



Review paper

National and international legal issues of the euthanasia

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ABSTRACT

Introduction: The value of human life as a personal intangible good is growing, which has led to international and national legal consolidation of norms providing comprehensive protection of life, while the life of the individual depreciates day by day. All this explains the extraordinary interest in euthanasia, which can be called one of the most controversial and unresolved issues of our time.

Aim: The aim of the article is to study the phenomenon of euthanasia, elaborate the decisions of the European Court of Human Rights on euthanasia and related rights, develop recommendations on the possibility of legalizing euthanasia in Ukraine.

Material and methods: The leading method of research of this issue is comparative and law, which allows to comprehensively consider the right to euthanasia, its positive and negative components and helps to establish trends in the implementation of the outlined phenomenon.

Results and discussion: It is concluded that the right to assisted suicide and the right to passive euthanasia can be recognized only as an element of the right to respect for private life in the context of Article 8 of the Convention. Regarding the legalization of euthanasia in Ukraine, this should be preceded by a serious public dispute on this issue with the widest possible involvement of lawyers, representatives of medicine, bioethics, philosophy, sociology and other sciences.

Conclusions: The materials of the article have practical value for all those interested in euthanasia and the realization of the right to die, as well as for practicing lawyers and judicial authorities.

1. INTRODUCTION

In the 21st century, the fourth generation of human rights linked to scientific discoveries in microbiology, medicine, and genetics is emerging. A striking example of this right is euthanasia, which is the satisfaction of a patient's request to hasten his death by any action and means, including the cessation of artificial life support measures¹. The issue of euthanasia has always been the focus of attention not only of lawyers and doctors, but also of psychologists, scientists, the religious community etc. Recently, a new wave of discussions on the legalization of euthanasia has been unfolded. Thus, on February 26, 2020, the Second Senate of the Constitutional Court of Germany ruled on euthanasia^{2,3}. In October 2020, 65.2% of New Zealanders in a national referendum supported the law on legalization of euthanasia.⁴

Such attention to this topic is explained by a number of factors, including: the progress of medicine, namely significant advances in resuscitation and transplantation, the development of new methods of life support, which allow for a long time to fight for the patient's life and support him artificially; ambiguous situation with morbidity, including severe, incurable diseases, with high-quality medical supply, relevant discussions at the global level; the lack of a uniform and clear algorithm for the use of euthanasia and certain changes in our ideological guidelines, etc. This explains the extraordinary interest in euthanasia, which can be called one of the most controversial and unresolved medical and deontological, religious and ethical and legal issues of our time.

Issues related to the use of euthanasia are complicated by the lack of a unanimous understanding and perception of the right to die. Ukraine is no exception. There is no single approach to the legalization of euthanasia in the world. Human life is recognized as the highest social value. Article 27 of the Constitution of Ukraine⁵ states, that everyone has the inalienable right to life. No one can be arbitrarily deprived of life. It is the duty of the state to protect human life. Everyone has the right to protect his life and health, the lives and health of others from unlawful encroachment.

Assistance in committing suicide or euthanasia is punishable in most states party to the Convention for the Protection of Human Rights and Fundamental Freedoms.⁶ As a result, most cases concerning the so-called 'right to die' end up in the European Court of Human Rights (ECtHR). Thus, the ECtHR is the final arbiter in resolving the issue of the human right to die at the time and in the way he has chosen, and is therefore very cautious about recognizing the right to die. However, the ECtHR maintains a neutral position, recognizing the right of member states to decide for them on this complex issue.

There is a paradoxical situation in the modern period: the value of human life as a personal intangible good is growing, which has led to international and national legal consolidation of norms providing comprehensive protection of life, while the life of the individual depreciates day by day.⁷ All this explains the extraordinary interest in euthanasia, which can be called one of the most controversial and unresolved issues of our time.

2. AIM

The aim of the article is to comprehensively study the phenomenon of euthanasia, elaborate the decisions of the ECtHR on euthanasia and related rights, develop recommendations on the possibility of legalizing euthanasia in Ukraine and prospects for the right to die implementation.

3. MATERIAL AND METHODS

The leading method of research of this issue is comparative and law, which allows to comprehensively consider the right to euthanasia, its positive and negative components and helps to establish trends in the implementation of the outlined phenomenon. Achieving the goal of the study stipulated the elaboration of Ukrainian and European law, national and international legal acts, decisions of the ECtHR using the comparative and law method.

The processing of international and legal acts in the field of human rights connected with the exercise of the right to euthanasia and related rights implementation was carried out using logical methods of analysis and synthesis. The leading method of research of this issue is comparative and law method, allowing to comprehensively considering the right to euthanasia, to identify common features and differences, their positive and negative components and helps to identify trends in the implementation of this phenomenon. This generalizes the experience, part of which can be taken into account in the development of national state and law systems. In Ukraine, such consideration is especially necessary.

4. RESULTS AND DISCUSSION

4.1. Euthanasia as one of the most controversial and unresolved issues of our time

The experience of euthanasia using in foreign states, where approaches to legalization of the right to die differ, was analyzed. It is this lack of harmony in the legislative decision in some states that leads to the growth of such a phenomenon as deadly tourism. Therefore, to avoid this, it is necessary to achieve a certain degree of harmonization of legislation or to establish appropriate restrictions in the legislation of those states that have legalized euthanasia. The problem of euthanasia in the Council of Europe is solved separately at the state level, because it is impossible to reach an interstate consensus.

The main position of the Council of Europe is that euthanasia is condemned, and as an alternative to euthanasia it is necessary to develop medicine and palliative care. However, some of the 47 member states of the Council of Europe have legalized euthanasia. The doctrinal outline of the evolution of the interpretation and recognition by the ECtHR of the right to die is outlined. A study of the ECtHR practice leads to the conclusion that the Court categorically denied the affinity of this right with the right to life in the context

of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.⁶

The right to life is in no way considered by the Court as a right to die and is not regarded as a right to suicide or euthanasia. Based on the analysis of the main cases that most vividly and informatively express the position of the ECtHR on the right to die, it is concluded that the right to assisted suicide and the right to passive euthanasia can be recognized only as part of the right to respect for private life of the Convention and only if it does not contradict the national law of the respondent state. Regarding the legalization of euthanasia in Ukraine, this should be preceded by a serious public dispute on this issue with the widest possible involvement of lawyers, representatives of medicine, bioethics, philosophy, sociology and other sciences and should focus on the grounds and conditions of passive euthanasia that would make the abuse impossible and would help to reduce the number of applications for this procedure.

For the most part, the introduction of the term 'euthanasia' into the scientific community is associated with the English scientist of the 16th century, who noted that the duty of the doctor is not only to restore health, but also to alleviate the suffering and torment caused by the disease. Discussions related to the use of euthanasia continue to this day⁸. There is no single approach to the legalization of euthanasia in the world. Ukraine is no exception. International regulations governing the right to life and thus involuntarily related to euthanasia include, inter alia, the Universal Declaration of Human Rights,⁹ the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁶ the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.¹⁰

Given the urgency of the issue of euthanasia use, the 35th World Medical Assembly adopted the Venice Declaration on Incurable Diseases,¹¹ according to which the doctor with the consent of the patient (and if the patient is unable to express his will – with the consent of his immediate family) may refrain from treating an incurable patient, although this does not exempt the doctor from the obligation to provide assistance to a dying person in order to alleviate his suffering in the final stages of the disease.

However, the issue of euthanasia is not directly regulated by international law, although the 39th World Medical Assembly in Madrid adopted the Declaration on Euthanasia,¹² which states that euthanasia, as an act of intentional deprivation of life of a patient, even at the request of the patient himself or based on the request of his relatives, is not ethical. It does not exclude the necessity for a respectful attitude of the doctor to the patient's desire not to interfere with the natural process of dying in the terminal phase of the disease. Today, euthanasia is used in a number of states, regardless of whether it is allowed by law or by international law or not. There are a number of states where euthanasia is legalized and widely used.

One of the first states in this respect was the Netherlands, which since 2002 has allowed 2 types of euthanasia

– direct euthanasia and assisted suicide. On average, 6.6% of all deaths in the Netherlands are euthanized. The most common causes of euthanasia are cancer (66%), comorbid conditions (12%), diseases of the nervous system (6%), cardiovascular system (4%), respiratory system (3%), old age (3%), the initial stage of dementia (2%), mental disorders (1%), etc. In 85% of cases, euthanasia is performed by a general practitioner – a family doctor, who is also the first person to whom the patient seeks such help for. More often the procedure takes place at home (80%), less often – in hospices (8%), nursing homes of various types (8%) or hospitals (3%). The euthanasia procedure is allowed and performed by a doctor according to certain strict rules and requires great responsibility and moral readiness.¹³

In Sweden and Finland, passive euthanasia is not considered illegal. In France, passive euthanasia is also not prohibited and there are discussions about the legalization of active euthanasia. At the same time, the French Parliament is obliging health authorities to take steps to improve palliative care. As for the United Kingdom, English law currently classifies euthanasia as premeditated murder or manslaughter, which carries a criminal penalty. In 2001, the Dutch Parliament legalized the euthanasia procedure. In 2002, euthanasia was legalized in Belgium. In 2006, euthanasia was officially legalized in Switzerland. In this state, euthanasia programs for foreigners are gaining incredible popularity. In Britain, the phrase 'go to Switzerland' has recently become synonymous with euthanasia. Since 2009, euthanasia has been legalized in Luxembourg.

In Ukraine, euthanasia is prohibited in any form, as it is clearly stated in Article 27 of the Constitution of Ukraine,⁵ Article 281 of the Civil Code of Ukraine,¹⁴ Article 52 of the Law of Ukraine 'Fundamentals of Health Legislation of Ukraine'.¹⁵ Euthanasia (from the Greek *eu* – good + *tanatos* – death) literally means 'good, easy death.' Euthanasia has such properties as:

- (1) the patient should experience unbearable suffering caused by an incurable disease;
- (2) not everyone can interrupt life or hasten death, but it can do a special subject – a medical worker;
- (3) this activity is carried out by a medical worker knowingly in the form of action or inaction, consciously anticipating the consequences of such actions;
- (4) the patient should persistently and several times express his desire to die, or if he is unable to clearly express his will, the request should come from his close relatives;
- (5) the sole purpose of euthanasia is to end the patient's suffering;
- (6) the patient or his representative should be fully, objectively and timely informed about the consequences of such intervention;
- (7) the consequence of euthanasia is the death of the patient.¹⁶

4.2. Judgments of the ECtHR on the right to die

Non-recognition of the right to euthanasia at the state level leads to the search for justice in the ECtHR. The number of cases heard by the ECtHR on this issue is quite small. These include cases such as *Sanles Sanles v. Spain*¹⁷ and *Pretty v. the*

United Kingdom,¹⁸ *Haas v. Switzerland*,¹⁹ *Koch v. Germany*,²⁰ *Gross v. Germany. Switzerland*.²¹ In the case of *Sanles Sanles v. Spain*¹⁷ argued for the right of the state not to interfere in a person's decision to terminate his life in the chosen way, as a person because of the car accident was paralyzed, suffered from pain and anxiety and wanted to die with dignity, but was refused by the Spanish national courts, and after his death a criminal investigation was launched against those who allegedly helped him die.

In *Pretty v. The United Kingdom*,¹⁸ the applicant suffered from an incurable disease of motile neurons. Knowing that a she would be completely paralyzed in the later stages of her illness, unable to control her muscles, which would degrade her human dignity, the woman wanted to end her life. Physically, she could not commit suicide herself, so she asked her husband for help. However, as assisting suicide in the United Kingdom is a criminal offense, the couple had previously asked the authorities not to prosecute her husband for assisting suicide. However, they were denied such a request. After going through all the courts in the United Kingdom, the woman applied to the ECtHR for violations of: the right to life (Article 2 of the Convention), the prohibition of torture (Article 3), the right to respect for private and family life (Article 8), freedom of expression. (Article 9) and prohibition of discrimination (Article 14). However, the ECtHR, having examined the case, found no violation of the authorities' actions in respect of any of the articles mentioned by the applicant of *Pretty v. the United Kingdom*.¹⁸ This case became a precedent in which the ECtHR clearly stated that Article 2 of the Convention, which guarantees the right to life, does not mean or protect a person's right to die.

In other words, the ECtHR has faced the problem of the right to euthanasia, in the light of which the right to life acquires a negative aspect which is directly opposite to the traditional understanding of the right to life. The negative aspect of the right to life involves deciding whether the right to life includes the right to die, that is the right to freely choose when and how to die. Indicative of the ECtHR' position on euthanasia are the cases of *Haas v. Switzerland*¹⁹ and *Koch v. Germany*²⁰ on the right to die as an element of the right to respect for private life in the context of Article 8 of the Convention.

Thus in the case *Haas v. Switzerland*¹⁹ the applicant had suffered from bipolar affective disorder for 20 years which was difficult to treat and prevented from living with dignity. During this time, he twice attempted suicide and was in a psychiatric hospital several times. It was not possible to legally purchase the drug. Relying on Article 8 of the Convention, the applicant complained of a violation of his right to choose the time of his death. In the case *Koch v. Germany*,²⁰ there was a refusal to authorize the purchase of a lethal dose of a drug for a person suffering from a disease that poses a threat to life. The case violated the requirements of Article 8 of the Convention. In the case *Gross v. Switzerland*,²¹ the applicant was denied euthanasia on the grounds that she did not have a life-threatening or intolerable clinical illness,

but complained of deteriorating health due to her age. The court acknowledged the violation, noting the suffering, and pointed to gaps in Swiss national law that allows euthanasia but do not clearly regulate the right to lethal injection.

Thus, the ECtHR practice on the right to die can be divided into two categories of cases. One category concerns the right to so-called 'assisted suicide,' when a person receives a lethal dose of a drug for voluntary termination of life from a doctor or a doctor's prescription or asks a third party to assist him in committing suicide when the person is physically unable to do so on his own. The second category of cases concerns the euthanasia of those patients whose lives are maintained artificially, that is the cessation of treatment (for example, by disconnection from artificial life support devices or cessation of certain drugs) has the effect of terminating the patient's life. On 25 June 1999, the Parliamentary Assembly of the Council of Europe approved Recommendation No. 14/8 'On protection of the human rights and dignity of the terminally ill and the dying,'²² which drew attention to the contradictions between euthanasia and the right to life enshrined in Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶

Gergelynyk²³ points out that euthanasia or assisted suicide is not a 'right,' and the practice of euthanasia itself should not be allowed and permitted under the Convention on Human Rights, as it is in itself a gross violation of Article 2, as the article demands from the state respect and protection of the lives of all people without exception, and establishes the principle – 'no one can be deprived of life intentionally.' In 2005, the Parliamentary Assembly of the Council of Europe expressed its negative attitude to the legalization of euthanasia in a number of states, noting that as an alternative to euthanasia, it is necessary to develop medicine that can alleviate the suffering of patients and palliative care²⁴.

In the aspect of the above the point of view of Chekhovska and Bilousiuk²⁵ is correct that it is necessary to develop, approve and finance State programs for the development of palliative and hospice care. The Parliamentary Assembly of the Council of Europe adopted a resolution 'Protection of human rights and dignity, taking into account the previously expressed wishes of the patient,'²⁶ which states that euthanasia is considered premeditated murder, by action or inaction of an incapacitated person allegedly in his interests should be prohibited.

Prior to the legalization of euthanasia in some European states, terminally ill patients committed suicide with the help of relatives in order to end physical suffering and die with dignity. However, such actions are a criminal offense in most Council of Europe member states. On this basis, terminally ill patients asked the authorities not to consider the actions of a person who would help them to die as a crime and not to apply any sanctions to such persons. As for the position of the ECtHR, it maintains a neutral position on this issue, recognizing the right of member states to decide for themselves on this complex issue. That is, the ECtHR, in making its decision, relies on the national legislation of the respective state, as there is no single decision on the right to

euthanasia in the European space. One factor in this is the nature of law itself. 'Law is a complex and multifaceted phenomenon in which cultural, ethical, economic, political and other aspects, civilizational and universal values, scientific truth and goodness and justice are intertwined.'^{27,28}

Ukraine's European integration efforts require taking into account international experience in this area as well. Given the trend towards the legalization of euthanasia in Europe, Ukraine also needs to prepare for this issue solving. The right to die requires legal regulation. Euthanasia is a complicated, complex issue, the study of which requires the analysis of such components as: ethical, existential, medical and medical and ethical, medical and technological, social, ethnic and cultural and religious, communicative, economic, legal, psychological and others. Prohibiting euthanasia does not preclude the suffering of terminally ill people. Therefore, the study of this issue is crucial.

5. CONCLUSIONS

Thus, the human right to euthanasia is a rather debatable issue. On the one hand, the legalization of euthanasia helps terminally ill people to get rid of the inevitable suffering. On the other hand, there are many negative aspects of such legalization. Summarizing the ECtHR practice on the right to die, we can draw the following conclusions:

- (1) The ECtHR denies the possibility of interpreting the right to die in the context of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms as an integral part of the right to life.
- (2) It is concluded that the right to assisted suicide and the right to passive euthanasia can be recognized only as an element of the right to respect for private life in the context of Article 8 of the Convention.
- (3) The ECtHR recognizes the right to die only if such a right is provided for by domestic law, provided compliance with the procedure for exercising such a right.
- (4) It is suggested to clearly fix norms that would regulate the recognition or prohibition of the right to die, and in case of recognition – they should clearly define the legal procedure and exhaustive grounds for the exercise of this right.
- (5) Regarding the legalization of euthanasia in Ukraine, this should be focused on the grounds and conditions of passive euthanasia, which would make it impossible to abuse it and help reduce the number of cases of this procedure.
- (6) The cross-cutting direction of development should be not only the legalization of euthanasia, but also the development of palliative care.

Conflict of interest

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