

UDC 342.72:616-036.885

Kaminska N. – Doctor of Law, Professor, Professor of the Department of Constitutional Law and Human Rights of the National Academy of Internal Affairs, Kyiv, Ukraine;

Nazarko Yu. – Postgraduate Student of the Department of Constitutional Law and Human Rights of the National Academy of Internal Affairs, Kyiv, Ukraine

EUTHANASIA AND THE HUMAN RIGHT TO HEALTH PROTECTION

The right to life and health is one of the main and inalienable human rights. Now, given the European integration, there is an increasing number of discussions and discussions about the right to euthanasia. The article covers and explores the concept, types, provision, implementation and protection of the human right to euthanasia in the human rights system for the protection of health. Data on international experience in the issues of ensuring and implementing the right to euthanasia are given, and relevant regulatory sources are analyzed. The article also discusses possible ways of developing the right to euthanasia in Ukraine, taking into account international experience.

Keywords: euthanasia, human rights, the right to health care, health, right to life.

One of the main and fundamental human rights, which occupy an important place among the subjective rights that ensure the natural and healthy existence of a person and a citizen, is the right to life and the right to health care. These rights are declared in Art. 27 of the Constitution of Ukraine, which states: «Everyone has an inalienable right to life», and Art. 49 of the Constitution of Ukraine states: «Everyone has the right to health care, medical assistance and medical insurance». Art. 3 of the Constitution of Ukraine also establishes the provision according to which person, his life and health, inviolability and security are recognized in Ukraine as the highest social value. Art. 11 of the European Social Charter also

provides for the effective implementation of the right to health care. Cancellation and restriction of the above rights is not permitted, except for cases that may be temporarily established in conditions of military and emergency state.

Strengthening and protecting health is a prerequisite for ensuring a healthy and dignified human existence, because health is a social task. All countries are responsible for the health and life of their citizens.

Now it is very important to legislate the right to euthanasia when Ukraine is on the path of reform. The article will analyze the concepts and types of euthanasia, as well as determine the place and legal justification of the right to euthanasia, taking into account its correlation with the right to health care in Ukraine and the European Union. There will be also arguments about the advantages and disadvantages of euthanasia and the prospects for introducing this right in Ukraine, taking into account the experience of the European Union. That is why the purpose of the study is to provide a comprehensive analysis of the right to euthanasia in accordance with the health care and international experience.

In legal science the right to euthanasia and its compliance with the right of inalienable human rights are given close attention, in general, sources for the study were the works of Z. Chernenko, M. Chumak, D. Dmitrieva, T. Dobko, V. Hryshchuk, N. Kaminskaya, M. Malein, F. Poet, I. Senyuta, V. Vitkova, who analyzed the question of the right to euthanasia and its connection with other subjective rights. Nevertheless, a comprehensive analysis of the right to euthanasia in Ukraine and in the countries of the European Union in accordance with other human rights to health and life has not yet been analyzed.

Human rights are the natural rights of everyone what provide life, human dignity and freedom. Human rights are inalienable and inviolable. They are non-state and non-territorial, they exist irrespective of consolidation in the laws of the state and are the object of protection of the international society and protection by the state.

If we analyze history, so the first attempt to legalize euthanasia was in Australia in 1996, a law was adopted regarding euthanasia. Then this law was renamed, and today euthanasia is prohibited in Australia.

Nowadays the euthanasia is legal in the Netherlands, Belgium, Ireland, Colombia and Luxembourg. Assisted suicide is allowed in Switzerland, Germany, Japan, Albania, Canada and several

US states. Most clearly, the right to euthanasia is formulated in the Netherlands legislation and in Belgian and Swiss, there are clearly formulated and consistent wishes of the patient to die.

It was April 2, 2002, in the Netherlands the «Law on the curtailment of life upon request or assistance in suicide» was adopted, which legally authorized the implementation of an assisted suicide and euthanasia.

In accordance with this law, anyone who has reached the age of 16 has the right to independently determine the procedure and way of completing his life. For individuals aged 12 to 16 years, this act is required with the consent of their parents or other legal representatives. The doctor who carries out euthanasia must be sure that the patient's request is independent, repeatedly and well thought out, and that the suffering of the person is prolonged and unbearable. In addition, it is required to inform the patient about his condition and prospects for recovery. Approval of euthanasia occurs only by collective decision taking into account the views of other doctors [1, p. 20]. Belgium is the second country in the world that legally accepted the idea of legalizing euthanasia. On September 23, 2002, the parliament of this state passed a law according to which euthanasia and suicide assistance became legal under conditions identical of the legislation of the Netherlands. In accordance with the law, the right to euthanasia have a person who is 18 years old [1, p. 21].

The term «euthanasia» from the Greek means the good, easy death. English philosopher Francis Bacon first used this term in the XVI Century. He called by this word the painless death of the dying person, who freed from physical torment. Now euthanasia involves the cessation of life of an incurably sick person who undergoes significant physical and psychological suffering. This procedure is performed by medical personnel upon permission of the patient or with the permission of relatives of a seriously ill patient.

Now, there is such general definition as euthanasia is the deliberate actions or inactivity of medical workers (or other persons) that are carried out by them in the presence of a written application of the patient (or «death statement») or an oral request if the physical condition makes it impossible written form of a petition of a patient who is aware of the significance of his actions and can govern them. In accordance with legally established conditions, in order to terminate his physical, mental and moral suffering, as a result of which is realized right to dignified death [2, p. 200].

As correctly pointed out by I. Silunianova, euthanasia, as a new way of medical solution to the problem of death (termination of life) is part of the practice of modern healthcare under the influence of two main factors. First, the progress of medicine, in particular, under the influence of the development of resuscitation, which prevents death of the patient. Second, changes in values and moral priorities in modern civilization, in the center of which is the idea of «human rights» [3, p. 111].

There is a classification of euthanasia, we can generalize it as follows: according to such a criterion, as a method of implementation, euthanasia is divided into an active (positive or «filled syringe method»), that is the use of special means or other actions that result in a quick and painless death, and a passive (negative or «method of deposited syringe»), which means the abandonment of measures conducive to maintaining life, that is the termination of the provision of life-saving medical care that accelerates the ting natural death. According to another criterion, the subject of the expression, euthanasia is divided into voluntary, that is, the use of medicinal or other means to an incurable patient, which leads to a mild and calm death upon the request of a patient who is aware of his actions and can control them and compulsory, which means causing light death by means of appropriate means and actions in the incurable patient, but by the decision of family members, legal representatives or public institutions [4, p. 87].

In Ukraine, an attempt to legalize passive euthanasia was carried out in preparation of the draft Civil Code of Ukraine in 2003. Now in the Ukrainian legislation it is stated that nobody can be arbitrarily deprived of life. The duty of the state is to protect human life. Everyone has the right to protect his life and health from unlawful encroachments. Therefore, euthanasia is considered murder in Ukraine. In addition, in paragraph 2 of Art. 52 of the Law of Ukraine «Fundamentals of Health Care Legislation» passive death is prohibited: «Medical workers are prohibited from performing euthanasia – the deliberate acceleration of death or death of a terminally ill patient in order to stop his suffering». However, at the same time it is allowed to stop treatment for incurable patients.

Part four of Art. 281 of the Civil Code of Ukraine, provides the same prohibition of euthanasia, which states that the satisfaction of an individual's request to terminate her life – is prohibited. However, in the Criminal Code of Ukraine, the voluntary consent of a person

for deprivation of his own life can be qualified as an attempt to suicide (Art. 120) or an intentional murder – the unlawful causing of death to another person (Art. 115).

An interesting view is also of the scientist Yu. Dmitriev, who believes that the prohibition of euthanasia is an unconstitutional act that is contrary to the principle of ensuring human dignity. In particular, Art. 28 of the Constitution of Ukraine stipulates that everyone have the right to respect his dignity. Indeed, it does not seem possible to act solely in the interests of the patient, who begs for the end of suffering, refusing him in this [5, p. 59].

International human rights treaties define the right to health as one of the essential social and economic rights, taking into account its decisive importance for the well-being and dignity of people.

As for the international consolidation of the right to euthanasia, we can say that in Art. 13 of the European Social Charter has the right to social and medical assistance, in particular to ensure that everyone who is dependent on adequate resources and cannot acquire such resources through his own efforts or from other sources would be able to obtain the necessary sickness benefit. On the basis of the above, one can talk about medical aid as a means of securing the right to euthanasia.

In our opinion, arguments for the use of euthanasia are very significant. In particular, there are: providing human rights through the use of euthanasia to dispose of their lives; humanity, which allows to stop the insurmountable suffering of man; personal expression of person.

So one of the scholars F. Fut defines euthanasia as «a decision on death for the one who thinks». F. Fut, considering the problem of criteria for defining life as a good, asks: «But do you always learn the other good, saving his life? Obviously not. Let us imagine, for example, that a person was tortured to death and gave her medicine that continues her suffering; it would not be coriander, but on the contrary. Alternatively, imagine that in fascist Germany, a physician rescues the life of a sick person, but this rescued man is sent to a concentration camp; the doctor should want, for the benefit of the patient, to die from illness. Continued life has not always been a blessing». The researcher is trying to find a link between life and good. She explains that since life is not always a blessing, we tend to reject this idea and consider the fact that life is considered to be

bless by chance, just as the fact that «inheritance is usually a good thing» is also evident. The researcher further notes that we tend to think that life is always a blessing, because the existence of good will make life a good, where life is good, but if life is good only because life is a condition of good, then why on the same basis of life cannot be evil if it is a source of bad. «And how can life be a blessing if it contains more evil than good?» That is, it is not permissive to «be alive» is defined as a benefit, namely life that will reach a certain standard of normality [6, p. 68].

There are several legal doctrines in the field of the right to euthanasia; we can distinguish the following main groups [7, p. 356]:

1) deny the right to euthanasia (S. Borodin, G. Borzenkov, O. Kapinos, N. Kozlov, I. Senyuta, S. Stetsenko, P. Tarakin, A. Zybrev). Proponents of the ban on euthanasia insist that the legalization of euthanasia can lead to abuses, as well as to paralyze scientific and research progress in the medical sphere;

2) legal doctrines that substantiate the possibility of a volitional choice of a person in the application of euthanasia (L. Minelli, Y. Dmitriev, E. Shlenev, V. Glushkov, I. Seul-Nova). According to this legal doctrine, the main argument is recognition of the independence of the individual; the right to give a person the opportunity to decide on matters concerning her psyche, organism, and emotional state. The patient should receive complete and comprehensive information about his health, his illness. According to this information, the patient can self-assess the possible medical intervention in accordance with his understanding, values and representations;

3) legal doctrines that substantiate that the right to euthanasia is a consequence of the right to life (A. Koni, M. Malein, N. McLein, G. Romanovsky, E. Te). The right to life logically implies the right to death, since the right to death is an integral part of the right to life. Without this, the right to life becomes a duty from which it is impossible to refuse.

The main adherents of euthanasia note [8, p. 25]:

1) the refusal of euthanasia can be considered as an application to a person of torture, violence, cruel and degrading treatment;

2) support for life at the stage of dying through advanced technology is very costly, and the means used to support life in hopeless situations would suffice to treat dozens, hundreds of people undergoing treatment;

3) euthanasia still exists outside the legal field and a special law will allow to control this process;

4) euthanasia is carried out by the hands of physicians and deprives members of the family of an ill-sick person from the reproof of conscience and financial expenses;

5) hopelessly ill person could act as a donor of organs for patients, which is vital for transplantation.

In contrast, opponents of euthanasia say [9, p. 162]:

1) euthanasia is contrary to medical ethics;

2) relatives of persons who are in difficulty, in the case of legalization of euthanasia, may abuse their rights for the purpose of property enrichment;

3) formal authorization of euthanasia can become a definite mental «brake» for finding new more effective means of diagnosis and treatment of seriously ill patients, and also promote unfairness in the provision of medical care to such patients;

4) even if the voluntary consent of the patient is obvious, it is taken into account that the psychological state of a person on the verge of life and death is not sufficiently studied;

5) one of the most serious arguments against euthanasia is the risk of misuse among medical personnel, as well as a particularly dangerous possibility of a diagnostic medical error.

As noted above, there are arguments on both sides of the right to euthanasia. Let us consider the practice of the European Court of Human Rights. Concerning the voluntary termination of life, there is a clearly expressed position of the international court regarding euthanasia – the case of *Pretty VS The United Kingdom* [10], which was considered by the UK judiciary and the European Court.

In fact, in July 2001, a British lawyer, Diane Pretty, who suffered from an incurable and fatal motor neuron disease, appealed to the Director of Public Proceedings «to make an undertaking not to expose the applicant's husband to prosecution if the latter provided assistance to her suicide». After receiving the refusal, the applicant applied for judicial review of the decision. By a decision of the High Court, the petition was rejected and the appeal filed was not taken into account by the House of Lords. The applicant applied to the European Court of Human Rights for a complaint alleging violation of Art. 2 (right to life), Art. 3 (protection against torture and ill-treatment), Art. 8 (right to freedom of opinion and belief) and

Art. 14 (protection against discrimination) of the United Kingdom Convention. In his statement, Pretty noted that Art. 2 protects not only the right to life, but also the right to choose, to continue life or not, and «protects the right to die in order to avoid unbearable suffering and humiliation». However, the Court ruled that «the Court is not inclined to consider that the» right to life «guaranteed by Art. 2 of the Convention can be interpreted in a negative way... just as it cannot create the right to self-determination in the sense of giving the person the right to choice of death instead of life».

However, the Court did not recognize that euthanasia was a violation of the right to life and shied away from comments on the legality of the use of euthanasia in European countries. Thus, the European Court found that, in the case of the Precede of the United Kingdom, the British authorities did not violate the right to life by refusing the husband, at his request, to contribute to the suicide of the applicant. The European Court also confirmed its position by stating «the right to death, implemented by a third party or with the support of public authorities, cannot be inferred from the content of Art. 2 of the Convention».

Another case of the European Court of Human Rights, «Lambert and others VS France» [11], refers to euthanasia. From the case studies, it is known that 38-year-old Vensan Lambert was in a vegetative state several years after the car accident of 2008. He slept, woke up, ate, smiled or cried, but was unable to communicate and respond adequately to the environment. The European Court of Human Rights has considered the case for two years, for the euthanasia was the wife of a paralyzed Frenchman, while his parents were opposed. In France, euthanasia is a permissible procedure. The European Court of Human Rights has ruled that the termination of the livelihoods of the paralyzed Frenchman Lambert does not contradict the human right to life. Moreover, this will not be in violation of Art. 2 of the European Convention on Human Rights if the procedure of euthanasia is fulfilled.

Therefore, if we talk about the countries that legalized euthanasia, it should be noted that the European Court of Human Rights recognizes the possibility for the states to regulate the matter without being bound by the right to life. In addition, in many cases it makes a decision to allow euthanasia, not counting it as a violation of the right to a person's life. The following cases can be cited:

Alda Gross VS Switzerland, the United Kingdom, NHS Trust Airedale VS Bland and others.

At present, palliative and hospice care is offered as an alternative to euthanasia. At the heart of palliative care is the creation of special hospices, in which persons who have a mortality disease are able to duly complete their lives. Hospice care is not only in the medical support of the patient's livelihood, but also in order to alleviate the physical and moral suffering of a person. This kind of assistance involves not only hospice workers, but also relatives and close patients. «Hospital medical staff refers to a patient as an individual who, until the last minute, remains a member of the community. The main task of physicians and nurses working in a hospice is to improve the quality of life of the patient, even if the life expectancy is short. Life remains life, and its quality is the main goal of the efforts of all who surround him, even in the last day and hour of his life» [4, p. 92].

When large-scale introduction of hospice traffic in Ukraine should take into account: 1) the need to study the social, moral, psychological and professional parameters that should be endowed by hospice workers; 2) the establishment of hospices has a special content due to the fact that in our country the level of pain experienced by a patient in a hospital and at home has reached unrealistic limits; 3) they will play the role of peculiar «social medicines», where the goals of democratic, religious, ecological movements will harmoniously combine; 4) the great influence can have on the development of the whole system of medical care of the population; 5) contribute to the improvement of the psychological climate in society by overcoming the tendency to deny death and curb the feelings of fear and grief associated with it [12, p. 126].

Therefore, thanks to the hospices, we can solve the problem with euthanasia. In the European Union, the practice of hospice activities gives positive results and it is possible to talk about their expediency and the expansion of the network of such hospitals in Ukraine, while ensuring the mechanisms of control of such institutions in order to prevent abuse.

Conclusion: unresolved issues related to euthanasia, the activities of hospices as an alternative method of solving problems with incurably ill people – one of the main both in the analysis of the right to life, and in the analysis of the right to health. Due to this, we

can talk about the relationship of the above rights. Regarding the relationship between these rights, it should be noted that the right to health is one of the guarantees of the right to life, since the right to life is determinant in the system of inalienable human rights, and human health is one of the main criteria of life, a condition «The durability of life». The notion of the right to euthanasia also allows to some extent realize the right to life and the right to health care.

Regarding the legalization and legislative consolidation of euthanasia in Ukraine at this stage, taking into account reforms and European integration in all spheres of human life is quite expedient. Although a completely Ukrainian society is not yet ready due to corruption and bribery, the economic crisis, legal nihilism to legislate of euthanasia because it may lead to abuses by the state, medical workers and citizens. The decision on the legalization of euthanasia must be made for a person, namely in the aspect of realization of his right to life and the protection of his health. In the countries of the European Union, there is also no definitive opinion regarding the right to euthanasia, since very few countries have a legally enforceable right to euthanasia. Although the European Court of Human Rights is taking the right to choose the state itself and does not consider it a violation of the right to life and health.

If Ukraine legalizes euthanasia, it will be one-step closer to the developed countries. The main thing is that this process is gradual, balanced, legal and impartial. The law must specify in what conditions euthanasia is possible, because the question concerns the life of each person.

REFERENCES

1. Dombrovskaya, O. (2008). Shchodo pravovykh aspektiv lehalizatsii evtanazii [About legal aspects of legalization of euthanasia]. *Pravo Ukrainy, Law of Ukraine*, 10, 19-24 [in Ukrainian].
2. Vorona, V.A. (2010). Pravo na evanaziiu yak skladova prava liudyny na zhyttia [The right to euthanasia as a component of human right to life]. *Pravo Ukrainy, Law of Ukraine*, 5, 205. Retrieved from <http://euthanasia.at.ua/publ/1-1-0-4> [in Ukrainian].
3. Siluianova, I.V. (2001). *Bioetika v Rossii: cennosti i zakony* [Bioethics in Russia: Values and Laws]. Moscow: Grant [in Russian].
4. Seniuta, I.Ya. (2006). Pravo liudyny na okhoronu zdorvia ta yoho zakonodavche zabezpechennia v Ukraini [Human right to health care and its legislative protection in Ukraine]. *Candidate's thesis*. Lviv [in Ukrainian].

5. Dmitriev, Yu. (1996). Pravo cheloveka na dostoinuiu jizn kak konstitucionno-pravovaiia kategoriiia [The right of man to a decent life as a constitutional and legal category]. A.E. Kozlov (Eds.). *Konstitucionnyi stroi Rossii, The Constitutional System of Russia*, 3, 54-62 [in Russian].

6. Fut, F. (1990). Evtanaziia [Euthanasia]. *Filosofskie nauki, Philosophical sciences*, 6, 63-80. Retrieved from <http://ec-dejavu.ru/e/Euthanasia.html> [in Russian].

7. Vitkov, V. (2014). Pravo na medychnu dopomohu ta pravo na smert [Right for medical assistance and the right to death]. *Yurydychnyi visnyk, Legal Bulletin*, 6, 356-361. Retrieved from file:///C:/Users/admin/Downloads/urid_2014_6_61.pdf [in Ukrainian].

8. Anikina, H.V. (2009). Perspektyvy lehalizatsii evtanazii v Ukraini [Prospects for legalization of euthanasia in Ukraine]. *Forum prava, Forum of rights*, 3, 25-34. Retrieved from file:///C:/Users/admin/Downloads/vaau_2012_3_26.pdf [in Ukrainian].

9. Shpachuk, A.O. (2012). Evtanaziia: pravovi ta etychni aspekty [Euthanasia: Legal and Ethical Aspects]. *Visnyk Akademii advokatury Ukrainy, Bulletin of the Academy of Advocacy of Ukraine*, 3, 159-163 [in Ukrainian].

10. Sprava Pritti proty Spoluchenoho Korolivstva vid 29 kvitnia 2002 roku [Case Pretty v. The United Kingdom, April 29, 2002]. (n.d.). www.hrcr.org. Retrieved from <http://www.hrcr.org> [in Ukrainian].

11. Sprava Lambert ta inshi proty Frantsii vid 5 chervnia 2015 roku [Case Lambert and others v. France, June 5, 2015]. (n.d.). www.hrcr.org. Retrieved from <http://www.hrcr.org> [in Ukrainian].

12. Vekovshinina, S.V., & Kulinichenko, V.L. (2002). *Bioetika: nachala i osnovaniia (Filosofsko-metodologicheskii analiz) [Bioethics: the beginning and the foundation (Philosophical and methodological analysis)]*. Kiev: Sphere [in Russian].

13. Hyske, V., & Kaminska, N.V. (2016). The question of euthanasia [The question of euthanasia]. S.S. Cherniavskyy, N.V. Kaminska, & I.H. Haldetska (et al.). *Vykorystannia anhliiskoi movy v yurysprudentsii, Use of English in jurisprudence: Proceedings of the Round Table*, (pp. 25-27). Kyiv: Nats. akad. Vnutr. sprav [in Ukrainian].

14. Zakon Ukrainy Osnovy zakonodavstva Ukrainy pro okhornu zdorovia: vid 19 lystop. 1992 r. No. 2801-XII [Law of Ukraine Foundations of the legislation of Ukraine on health care from November 19, 1992, No. 2801-XII]. (n.d.). zakon4.rada.gov.ua. Retrieved from <http://zakon4.rada.gov.ua> [in Ukrainian].

15. Konstytutsiia Ukrainy: vid 28 cherv. 1996 r. [The Constitution of Ukraine from June 28, 1996]. *Vidomosti Verkhovnoi Rady Ukrainy, Bulletin of the Verkhovna Rada of Ukraine*, 30. Retrieved from <http://zakon0.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> [in Ukrainian].

Стаття надійшла до редколегії 26.10.2017

Камінська Н. В. – доктор юридичних наук, професор, професор кафедри конституційного права та прав людини Національної академії внутрішніх справ, м. Київ;

Назарко Ю. В. – аспірант кафедри конституційного права та прав людини Національної академії внутрішніх справ, м. Київ

Евтаназія та право людини на охорону здоров'я

Визначено, що право на життя та охорону здоров'я є невід'ємним правом людини. Досліджено поняття, види, забезпечення, реалізація та захист права людини на евтаназію та його співвідношення з правом людини на охорону здоров'я. Окреслено міжнародний досвід щодо питань забезпечення та реалізації права на евтаназію, а також проаналізовано відповідні нормативні джерела. Означено можливі шляхи розвитку права на евтаназію в Україні, відповідно до міжнародного досвіду.

Ключові слова: евтаназія, права людини, право на охорону здоров'я, здоров'я, право на життя.