient is the one to administer himself/herself the medication by the physician, such medication being particularly adapted to speed-up the death and blur suffering as much as possible. Thus, assisted suicide differs from the passive euthanasia (see N.M. Vlădoiu, *Protecţia constituţională a vieţii, integrităţii fizice şi a integrităţii psihice. Studiu de doctrină şi jurisprudenţă,* Ed. Hamangiu, Bucharest, 2006).

[38] Life, as biological quality of the individual, is the synthetic and fundamental attribute in absence of which no other qualities of the person could exist. Moreover, life of the individuals is a supreme condition of the very existence of the society, and the human community of the social cohabitation of the individuals would not be possible should such condition not be met; consequently, from a biological value, life becomes a social and legal value (see R.M. Stănoiu, *Omuciderea, op. cit.*, p. 179).

[39] See P. Roubier, *Droits subjectifs et situations juridiques,* Paris, Dalloz, 1963, p. 50, *apud* N.M. Vlădoiu, *op. cit.,* p. 18.

[40] See ECHR, the decision dated 29 April 2002, in the case *Pretty v. the United Kingdom,* paras. 39. For a detailed analysis of this decision, see A. Pedain, *The human rights dimension of the Diane Pretty Case*, Cambridge Law Journal no. 62/2003, pp. 181-206, *apud* M. Udroiu, O. Predescu, *op. cit.*, p. 73.

[41] See A. Filipaş, *Drept penal român. Partea specială, op. cit.*, pp. 94-137.

[42] Development of the medical science made possible keeping a person in vegetative stage for long periods of time, provided that the brain death does not occur.

of the moment when the death occurs should be subject to a wider approach, taken into account, in particular, the special global development of the medical techniques[43].

As most of the criminal legislations, the Romanian criminal legislation does not criminalize suicide, based on the concept according to which the law does not involve in such a self-suppression decision and on the ground that the law regulates the social relations (the relations in which the individual enters with his/her likes, not with himself/herself).

Art. 179 of the Civil Code sanctions determining to or easing suicide of a person, provided that the suicide or attempted suicide took place; thus, not only the action of a person who takes another person's life directly and immediately is criminalized (in this case, one's own will), as suicide is not considered a violation of the right to life, but, in reality, a contribution to murder is criminalized, considering that such deeds impair equally on the right to life of another person[44].

Suicide facilitation includes also the situation when the person committing suicide is assisted by other persons or by a physician, who prescribe or recommend the products to take to accomplish the fatal decision[45].

Moreover, if a person coerces another person to commit suicide (for instance to jump from a higher floor[46]), the offence will be second degree murder [provided for by art. 174 by reference with art. 175 para. (1) letter c) of the Criminal Code] and not suicide determination (provided by art. 179 of the Criminal Code), since for the offence of suicide determination or facilitation to exist, the victim should not be coerced to perform the action of taking his/her life, but have the possibility of deciding freely whether to commit suicide or not[47].

In Romania, *de lege lata* – justified by the interest of the society to protect the life of the individual - murder upon request of by consent are not admitted, not even when death would be a better solution for the patient[48], but only a legal mitigating circumstance could occur in favor of the author[49].

At European level, the legislative solutions regarding the assisted suicide differ: the criminal codes in Luxembourg, Spain or France sanction killing on request in the same way as an ordinary murder, while some other countries regulated under the criminal legislation the possibility of consented death, with a mitigated penalty[50]. In the United States of America, the case-law is not at all consistent in solving the cases of killing on request: usually, the courts consider these deeds as murder or mitigated murder, but in several cases the courts decided to acquit the defendants for murders committed out of mercy or on request[51].

Passive euthanasia (refusal to continue with the prescribed medication to reach death) is approached in a similar manner, with the grounding that, in this case too, an explicit and final decision of the patient is necessary. In the case-law of the European Court, it was stated that a person may claim the right to exercise the choice of death by refusing to agree to a treatment which could result into prolonging his/her life[52].

The researches conducted by the European Court indicated the fact that certain Member States of the Council of Europe have applied specific regulations regarding the access to substances liable to facilitate suicide. In Belgium, the Law of 28 May 2002 defined euthanasia as an act of a third party whereby the life of an individual is deliberately ended, upon the request of the latter. Consequently, a pharmacist who releases a "lethal substance" does not commit an offence in case this is based on a prescription in which the physician explicitly indicated that he/she acted in accordance with the law. The application rules lay-down the

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[43] See M. Udroiu, O. Predescu, *op. cit*., p. 74.

[44] See A. Boroi, *Infracțiunea de determinare sau înlesnirea sinuciderii*, in Dreptul no. 7/1998, p. 60.

[45] See G. Antoniu, *Ocrotirea penală a vieții persoanei, cit. supra.*, p. 10.

[46] See: Supreme Court, Criminal Section, decision no. 3101/1979, in RRD no. 9/1979, pp. 66 and following; High Court of Cassation and Justice, Criminal Section, decision no. 6567/2004, available at www.scj.ro.

[47] See M. Udroiu, O. Predescu, *op. cit.*, p. 75.

[48] The Dutch legislation recognized under the Law on the control of euthanasia and assisted suicide of 2001, both the right of the individual to euthanasia (through the intervention of the physician who gives the lethal substance), as well as the right to suicide with medical assistance (assisted suicide), with the patient taking the lethal substance recommended by the physician himself/herself, without any criminal liability being incurred by the persons involved in the death of the subject, provided that the suffering is irreversible (the condition of the patient would gradually get worse; the suffering is unbearable; the patient voices repeatedly and voluntarily his/her request; the action is medically justified, with a detailed argumentation of why the desire of the patient should be respected being provided by the physician; a second medical opinion from an independent specialist was sought in the respective case).

[49] See G. Antoniu, *Ocrotirea penală a vieții persoanei, cit. supra.*, pp. 11 and 12.

[50] For instance, the German criminal code stipulated for the first time the need for an explicit and reliable request on the part of the victim, in which case, the killing on request is deed a privileged crime, with a considerably mitigated penalty. Similarly, in the criminal legislations of Greece, Denmark, Iceland, Finland and Austria, the penalty for euthanasia on request is mitigated.

[51] See G. A. Cudrițescu, *op. cit.*, p. 195.

[52] See ECHR, the decision dated 29 April 2002, in the case *Pretty v. the United Kingdom,* paras. 39.

prudence criteria and conditions to be met to prescribe and release such medicines; the necessary measures must also be taken to ensure availability of the lethal substances. In Luxembourg, the Law of 16 march 2009 decriminalizes euthanasia and assisted suicide. In accordance with this law, access to a medicine which permits suicide is legally possible for a physician only when the latter is part of the euthanasia or assisted suicide process[53].

Controversies were also caused by the situations of artificial extension of the life of an incurable patient, grafted on the state on unconsciousness of the patent or on his/her impossibility to express his/her will, when a legal regulation is necessary as other persons except for the patient are involved.

In France, the legislation ignores euthanasia, considering that the consent of the victim would not represent a justification thereof[54]. In Germany, the fundamental importance the German legal order attaches to protection of life against induced euthanasia relies on solid historical grounds which have led to a legal concept of the human dignity[55]. The Swiss Constitution and the Swiss criminal law forbid active euthanasia; nevertheless some Swiss cantons accept passive euthanasia, understood as the right of the patient to refuse in advance the medical care or artificial extension of life[56].

Moreover, Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe regarding protection of the human rights and human dignity of the incurable and dying patients calls upon the Member States to regulate a mechanism for protection of these patients against certain dangers or fears under their domestic law[57]. The Parliamentary Assembly recommends to the Committee of Ministers to urge the Member States to respect and protect the dignity of the patients in terminal stages or dying patients in all respects, for instance by forbidding the deliberate suppression of their lives, on the grounds of[58]: the right to life, in particular, in case of these persons, is guaranteed by the Member States pursuant to art. 2 of the European Convention; the desire of these persons to dye does not stand for a legal ground of the death caused by a third person; the desire of the patients in terminal stages or dying patients to die cannot itself represent a legal justification for the actions aimed at causing death[59].

The right to decide on the moment of one's own death was linked also to the right to dignity, which was not stipulated in the European Convention, but which is stipulated, for instance, under art. 1 of the Charter of the Fundamental Rights of the EU. *(Human dignity is inviolable. It must be respected and protected)*, even before the right to life (art. 2). Thus, it was argued in the technical literature that: "The respect for the human dignity would include the right to live in dignity and end or ask for the assistance of a third part to one's own life"[60], as a way for the patient not to endure the suffering caused by an incurable illness. The Romanian doctrine appreciated that turning to the human dignity to solve the problem of euthanasia would represent a "trap", as its outcome is differently understood. Thus, a contrary opinion argues that the very human dignity invests the right to life with that sacred and inviolable nature. Consequently, it is shown that, even in case a consistent opinion would be formed in this respect, the law-maker would still find it difficult to determine the actual form of the permitted euthanasia. A series of problems emerge in this framework, as follows: "Who can determine when the suffering of a patient reached limits which can justify such an intervention. Should it be limited to a certain number of illnesses or should it be left for the physician to decide". To the listing above, we also add the determination of the patient's free and clearly expressed consent.[61]

In the judicial practice of the European Court and in the criminal doctrine of certain Member States of the Council of Europe, a question was raised, namely to what extent causing death in the form of euthanasia in private hospitals and not in state-owned healthcare facilities would justify an application under the

[53] See ECHR, the decision dated 20 January 2011, in the case *Haas v. the Netherlands,* paras. 29-31.

[54] Still, according to the well-known newspaper Le Figaro, the debate on euthanasia in France is far from being over. Thus, according to a recent survey, currently almost one of two French people think that the law in effect on the end of life does not permit a satisfactory mitigation of the physical or mental suffering of the patients. To the contrary, 86% of the French people are in favor of a law which would legalize euthanasia. Likewise, more and more ideas have started to emerge in the state authorities and in the civil society promoting enhancement of the end of life, in particular in case of the seniors in an advance or terminal stage of an incurable illness, which causes them physical or mental unbearable pain; for instance, President François Hollande had the initiative to establish a reflection commission on the end of life and an amendment proposal has already been submitted for the law of 2008 (this information is available at http://sante.lefigaro.fr, accessed on 5 October 2012).

[55] See ECHR, the decision dated 19 July 2012, in the case *Koch v. Germany,* paras. 57.

[56] See B. Selejan-Guțan, *Protecția europeană a drepturilor omului*, All Beck Publishing House, Bucharest, 2004, p. 85.

[57] For instance, artificial extension of the course of the illness in case of incurable or terminal patients, either by using out-of-proportion medical measures or by continuing with the treatment without the consent of the patient.

[58] See item 9 letter c) of the Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe.

[59] See M. Udroiu, O. Predescu, *op. cit.*, p. 77

[60] P. Jordan, *The Human Right to die with Dignity. A policy oriented essay,* HRQ, 1995, *apud* N.M. Vlădoiu, *op. cit.,* p. 19.

[61] See N.M. Vlădoiu, *op. cit.,* pp. 19 and 20.

European Convention. The response was a negative one, given that, pursuant to the provisions of art. 34 of the European Convention, individual applications are allowed only in case of a violation of the human rights by one of the High Contracting Parties and not by a private individual or legal entity[62].

In our legislation, art. 22 letter a) of the Code of Medical Ethics of the Romanian College of Physicians[63] provides that euthanasia and eugenics are considered unethical deeds and acts, contrary to the fundamental principles of the physician profession.

De lege lata, the Criminal Code [64]in effect makes no reference whatsoever to euthanasia and, consequently, the person accused of such practices shall be liable for the offence of murder (simple or first degree), even if his/her actions or the lack thereof were committed out of mercy, to end the prolonged and useless suffering of the victim, as long as the latter was no not in brain death. If the death occurs as a result of the express refusal of the patient to taken the medical treatment or the medication prescribed by the physician, or if the failure to give or interruption of the treatment or uncoupling from the medical devices occur after finding the brain death of the patient, no criminal behavior of the physician or medical assistant could be found[65].

We believe that the supporting cause of the necessity could not be upheld for the person accused of murder by euthanasia[66]. Even if the life of a patient is threatened by an imminent or current and unavoidable danger, one could not consider that the lethal action of the person who contributes to the death of the patient as a "saving action" in respect of the life of that person, performed to remove the danger. On the other hand, irrespective of the interpretation which could be given to the concept "saving action", it still could be considered neither necessary to save the patient, nor proportional with the state of danger (patient's suffering)[67].

The problem represented by the patient who is not in a terminal stage - but trapped in his/her own body as a result of a stroke, being fully aware, but immobile and capable of communicating only through blinks of the eye[68] - triggered fierce controversies in the United Kingdom. The court was asked not only to recognize the right to die, but also the right for someone else to kill him/her. The High Court of Justice in England and Wales dismissed the action showing that the situation of the patient caused strong dynamics in the society and accepting his request would have much wider consequences than on the case at hand, and such a large-scale decision should be taken exclusively by the law-maker.

The English doctrine and case-law looked into the correspondence between the provisions of art. 2 of the European Convention and the surgery performed to separate two Siamese twins[69], which led to the death of one of them; the conclusion drawn, relying of the necessity doctrine, was that there has been no violation of the provisions of the European Convention on the grounds that the purpose of the surgery was not to deprive the more vulnerable twin of his life. His death was an unavoidable consequence of the surgery which aimed at saving the other twin's life and the death of the more vulnerable twin would have occurred anyway as his body has neither been, nor would ever be viable independently[70].

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[62] Decision no. 33/1955, the Yearbook of the European Convention, vol. I, 1955-1957, p. 154, *apud* M. Udroiu, O. Predescu, *op. cit.*, p. 78.

[63]Adopted under decision no. 2 of 30 March 2012 (Appendix no. 2) of the General Assembly of the Romanian College of Physicians, published in the Official Gazette no. 298 of 7 May 2012.

[64]Nevertheless, in the Criminal Code of Carol the 2nd of 1936, art. 468, paras. (1) and (3) provided for two mitigated forms of deliberate murder: the first one consisted in killing a person following the serious, repeated and persistent request thereof (the offence of killing on request), but the requirements must have been done by a person in his/her own mind and thus aware of the consequences of his/her requests, disregarding the causes of the victim's requests; the second form consisted in killing a person out of mercy caused by the physical (and not mental) pains of the victim, who suffered from an incurable illness and whose death was unavoidable (see for details C.C. Rătescu, H. Aznavorian, I. Ionescu-Dolj, Tr. Pop, I.Gr. Perieţeanu, M.I. Papadopolu, V. Dongoroz, N. Pavelescu, *Codul penal Carol al II-lea adnotat. Partea specială*, vol. III, Ed. Librărirei Socec, Bucharest, 1937, pp. 99 and following).

[65] See M. Udroiu, O. Predescu, *op. cit*., p. 78.

[66] To the contrary, see R. Chiriţă, *op. cit.*, pp. 130 and following.

[67] See C. Girault, *Le droit l'epreuve des pratiques euthanasiques*, Presses Universitaires D'Aix-Marseille, Collection de droit de la santé, Aix-en-Provence, 2002, pp. 476 and following.

[68] For details about the case of Tony Nicklinson, see http://www.dailymail.co.uk/news/article-2191944/Tony-Nicklinson-death-Locked-syndrome-sufferer-dies-home-refusing-food-contracting-pneumonia-week-failed-High-Court-bid-right-die.html#ixzz24LoQVkwd (consulted on 1 September 2012).

[69] The medical exams showed that both Siamese twins would have died shortly had they remained united, but the most developed one of them could have survived in case of a successful separation surgery.

[70] See: B. Emmerson, A. Ashworth, A. Macdonald, *Human Rights and Criminal Justice*, 2nd, Sweet & Maxwell Publishing House, London, 2007, p. 763; A. Ashworth, *Principles of Criminal Law*, 5th, Oxford University Press Publishing House, 2006, p. 251, *apud* M. Udroiu, O. Predescu, *op. cit*., p. 79.

3. Conclusions and proposals *de lege ferenda*

Given the aforementioned, the topic of euthanasia and legalization thereof and, consequently, of its decriminalization remains a controversial one as no clear opinion has been yet shaped in one direction or another one.

Nevertheless, *de lege ferenda,* we believe, adhering to the opinion formulated in the Romanian specialized literature[71], that the right of the patient to refuse any medical therapy[72] or to request a certain behavior from the physician or the nurse aimed at putting an end to the suffering, with implicit consequences in the criminal regulation, requires a deeper analysis. Telling for the absence of the criminal nature of the euthanasia practices, exclusively in strictly determined conditions, is supported by the fact a separation line will be thus drawn between the private and public life, subject to the state recognizing a stronger control on the individual's body and life[73].

[71] See L. Hecser, *Eutanasia – reflecţii medicale şi socio-juridice*, in Dreptul no. 11/2001, pp. 93-102.

[72] In the foreign doctrine it was shown that the "(legitimate) refusal to recognize a right not to die does not prevent recognition of the right of a person to refuse an unwanted medical treatment, even if such treatment is vital for the person in question. Denying this right would undoubtedly represent an impaired, if not on art. 2 of the Convention, at least on art. 3 and art. 8 thereof, with the specification that the European Convention for the Human Rights and Biomedicine subordinates to the free and clear consent of the patient any health-related intervention (...) In this case, the patient must have voiced his/her request in conscious and voluntary matter, his/her medical condition should be an irreversible one and an effective control must have been exercised" (J.-Fr. Renucci, *Tratat de drept european al drepturilor omului,* Hamangiu Publishing House, Bucharest, 2009, pp. 111 and 112). Regarding the aforementioned, another problem appears, namely in the situation when the person is unconscious or incapable of expressing his/her will, obviously in absence of a prior declaration.

[73] See S. Hennette, *Les droits de la personne sur son corps au moment de la mort. Contribution a l'étude théorétique de la validité juridique des droits*, 2000, *apud* C. Andre, *op. cit.*, p. 52.