



The Offense of Homicide by the Victim's Request according to the Romanian Criminal Law

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Abstract: In this paper we have examined the offense of homicide by the request of the victim, newly introduced in the Romanian Criminal Law. As it results from its legal content this incrimination envisages the exceptional situation of the person, suffering from an incurable illness or a permanent medically certified disability, causing permanent and unbearable sufferings, and in this situation, the person asks someone to end their life in order to put an end to the unbearable sufferings. The justification for sanctioning such acts is motivated also by the provisions of article 22 paragraph (2) Criminal Code, according to which *the consent of the injured person does not take effect for the crimes against life and when the law excludes its justifying effect*. We also appreciate that this act, due to its marginal title *homicide at the request of the victim* and not at *murder at the request of the victim*, it cannot be in the history of the person who committed the act in the case of qualified murder provided for in article 189 paragraph (1), letter e) of the Criminal Code. The paper continues further examination carried out in connection to the offenses under the New Criminal Code. Given the novelty in the Romanian law, the study may be useful both to theorists and practitioners.

Keywords: objective side; the subjective side; legal content

1. The Legal Content and the Characterization of the Offense

Art. 190. The homicide by the request of the victim

A murder committed at the explicit, serious, conscious and repeated request of the victim who was suffering from an incurable disease or serious medically certified disability, causing unbearable permanent sufferings shall be punished with imprisonment from 1 to 5 years.

This offense has no correspondent in the 1969 Criminal Code.

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As described by the legislator in the incrimination norm, the offense consists of killing a person by another person at its explicit, serious, conscious and repeated request, being determined by the existence of an incurable disease or serious medically certified disability, causing permanent and unbearable sufferings.

As it results from its legal content this incrimination envisages the exceptional situation of the person, suffering from an incurable illness or a permanent medically certified disability, causing permanent and unbearable sufferings, and in this situation, the person asks someone to end their life in order to put an end to the unbearable sufferings.

According to recent doctrine, *“the reintroduction of the text was necessary but, above all, it is as a follow up of the new regime of the mitigating circumstances established by the General Particle Indeed, if in the current legislation (the Criminal Code 1969 - sn), the fact envisaged in article 190 of the Criminal Code can be valued as a judicial mitigating circumstance, thereby applying a special minimum punishment, under the new rule (there are considered the provisions of article 190 of the Criminal Code. - sn), even being a judicial mitigation, the punishment shall not be situated compulsorily below this limit. Therefore, to allow for a sentence corresponding to the degree of social danger of this act, it was necessary a separate legal regulation. Finally, the preferred marginal title was homicide at the request of the victim and not murder at the victim's request, so as to exclude this act of first degree murder provided for in article 189, paragraph (1) e)”* (Boroi, 2014, p. 54).

Another author sustains that *“according to the New Criminal Code retaining the mitigating circumstances does not have as effect reducing the mandatory sentence under the special minimum, but both the special minimum and maximum of the punishment will be reduced by one-third for the penalty which the court shall determine would be within this range. Therefore it was necessary this mitigating self-incrimination of homicide with setting proportionate punishment limits to the degree of social danger of the act.”* (Udroiu 2014, p. 25)

Another opinion sustains that *“although life is a social value incapable of negotiating, the individual being unable to decide upon it, the legislator exceptionally provided for in very severe cases a person may request to end the thread of life in order to put an end to great sufferings. If someone is persuaded by the repeated earnest entreaties of the victim and he fulfills this demand by killing the sick person with his consent (euthanasia), he will be responsible for homicide, but with a much reduced sentence. Thus the legislator, on the one hand has implicitly settled that in case of homicide the consent shall not constitute the*

grounds to remove the criminal liability, and on the other hand he allows an attenuated liability for one who kills the victim under the above conditions". (Toader, 2013, pp. 48-49)

The justification for sanctioning such acts is motivated also by the provisions of article 22 paragraph (2) Criminal Code, according to which *the consent of the injured person does not take effect for the crimes against life and when the law excludes its justifying effect.*

We also appreciate that this act, due to its marginal title *homicide at the request of the victim* and not at *murder at the request of the victim*, it cannot be in the history of the person who committed the act in the case of qualified murder provided for in article 189 paragraph (1), letter e) of the Criminal Code.

2. The Current Criminal Code in Relation to the Previous Law

Although this crime was not provided in the previous Criminal Code, still incriminating this act existed in the Romanian law, being provided for in article 468 of the Criminal Code Carol II in a similar wording.

The incrimination of this act is found in most European criminal codes, among which we mention: article 143, paragraph (4) of the Spanish Criminal Code, article Portuguese 134 of the Criminal Code, article 114 of the Swiss Criminal Code, article 235 of the Norwegian Criminal Code, paragraph 216 of the German Criminal Code, etc.; we mention that these European criminal codes have incriminated the offense as a mitigating way of the homicide.

3. Preexistent Elements

3.1. The legal object is identical to that for the offenses of murder and manslaughter and it consists of social relations on the individual's right to life.

From the interpretation of the provisions of article 22 of Criminal Code it results that "the life of a person is not included in the categories of values of which he may decide (except the hypothesis of suicide), which makes the victim's consent not to be accepted as supporting the case for euthanasia; by incriminating euthanasia the legislator wished to avoid situations of definite resolution of the cases of vulnerable people suffering from an incurable disease, under the pretext of granting the sufferer a dignified death". (Udroiu 2014, p. 26)

3.2. The material object consists of the victim's body, the living person who was suffering from an incurable disease or serious medically certified disability, causing unbearable permanent sufferings and who has asked explicitly, really, consciously and repeatedly to end his life.

3.3. The Subjects of the Offense

a) The active subject can be any physical or legal entity (non-circumstantiated), which meets the general conditions required by the law in order to have this quality. Criminal partnership is possible in all its forms: as accomplice, moral or material aid and abetting.

b) **the passive subject** can only be a natural person who meets cumulatively the conditions provided in the standard of incrimination; thus it must suffer from an incurable disease or serious medically certified disability, causing unbearable permanent sufferings so that he requested to another natural or legal person, explicitly, seriously, consciously and repeatedly to end his life.

By incurable disease we understand “a disease about which at the time of the offense it was not agreed in the medical community a curative treatment (e.g. cancer); They will not be considered the experimental medical treatments; the incurable nature of the disease may be established by any scientific means of evidence (documents, medical treatments, testimony of a witness who is a doctor, etc.).” (Udroiu 2014, p. 26)

By *serious disability* in the sense desired by the legislator it is understood “*the existence of morphological changes, morpho-functional or functional presenting a high level of severity (e.g. paralysis).*” (Udroiu 2014, p. 26)

We believe that the existence of an incurable disease or serious infirmity can be proved, firstly through medical documents issued by a physician or even medical committee. Also, for the existence of the crime it is not sufficient merely stating that the victim was suffering from an incurable disease or serious infirmity, one of these conditions is required to be completed by the concrete situation which causes the victim to bear some permanent physical or mental sufferings difficult to bear, without foreseeing any hope for improvement in this particular situation in which the victim is.

It is irrelevant whether the victim and the committer were family members or not, or whether the victim could or not commit suicide (due to physical and mental state).

4. Structure and Legal Content

4.1. Premise Situation

As in the case of murder, there is no premise situation.

4.2. The Constitutive Content

a) **The objective side** comprises the material element, the essential requirements, the immediate consequence and the causal connection.

The material element of the objective side consists of an action or inaction of killing the victim. It does not matter if the action or inaction (where it is necessary finding the legal or conventional obligation of the active subject to act), is violent or nonviolent.

According to recent doctrine, “*the New Criminal Code incriminates therefore both **active euthanasia**, consisting of the action a person by terminating life for the suffering patients with his consent (for example, the action of the doctor who administered to the patient, who was in the terminal stage of the disease, a lethal injection with an overdose of morphine) and **passive euthanasia** (indirect) consisting of causing the death of a suffering patient by not carrying out an act or by interrupting it, which had resulted in death (**exempli gratia**, the intentional omission of the doctor to administer a particular treatment to a suffering person in order to produce death, stopping the life support devices, which kept a certain person alive).*” (Udroiu 2014, pp. 26-27)

The Essential requirement in the text of incrimination consists of the existence of *an explicit, serious and repeated, conscious request of victim* to the committer.

We note that this essential requirement implies cumulative fulfillment of four conditions provided by the law. An explicit request is supposed to be made clearly, unequivocally, without the possibility of being interpreted otherwise; this request must unreservedly induce the idea that the victim wants to end his life without the existence of other interpretations; we consider that this request can take the written form. In the case where no such request was ever addressed to the offender, and the victim's life was ended out of mercy will not be fitted for this offense, the deed will be categorized in the provisions of article 188 paragraph (1) Criminal Code (murder). Also, it will be the offense of murder in the case in which the perpetrator is a person other than the one requested by the victim.

The request shall be construed as being *conscious*, when the victim expresses this desire to put an end to his life in moments when he is conscious in terms of both verbal expression or written demand, and the acknowledgment of the victim for the

consequences to which he is exposed, i.e. the cessation of life; the term *conscious* presupposes that at the moment of the requirement, the victim was not suffering from another illness (mental), due to which, he could not be aware of the consequences of his request (he was irresponsible).

In the interpretation of this term in the specialized literature it was also claimed that “*the judicial bodies should pay a particular attention to the evaluation of the conscious feature of the request in the event that it was made by a person who had decreased or greatly diminished discernment, when it can be rightly foreshadowed the situation that although we are not in the presence of an irresponsible, yet the request for ending his life does not meet the condition of the conscious feature. Likewise, special attention should be paid in the case of euthanasia requests made by minors even if the request was confirmed or accepted by the legal representative*”. (Udroiu 2014, p. 27)

The term of repeated request of the victim to end his life requires that the victim insists several times and he requires the perpetrator to act or not to act in the view of his killing. Although the doctrine found that this request satisfies the requirement of repeatability when it is done at least twice (Udroiu 2014, p. 27), taking into account the particular consequences of the act, we consider that this request should be done more than twice, practically the interpretation being the insistence of the victim to the perpetrator for several times. The repeatability feature should not be understood as a literary interpretation, but as an insistence from the victim. It will not satisfy this requirement in the case where the victim requests the perpetrator to end his life at large intervals (the second request after about a week, the third after about a month, etc.). We consider that these repeated requests should succeed in a short period of time.

The *immediate result* is the death of the victim.

The *causal connection* involves the action or inaction of the perpetrator which caused the victim's death. The most important evidence in establishing the causal connection is the forensic report. In the case where from the evidence it results that the victim's death did not occur as a result of action or inaction of the offender, but from other causes, the causal connection does not exist, and therefore the active subject will not criminally liable for this offense in the consumed manner.

b) **The subjective aspect** is the direct intention of the active subject to kill the victim as specifically provided in the incrimination text.

In the specialized literature it was assessed that “in the case where the offender euthanized by mistake a person other than the suffering one, which repeatedly requested to be killed (*error in personam*) it shall not be retained as the legal error

as the cause of non-imputability, but it will retain the offense of murder at the request of the victim, and not that of murder/manslaughter”. (Udroiu 2014, p. 27)

5. Forms. Methods. Penalties

5.1. Forms

Although they are possible, both *preparatory acts* and *attempt* are not punishable by law. As for the attempt we appreciate that in a concrete situation where although the perpetrator executes the action or inaction that is liable to lead to death of the victim, though the victim does not die, this act is an attempt to the examined offense, but which is not punishable; the described act cannot meet any other elements of an offense against the health or bodily integrity because, according to article 22 paragraph (1) there is the consent of the victim, the act is interpreted as a justifying cause.

The occurrence of the offense is when the victim's death is recorded.

5.2. Methods

The offense can be committed in the *normative manner* described in the text of incrimination; in terms of *methods in fact* they are diverse, being characteristic of every deed in hand, both in terms of action and inaction that led to the death of the victim (poisoning, strangulation, disconnecting medical devices that maintained the victim alive, failure to apply the adequate treatment, etc.).

5.3. Penalties

Under article 190 of the Criminal Code, the punishment provided is imprisonment from 1 to 5 years.

6. Additional Explanations

6.1. Link to Other Crimes

Although distinctly incriminated, in a different way however to homicide offense at the victim's request shows some elements of similarity and distinction with the murder offense. Specific to this crime is the position of the passive subject who is in a special situation (suffering from an incurable disease or serious infirmity, medically certified, which causes permanent and unbearable sufferings) and the action or inaction of the active subject which ends a life at the explicit serious and repeated conscious request of the victim.

6.2. Some Procedural Issues

The procedural aspects present issues of identity with those mentioned in the case of examining the murder offense.

7. Previous Legislative Mentioning and Transitory Situations

Since in the 1969 Criminal Code it does not incriminate this act, there are previous legislative mentioning and transitory situations.

8. Conclusions

Incriminating the homicide act at the request of the victim, as a weaker form of murder, was imposed given the new changes occurring with the adoption of the new Criminal Code. In some European legislations, this act is not a crime, such as the Dutch and Belgian legislation where the euthanasia is legal. Thus, in those States, they are not criminally liable the persons involved in the death of the subject, provided that the suffering is irreversible and unbearable and the patient has to assert repeatedly and voluntarily the request, the action being medically justified and not being a second medical opinion from an independent specialist (Boroi 2014, p. 55).

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