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Review Paper
DOI: 10.47152/ns2024.18

MERCY KILLING IN LEGISLATION AND JUDICIAL PRACTICE

The right to life and bodily integrity is the most important human right. In the criminal legislation of the Republic of Serbia, deprivation of life out of compassion (mercy killing), at the express and serious request of an adult person suffering a terminal health condition, is a form of "privileged" murder (homicide) which is punishable by a term of imprisonment ranging from six months to five years. Euthanasia is a serious legal and criminological problem. Although there are numerous reasons for decriminalization of mercy killing, in the analysis of this criminal offence the authors start from the elements of this crime, provided in Article 117 of the Criminal Code of the Republic of Serbia. In addition to the criminal-law analysis of this criminal offense, the authors also examine the available judicial practice, presenting and analyzing the decisions of competent courts in cases involving this criminal offense. The paper aims is to draw attention to the complexity of the criminal act of mercy killing, taking into account its legal, social and ethical characteristics.

***Keywords**: mercy killing, euthanasia, criminal law, judicial practice.*

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1. Introduction

Etymologically, the word *euthanasia* derives from Greek words (*εὖ*/eu meaning 'good' and θάνατος/thanatos meaning 'death'), literally meaning "good death", or gentle or easy death (Etymology Dictionary, 2024).[1] It refers to painless death aimed at eliminating pain and suffering (Vujaklija, 1986, p. 305), i.e. an act of causing a painless death to a chronically or terminally ill individuals "suffering from painful and incurable disease or incapacitating physical disorder, or allowing them to die by withholding treatment or withdrawing artificial life-support measures" (Britannica, 2024).[2]

Although it may be concluded from the etymological meaning that taking a life out of compassion is a humane act, it is not so from the perspective of substantive criminal law. Namely, mercy killing was legally sactioned in the past[3] and, in the criminal legislations of most modern countries, it is envisaged as a "privileged" form of murder (homicide) which is sanctioned by a milder punishment. The "privilege" of this form of murder refers to the fact that an adult is deprived of life out of compassion, due to the serious health condition and at such person's explicit and serious request (Stojanović, 2024, p. 477).

The right to life and bodily integrity is the most important human right explicitly guranteed in both national and international laws. On the other hand, the right to die or the right to a dignified death, which entails allowing terminally ill patients diagnosed with incurable diseases or conditions to choose when an how they die, is still a highly controversial issue which raises numerous moral, ethical, social, medical and legal concerns. In this context, euthanasia (mercy killing or deprivation of one's life out of compassion) is a serious legal and criminological problem. Although there are numerous reasons for decriminalization of euthanasia, the authors' analysis of this controversial issue will start from the legal provision on the criminal offence of mercy killing envisaged in Article 117

[1] Etymology Dictionary (2024).Euthanasia, in*: Online Ethymology Dictionary*, https://www.etymonline.com/search?q=euthanasia

[2] Britannica (2024). Euthanasia , in: *Encyclodaedia Britannica* (online), last updared 24.Aug. 2024; https://www.britannica.com/topic/euthanasia

[3] The term "legally sanctioned mercy killing" was recorded in English by 1869 (Etymology Dictionary, 2024).

of the Criminal Code of the Republic of Serbia.[4] In addition to the criminal-law analysis of this criminal offense, the authors will explore the available judicial practice, and present and analyze the decisions of the competent courts in cases involving the criminal act of mercy killing. The paper aims to draw attention to the complexity of the mercy killing, taking into account the legal, social and ethical characteristics of this criminal act.

2. Criminal-law characteristics of the criminal offence of Mercy Killing in the Republic of Serbia

Pursuant to Article 117 of the Criminal Code of the Republic of Serbia (hereinafter: the CC RS), the criminal offence of mercy killing is a criminal act which is committed by a person who takes life or causes death of an adult person out of compassion due to a serious health condition and at an explicit and serious request of such person; the offender shall be punished by a term of imprisonment ranging from six months to five years. Thus, mercy killing is a priviledged form of murder (homicide) which exists only if certain legal requirements have been fullfilled. For this criminal offence to exist, the following conditions must be cumulatively met: 1) the person in question is an adult; 2) the person was deprived of life out of compassion due to the person's serious health condition; and 3) the act was performed at the explicit and serious request of that person (Lazarević, 2006, p. 358)

The passive subject must be an adult person in "a serious health condition". This medical criterion is fulfilled when the adult is in such a severe or terminal health condition that there is no possibility of curing that person, and which will almost certainly result in death. In terms of criminal law, the key requirement is that the passive subject (victim) has been exposed to severe physical or mental pain and suffering due to his/her terminal health condition. The intention of the perpetrator is to "end the torments" of the victim by taking his/her life (as an act of mercy). If this condition is not met, the crime is not regarded as mercy killing

[4] The Criminal Code of the Republic of Serbia (Krivični zakonik Republike Srbije), *Official Gazette of the Republic of Serbia,* no. 85/2005, 88/2005- corr., 107/2005- corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, and 35/2019; https://www.mpravde.gov.rs/files/Criminal%20%20%20Code_2019.pdf

(a priviledged form of murder or homicide) but as a crime of murder or aggravated murder (Lazarević, 2006, p. 359). The object of protection in this criminal offense is the life of an adult person. As for the perpetrator, the key legal requirement is intent (Jovašević, 2006, p. 274). The next important requirement that must be fulfilled in order for this criminal offense to exist is that the deprivation of life is carried out at the explicit and serious request of a person who is in a severe and terminal health condition. The request may be expressed in writing, orally, or in some other form, but it must be clearly revealed, articulated, and given without coercion, threat or delusion (Jovašević, 2006, p. 32).

As the Serbian legislator did not define the criminal act of comission of this crime, for the purpose of further analysis, we should refer to different types and forms of euthanasia. In literature, there is a general distinction between active euthanasia and passive euthanasia. *Active (direct) euthanasia* is the taking of a patient's life by a doctor acting at the express request of a patient strongly affected by the subjective feeling of unbearable and hopeless suffering (Banović, Turanjanin, Ćorović, 2018, p. 275). Active euthanasia entails an active participation of the doctor in the process of taking the patient's life.[5] *Passive (indirect) euthanasia* entails the absence of action and "letting the person die out of mercy"; thus, the consequence of the act occurs due to inactivity (Rešetar, 2017, p. 110), i.e. omission or failure to act. Under the Serbian criminal law, the offender is punishable both in case of active (direct) and passive (indirect) eutanasia because the Serbian legislator does not recognize "the consent of the injured party as a basis for excluding illegality." (Đurđević, 2020, p. 262). Thus, it seems that illegality is not excluded no matter how the doctor acts; the only question is whether it will be qualified as criminal or misdemeanor liability. We may assume that the doctor would choose the "lesser evil" and continue to treat the patient (Đurđević, 2020, p. 262-263).

In literature, we encounter different forms of euthanasia: voluntary and involuntary euthanasia assisted death or suicide, medically or physician-assisted

[5] Yet, active euthanasia can be direct and indirect. *Direct active eutanasia* implies the termination of one's life by administering a medical therapy or a lethal injection with the intention to sedate the terminally ill patient, stop the pain and end one's life. *Indirect active euthana*sia implies ending the patient's life by the "incidental effect" of the administered medical treatment aimed at relieving the pain (e.g. terminal sedation) (Golijan, 2020, p. 423).

death or suicide. Golijan observed that "strictly observed, both cases involve euthanasia based on the will of the patient, just in the case of involuntary euthanasia, the patient, before losing consciousness or other capacities to express their decision, clearly expressed their desire to be submitted to euthanasia at certain circumstances of the ter-minal stage of the disease, but the immediate decision, now, based on the will of the patient, needs to be made by someone else, usually a person the patient authorised for that" (Golijan, 2020, p. 425). On the other hand, same author noticed that "physician-assisted suicide, unlike assisting in suicide, can certainly be treat-ed as euthanasia. This type of euthanasia implies the explicit request of the patient to be subjected to lethal treatment, and a physician assists the patient in that, by, for instance, indicating which medical devices will cause a rapid and painless death, or by supplying the mentioned devices. In this case, the patients themselves are the agents of termination of life, but the activities of another person are necessary in order to achieve the deprivation of life, which is why this is a specific form of euthanasia" (Golijan, 2020, p. 424). These forms of euthanasia and others forms of deprivetion of life are very important for judicial practice.

In addition to the criminal law provision on mercy killing in Article 117 of the Serbian Criminal Code a, this subject matter is also regulated in the Patients' Rights Act[6] (hereinafter: the PRA) but in a different way. Article 15 of the Patients' Rights Act (on patient's consent) prescribes: "The patient has the right to freely decide on all issues concerning his/her life and health, except in cases where it directly threatens the life and health of other persons. As a rule, no medical measure may be taken without the patient's consent. Medical measures against the pateient's will (or against the will of the patient's legal representative/guardian in case the pateiend is deprived of legal capacity) may be taken only in exceptional cases, established by the law and in accordance with medical ethics." Further, Article 17 of the PRA expressly prescribes that "a patient capable of reasoning has the right to refuse the proposed medical treatment/measure, even when the measure is aimed at saving or maintaining his/her life. The competent medical professional is obliged to inform the patient about the consequences of

[6] The Patients' Rights Act (Zakon o pravima pacijenata), *Official Gazette of the Republic of Serbia*, no. 45/2013 and 25/2019 -another act.; https://www.paragraf.rs/propisi/zakon_o_pravima_pacijenata.html

his/her decision to refuse the proposed medical treatment/measures. The patient is required to give a written statement on refusal, which is kept in the patient's medical documentation. In case the patient refuses to give the written statement on refusing treatment, the medical staff is required to make an official note on that. The competent medical professional shall also enter information on the patient's or his/her legal representative/guardian's consent to the proposed medical treatment, as well as information on the refusal of such measure, into the medical documentation" (Article 17 of the PRA).

The observed inconsistency between the two legal texts should be taken into account by the legislator when revising the legislation in this area. Such a situation can create a series of moral and ethical dilemmas for medical personnel in practice. In the next part of the paper, we provide an overview of the moral and ethical dilemmas arising from the controversial issue of mercy killing as a social and legal phenomenon.

3. Ethical Dilemmas and Euthanasia Pros and Cons

3.1. Ethical Dilemmas: the right to life and the right to a dignified death

Is there a right to human dignity? If there are human rights, then the right to dignity should be one of them, or the first among them, because respect for everyone's dignity is intrinsically correlated with the fundamental possibility of establishing any right and any value: the presence of true freedom as an actual reality, as something that exists really and not only declaratively. On the other hand, freedom can be abused in many different ways. The possibility of choosing evil is a metaphysical assumption of the possibility that freedom exists; otherwise, there is necessity, the principled absence of choice and the impossibility of establishing responsibility. Therefore, we can say that freedom is not a value *per se* but a necessary assumption of every value, both positive and negative (Babić, 2020, p. 27).

Perceived as the negation of life, death has an inevitable impact on all social and personal dimensions of human life. For every man, the inevitability of death and mortality is a specific burden, which makes it impossible to approach death without a sense of immediate involvement. The fact of human mortality

naturally generates certain opinions, attitudes and sometimes prejudices towards the idea of personal death, while the experience of death (dying relatives and friends) accompanied by feelings of sadness, pain and loss generates a specific emotional impact. Hence, the difficulties in explaining the phenomenon of death aggravate the efforts to achieve scientific objectivity (Stevanović, 2023, p. 124).

Looking at the historical development of euthanasia, it may come as a surprise that euthanasia (mercy killing) has always existed in the history of humankind, and that it has been practiced since ancient times (Jerotić, 2008, p. 331). As noted by Stevanovic (2023), "the process of aging, dying and death in all traditional societies of the world is connected with certain customs enabling the person to transcend mere physical existence. All these customs presuppose a metaphysical framework for establishing one's relation toward eternity. The moral values of a particular society create an essential criterion for the metaphysical validation of the individual. Forcible promotion of individual free will as the sole criterion of the moral values, as in the case of the human rights ideology, precludes even the possibility of obtaining dignity as universally accepted good. We can legally promote dignity only through indirect legal measures to strengthen the moral community capable of promoting generally accepted moral values for its members. This means that we should not legally introduce measures which potentially threaten the accepted public morality unless we want to deliberately create tacit prerequisites for the social anomia". In human rights ideology, dignity is "a personal capacity to create one's own 'eternal' values"; yet, forcible introduction of this meaning of dignity in the legal system "will certainly diminish all possibilities for introducing dignity as a moral quality. […] Ethics cannot be proclaimed by the law […] In order to promote a dignified death, we must try to promote the morality" (Stevanović, 2023, p. 134).

Under the Hippocratic Oath (WMA, 1948)[7], doctors "solemnly pledge to dedicate life to the service of humanity, health and well-being of their patients, to maintain utmost respect for human life, and to respect the autonomy and dignity

[7] The WMA Declaration of Geneva (The modern Hypocrathic Oath) of the World Medical Association's (WMA), adopted by the 2nd General Assembly in Geneva (Switzerland) in 1948, amended by the WMA in 1968, 1983, 1994, 2005, 2006, and 2011; https://www.wma.net/policies-post/wma-declaration-of-geneva/; Dom zdravlja Aleksinac (2024). Hipokratova zakletva, https://dzaleksinac.co.rs/hipokratova-zakletva;

of their parients". Consequently, the Code of Medical Ethics of the Medical Chamber of Serbia[8] expressly prohibits euthanasia, but in a somewhat vague and ambiguous way. Thus, Article 67 of the Medical Ethics Code (hereinafter: the MEC) states that it is forbidden to take actions that actively shorten the life of a dying patient (Article 67 §2 of the MEC), which is contrary to the medical ethics. However, "in case where delaying the inevitable death for a dying patient would only represent an inhumane prolongation of suffering, the doctor may, in accordance with the freely expressed will of the patient capable of reasoning on refusing further measures to prolong life, limit further treatment only to the effective relief of the patient's suffering (Article 67 §3 of the MEC). This provision envisages the doctor's obligation to respect the wish of a well-informed and fully aware patient, suffering from an incurable disease, not to apply any medical measure that would save or prolong his life (Arsić, 2022, p. 30). Thus, this provision is contradictory to the provision on the prohibition of euthanasia.

3.2. Euthanasia Pros and Cons

In this context, there are different arguments for and against euthanasia. The moral arguments in favor of euthanasia are most often related to respect for the principle of autonomy of will, which is essentially the patient's right to decide on the course of further treatment. The arguments proposed by the supporters of eutanasia often rely on the principles of humanity and the freedom of choice for patients capable of reasoning to take their lives at their express request, which is the embodiment of patients' rights. Another argument in favor of euthanasia are economic indicators, considering that the application of eutanasia can significantly reduce health care costs. In modern medicine, due to increasingly complex medical diagnostic and therapeutic procedures, maintaining the life of patients with serious and life-threatening conditions can significantly burden the budget allocated for these purposes. According to Wesley J. Smith, a senior associate at the Discovery Institute, a drug that can kill a patient costs $40, while keeping him alive and preventing him "to choose life or death" costs $40,000. Thus, there is a

[8] The Code of Medical Ethics of the Medical Chamber of Serbia, *the Official Gazette of the Republic of Serbia,* no. 104/2016; https://www.paragraf.rs/propisi/kodeks_medicinske_etike_lekarske_komore_srbije.html

risk that the medical staff will succumb to the pressure of their administrations who take care of the financial costs of treatment (Gajić, 2012, p. 176).

On the other hand, there are numerous arguments against the legalization of euthanasia. The first argument commonly refers to medical ethics. Under the Hippocratic Oath, doctors pledge to have respect for human life, take care of the patients' health and well-being, and respect the patients' autonomy and dignity rather than help them die. The next disputable issue is the presence of the free will of a patient suffering unbearable physical pain and mental distress, and his/her capacity for free decision-making. Hence, criminal law protection of the elderly against abuse and discrimination is particularly important (Igrački, 2023, p. 467). Common arguments against euthanasia also include the possibility of making a wrong diagnosis, the time frame of the "terminal phase of the disease", and the possibility of subsequent discovery of a cure. Yet, the most important moral and ethical argument against euthanasia is that it is a kind of "negation of the right to life" because it rejects the importance and value of life (Gajić, 2012, p. 177).

The results of research conducted in 2015 (Živković, Pavlović, 2019) about the need to legalize euthanasia in the Republic of Serbia may be interesting as a solid basis for further research and consideration. In response to the statement: "I believe that euthanasia is an expression of the free will of each individual", the largest number of respondents completely agreed (58.4%); a significant percentage of respondents (30.7%) both agreed and disagreed, while 10.9% of respondents fully disagreed. In response to the statement: "Euthanasia is inadequately qualified in our Criminal Code", the largest number of respondents both agreed and disagreed (46.1%), while 35.4% of respondents fully agreed. In response to the statement "Euthanasia should be qualified as suicide in law", the largest number of respondents (56.9%) disagreed with the statement. In response to the statement: "In our society and health institutions, the passive form of euthanasia (without a written request) is frequently applied, without sanctioning the perpetrator", the respondents provided different replies; the largest number of respondents (53.8%) both agreed and disagreed, but the percentage of those who disagreed was higher (27.7%) as compared to those who agreeed (18.5%). In response to the statement: "I believe that a public discussion is needed before the legalization of euthanasia", a vast majority of respondents (81.5%) fully agree

with the statement. In response to the statement: “I believe that it is necessary to legalize euthanasia with strict legal restrictions that would prevent abuses”, an overwhelming majority of respondents (73.8%) agreed with the statement, but a significant number of (male and younger) respondents both agreed and disagreed with the statement. In response to the statement: “The final decision on performing euthanasia must not be left to a single person - the doctor”, the vast majority of respondents (92.3%) agreed with the statement (Živković, Pavlović, 2019, pp. 78-79).

Without intending to plead for or against the legalization of eutanasia (as a medical act), it is quite clear that the issue of decriminalization and legalization of euthanasia requires further multidisciplinary research and careful consideration of its intricate aspects.

4. Deprivation of life (Mercy Killing) in Judical Practice

Searching through available databases of court decisions, we could not find any decisions of the domestic courts on the subject matter of euthanasia, which is prohibited in the Republic of Serbia. Thus, in this part of the paper, we will present relevant decisions of the European Court of Human Rights (ECtHR), which refer to different moral, ethical, social and legal aspects of euthanasia (mercy killing).

In the case *Pretty v. United Kingdom* (application no. 2345/02)[9], the applicant (Mrs Pretty, aged 43) was diagnosed in 1999 with a degenerative and incurable motor neuron disease, which affects her muscles and breathing, and results in death. As her health condition rapidly deteriorated, the desease was in an advance stage; she was paralyzed from neck down and had to be tube-fed but her mental capacity was unimapaired. To be spared of suffering, humiliation and undignified life, she wished to commit suicide but she could not do it without her husband’s assistance. Under the English law, suicide is not a crime, but assisting another to commit suicide is a punishable offence. The applicant’s request to the

[9] ECtHR case: *Pretty vs. United Kingdom* (Application no. 2346/02). European Court of Human Rights.

Director of Public Prosecutions to grant an immunity from prosecution to her husband if he assisted was rejected. After exhausting the legal remedies in the UK, she filed an application with the ECtHR claiming that the prohibition of assisting suicide in domestic law constituted a violation of her rights under Articles 2 (right to life), 3 (inhuman and degrading treatment and punishment), 8 (right to privacy), 9 (freedom of conscience), and 14 (prohibition of the discrimination) of the Convention. The ECtHR found that there was no violation of the applicant's rights on any of the grounds raised in the application.

In the case *Ada Rosi and others v. Italy* (2008)[10], applicants were six Italian citizens, six associations whose members were relatives and friends of the people with severe disabilities, doctors, psychologists and lawyers, and a human rights organization. After sustaining severe head injuries in a car accident, a 20-year-old girl (E.E.) fell into a coma in January 1992, and her condition developed into a vegetative state with spastic tetraplegia and loss of all higher cognitive function. In January 1999, her father (as guardian) initiated proceedings in Italy, seeking authorisation to discontinue his daughter's artificial nutrition based on the arguments about his daughter's personality and ideas on life and dignity expressed before the accident. His request was rejected by the first instance court, and twice on appeal (in 1999 and 2003). In 2005, the Court of Cassation quashed the 2003 ruling of the Milan Court of Appeal (CA) and reversed the case for retrial, specifying that the father's request could not be granted without exact proof of the daughter's wishes expressed before the accident; the Court of Cassation also established two criteria: the judicial authority could authorize the suspension of nutrition if the person concerned was in a permanent vegetative state and if there was evidence that the person would have opposed medical treatment if he/she had had all capacities. In June 2008, relying on these two criteria, the Milan CA granted the requested authorization. In November 2008, the Court of Cassation dismissed the prosecutor's appeal on points of law for lack of capacity to act. In their applications to the ECtHR, relying on Articles 2 (right ro life), Article 3 (prohibition of inhuman and degading treatment), and Article 6 § 1

[10] ECtHR case: *Ada Rosi and Others v. Italy,* (Appl. nos.55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08 and 58424/08), Press release, ECtHR, 2008; Factsheet: End of life and the ECHR (Press Unit), ECtHR, Nov. 2023, https://prd-echr.coe.int/documents/d/echr/FS_Euthanasia_ENG

(right to a fair hearing), the applicants complained about the harmful effects that the execution of the Milan CA decision in E.E. case could have on them. In its judgment, the ECtHR held that there was no violation of Articles 2, 3 and 6 of the Convention because the decisions of the domestic courts referred only to the participants directly involved in the E.E. case, and did not apply to individuals/associations that were not directly affected by the domestic court decision. First, the Court first found that the individual applicants had no direct relation to E.E, nor were they directly or personally affected by the Milan CA decision which refered only to the facts and parties in the E.E. case, and not to the applicants who were not directly involved in the case. Thus, the Court declared the complaints inadmissible because "individual applicants cannot be said to be the victims of alledged violations and the failure of the Italian state to protect their rights guaranteed underArticles 2 and 3 of the Convention". Second, considering that "a victim status may be granted to an association (not its members) if it is directly affected by the specific measure", the Court held that the applicant associations were not victims of the violations of these rights because the Milan CA decision had no impact on their activities, and declared their complaints inadmissible. In terms of Article 6, the Court declared the complaints inadmissible and clearly ill-founded because "the proceedings in question had involved third parties, and the applicants had not been parties to those proceedings". Therefore, in this case, the ECtHR took a stand that the domestic court decisions refer only to the participants directly involved in the proceedings and could not be applied to other similar cases. From the point of view of the associations and persons who are in a similar situation, we believe that their fears are well-founded. In such cases, courts should decide on the merits of each individual case and in the best interest of the person whose fate is at issue. In order to preclude the abuse of the right to euthanasia, such decisions should be in compliance with the domestic and international law,

In the case *Gard and Others v Great Britain* (Application no. 39793/17) [11], the infant (Charles Gard, born in 2016) was admitted to hospital in October 2016 and diagnosed with a severe genetical degeneration of the DNA on the mitochondrial level. As his condition deteriorated, he did not respond to therapy and could not interact with the doctor and parents; he was attached to life-support

[11] ECtHR case: Gard and Others v. The United Kingdom, Application number 39793/17, ECtHR,

equipment and unconscious. Considering that Ch.G. was in a terminal state of illness, the hospital proposed to take him off the life-support devices and put him in palliative care to ease his pain. The parents disagreed, claiming that his condition was better than suggested by doctors, that he had a regular sleep/wake cycle, and that it would be useless to keep him alive if there was no hope of improvement; they noted that a USA doctor suggested experimental therapy with nucleotides. Several UK medical experts provided opinions that such treatment could slighly improve the child's condition but not reverse the damage to his brain. In February 2017, the hospital asked the High Court (HC) to issue a declarative order on whether it would be lawful to remove the child from life-support devices and transfer him to palliative care. The HC appointed an independent legal guardian to protect the child's interests. In view of the child's health and emotional well-being, the HC concluded that it would be lawful and in the child's best interst to withdraw life-support treatment and to put him in palliative care as the child was likely to suffer significant harm from prologned treatment without any realistic prospect of improvement. Base on the UK medical experts' consensus that the experimental therapy would be aimless and ineffective, that it would expose ChG to unnecessary pain and complications, and that transport could be complicated and detrimental, the HC ruled that the child should not be transported to the USA. On parents' appeal, the UK Court of Appeal (CA) ruled that the hospital had not exceeded its authorizations and that the HC considered the "child's best interests". In the UK Supreme Court (SC), the parents contested the interference with their parental rights (Article 8 of the Convention). Relying on the primary relevance of "the best interests of the child", the hospital and Ch.G's guardian indicated that taking a terminally ill child to the US for the experimental treatment was not in the child's best interest. The UK SC affirmed the CA decision, stating that, even if the "best interest" were replaced by the test of "least harm", the child was most likely to be exposed to suffering with no realistic prospect of improvement. In the application to the ECtHR, the applicants (ChG and parents) referred to Articles 2, 5, and 8 in conjunction with Article 6 of the Convention. The Court held that there was no violation of the applicants'rights guaranteed in these articles and declared the complaints ill-founded.

In terms of Article 2 (arbitrary deprivation of the right to life) and Article 5 (right to liberty and security), the Court concluded that applicant's complaints

were inadmissible and ill-founded because the the State did not arbitrarily deprive the child of the right to life, First, the court decisions to disallow the child's transport to the USA for experimental treatment was based on the UK expert opinion on the detrimental nature of csuch activity due to child's critical health condititon. Second, the UK has a relevant regulatory framework on the use of the experimental treatment/drugs upon approval of the medical ethics committee. Third, although the child could not express his will, his best interests were safeguarded by an independant legal guardian, appointed by the courtl he had access to the best UK medical practitioners, and his parents were fully involved and duly informed, and had full access to courts. Considering that Articles 2 and 5 could not be interpreted in terms of enabling access to the unapproved medical procedures to terminally ill patients, the Court found there was no violationf of Article 2 and Article 5 of the Convention.

In terms of Article 8 (right to respect for private and family life) in conjunction with Article 6 (right to a fair trial), the applicants claimed arbitrary interference into the private and family life by public authorities (the hospital's request for a declarative order to remore the child from life-support devices and transfer him to palliative care) in spite of the parents' complaints, which implies interference uinto theirr parental rights as well as interference in the child's right to private life, especially his right to physical integrity. Given the conflict of interests (parents' will and medical opinions) on the child's medical treatment, the Court found that the hospital's interference was justifiable, as all participants had a chance to present their opinions in court to get a solution. The Court pointed out that there must exist a balance between the conflicting interests: the legitimate interest of the child, parents and the public order, but that the primary criterion in adjudicating all cases involving children is generally accepted international standard of the best interest of the child. Thus, the interference was necessary in order to consider whether the proposed medical measures could be justified and sufficient in light of the case facts and the law. It was in the best interest of the terminally ill child: to ease his pain and suffering which could be prolonged and further aggravated by the experimental treatment, which offered no realistic prospect of improvement but could have a detrimental effect on child's progressively deteriorating health condition. The Court noted that decisions had been based on meticulous and thorough investigation and review at three levels of jurisdiction,

and full legal representation of all interested parties (the child/applicants/experts/third parties) As the Court could find no elements of arbitrary and inappropriate interference, the applicants' complaints were declared inadmissible.

In the case *Daniel Karsai v Hungary* (Application no. 32312/23),[12] the applicant (D.K, 47, a prominent human rights' lawyer) was diagnosed in 2022 with amyotrophic lateral sclerosis (ALS), incurable progressive neurodegenerative (motor) disease leading to inevitable death. Due to the nature of the disease, patients progressively lose the ability to move limbs, talk, swallow and breathe, but in most cases their intellect stays intact. D.K. wanted to choose the moment of death while was fully conscious and able to express his consent to die; he wanted to die with dignity and not to end in palliative care, awaiting death. He wanted to be assisted in ending his life by a doctor, but medically assisted death/suicide and voluntary euthanasia are illegal in Hungary. In Europe, five states have legalised the medically assisted death/suicide: Belgium, Luxemburg, Netherlands, Spain and Portugal, while some states recognize only some forms of assisted suicide (EJIL: Talk, 2024).[13] In Hungary, doctors are prohibited to participate in assisted death/euthanasia because (under the Hippocratic Oath) they are obliged to save the patients' lives and ease their pain, not to facilitate death. Moreover, there is a special institute of palliative care where terminally ill patients may be sedated or given symptomatic therapy to ease their pain while awaiting death. In his application to the ECtHR, D.K. referred to the violation of his rights under Article 8 (right to private life) and Article 14 (prohibition of discrimination) in conjunction with Article 8. The Court held that there was no violation of either article. First, the Court stated that assisted suicide and euthanasia are morally and ethically sensitive issues which should be approached with due diligence. In the majority of the Council of Europe member states, euthanasia is

[12] Daniel *Karsai v Hungary*, Application no. 32312/23, European Court of Human Rights, 2023; https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-234151%22]}; https://hudoc.echr.coe.int/eng#_Toc168912011

Factsheet : End of life and the ECHR, European Court of Human Rights, Press unit, 2024; https://prd-echr.coe.int/documents/d/echr/FS_Euthanasia_ENG;

[13] EJIL:Talk (2024). Palliative Care and Assisted Suicide at the ECtHR: Dániel *Karsai v. Hungary*, by G.G.Escobar, Blog of the European Journal od International Law, https://www.ejiltalk.org/palliative-care-and-assisted-suicide-at-the-ecthr-daniel-karsai-v-hungary/ (20 July 2024)

prohibited because Article 2 of the Convention envisages that everyone has a right to life and protection from arbitrary deprivation of life. Referring to Article 8 of the Convention (right to private life), D.K. asserted that Hungary violated his right to self-determination and dignified medially assisted death. As doctor-assisted suicide/death and autanasia are prohibited in Hungary, the Court found that Hungarian authorities had not failed to strike a fair balance between the competing private and public interests, particularly considering the potentially broad social implications and risks of error and abuse involved in the provision of physician-assisted dying. While the need for appropriate legal measures should be reviewed in line with international standards on medical ethics, assisted suicide is not an alternative measure, which was clearly confirmed by domestic courts which rejected DK's request for medically assisted death. The Court further considered that high-quality palliative care, including access to effective pain management, was essential to ensuring a dignified end of life. It was fully available to D.K. who also had the right to reject such alternative treatment. Regarding the violation of Article 14 (discrimination), D.K claimed that Hungarian law did not provide him with an option to hasten his death, which is provided to to terminally ill patients who were dependent on life-sustaining treatment. The Court found that the right to refuse or withdraw life-supporting treatment in terminal phases of diseases is generally accepted in many states. In the opinion of the medical profession, it is intrinsically linked to the right to free and informed consent rather than a right to be assisted to die. Thus, it is justified to make a distinction between seeking consent to withdraw/refuse life-support treatment and seeking illegal medical assitance in dying with a help of a doctor. Considering that the alleged difference in treatment of the aforementioned two groups of terminally ill patients was objectively and reasonably justified, the Court held that the was no violation of Article 14.

The analysed case law of the ECtHR shows different opinions about the right to life and assisted death. In its case law, the ECtHR has underlined that the issue of euthanasia is a very complex and sensitive matter, not only form the legal perspective but also from the moral and ethical perspectives. Yet, in its last landmark case (*Daniel Karsai v. Hungary, 2023*), the ECtHR has taken the stand that palliative care has priority over assisted death/suicide, thus confirming the importance of life as the most important human right and ultimate value.

5. In Lieu of Conclusion

Euthanasia (mercy killing or deprivation of life out of compassion) is a multifaceted legal and social phenomenon that has been present in human history in various forms since anceient times. In the criminal law theory and practice of the Republic of Serbia, there are different views on whether euthanasia should be decriminalized or not. In order to be properly addressed, this extremely complex question requires a multidisciplinary approach. Decision-making in cases related to euthanasia is very complicated because it requires consideration of various moral, social, medical, psychological and legal issues, which have been the subject matter of judicial assessment in a number of presented ECtHR judgments. For these reasons, the idea of possible decriminalization of euthanasia must be carefully considered, clearly justified and substantiated with rational objectives, which are to be achieved without interference with or violation of the guaranteed fundamental human rights.

Until a social consensus is reached on the possible decriminalization of euthanasia, we believe that the norms of the Serbian criminal legislation should be strictly observed and applied. By defining mercy killing as a form of privileged deprivation of life (homicide) punishable by a term of imprisonment ranging from six months to five years, the Serbian legislation provides a safeguard aimed at protecting human life and preventing possible abuses. During all scientific and professional discussions of the issue of (de)criminalization of euthanasia, it should be borne in mind that the right to life is the fundamental human right that is protected by moral, social and legal norms.

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