

The Right to Life in the Legal Order of the Republic of Slovenia

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SUMMARY

The purpose of this short article is to present the Slovenian legal regulation of medically assisted dying and the problems we face in this field. The aim of the article is to determine whether Slovenia is one of the countries with a limited set of rights regarding this and whether it is competitive in the field of medical assisted dying compared to other European countries.

Keywords: Life; Euthanasia; Dying; Law; Constitutional Right

Life as a Social Good

On the issues of life and dying, and the question of who's a life is, I am unable to place the professional competence, persuasiveness, and credibility within myself, to critically test the weight and reach of legal opinions, theories, positions, or judgements in a concrete problem field, and to understand and persuasively justify why some positions are more likely to be followed than others. Merely summarising the views of legal theorists, judgements, and legal theories to suit my own beliefs, and ideological views, with serious argumentation, has nothing to do with my legal knowledge about living and dying. The 2017 litigation before the European Court of Human Rights (ECtHR) concerns Mr Mortier's complaint against Belgium [1] for an alleged breach of the State's obligation to protect the right to life by failing to prevent a doctor from ending the life of a patient suffering from chronic depression, without the knowledge and consent of her son and daughter. In this court case, the complainant's mother, diagnosed with chronic depression, was euthanised by a doctor who failed to inform the complainant and his sister.

The Administrative Board, which is responsible for verifying the procedure and compliance with the conditions laid down by the

Belgian Euthanasia Act, did not find any irregularities, even though the decision was not made public. The complainant claimed that the State had failed in its duty to protect his mother's life. He argued that the safeguards provided for by law were illusory, due to a failure to follow due process. He also thought that the investigation carried out was not sufficiently effective. He questioned the impartiality of the Administrative Board, since the doctor in question was one of the members of the Board and, a few weeks before her death, the complainant's mother had donated €2,500 to the medical association of which the doctor was president. The complainant also asserted that the facts of the case violated his mental integrity and interfered with his family life. He pleaded a violation of Articles 2 and 8 of the Convention on Human Rights. As I was studying the court case and looking for a timeless concept of humanity and its value, a few questions came to my mind.

Which behaviour is the most human? Helping a person to die because they asked for it, for whatever reason? Would it not be more humane to say: 'You matter because you are you, and you matter for the rest of your life. We will do everything we can, not only to help you die peacefully but also to help you live until you

die.' As in the case of Vincent Lambert [2] from France in 2019, these are two opposing concepts of humanity and human rights: on the one hand, a humanist concept that values and protects the intrinsic dignity of each person, and on the other hand, an individualist notion that does not believe in human nature, but only in individual will. The case of *Mortier v. Belgium* raises many questions to which I am still seeking answers. Legal theory and case law also distinguish between the capacity to act [3] and the capacity to judge [4]. According to legal theory, the capacity to judge is the actual capacity to understand the meaning of one's own decisions and actions, the capacity to understand the meaning of a statement of one's own will and the legal consequences that such a statement of business will entail.

The discrepancy between the two concepts arises when a person with the capacity to act loses the actual capacity to judge, for example, due to dementia, alcohol consumption, medication, or stress. Discretion is the essence of the capacity to act, but the will of a person who is incapable of discernment is null and void, so there is no valid declaration of will, and such a person does not understand the meaning and consequences of the declaration because they were incapable of discernment at the time. The concept of discernment is a legal concept, not a medical one. The court can only conclude on the person's capacity on the basis of a determination of all the circumstances relating to the person's mental state. Of course, the legislature has undoubtedly taken into account the advances of medical science in the matter of discernment. The psychiatric expert has a special role in the process of establishing capacity, but only in the sense that their expertise enables the court to ascertain the necessary circumstances of the mental state and then, on the basis of that evidence, to determine whether or not the person was capable of exercising judgement at the time of the declaration of intent, or whether or not they were capable of acting at that time.

Human dignity is the highest ethical value and the benchmark and limit for state power. The constitutional legal order is therefore built on values that fundamentally belong to the individual: the free human being. The Charter of Fundamental Rights of the European Union [5] makes it clear that human dignity is inviolable and must be respected and protected. Article 17 of the Slovenian Constitution provides for the same. Everyone has the right to life and personal integrity. Everyone has the right to respect for their physical and mental integrity. In the fields of medicine and biology, free consent must be respected, after prior information of the person concerned in accordance with the procedures laid down by law. In our country, this is laid down in Article 26 of the Patients' Rights Act [6]. For many years now, there has been much talk of a legal framework that, at least in theory, would be so safe and secure that it would not allow abuses in the area of life and dying. The law always exists within social developments. Modern medicine is often a reflection of the society that pushes with all its might, believing that at the end of life, there is still something more that can be done for the patient,

perhaps with more aggressive medical treatment, which does not improve the quality of life or prolong it.

The pressure on medicine and on the dying is exerted through legal means, through lawsuits by relatives who cannot cope with their relative's dying and who claim that the doctors did not do everything they could, even if the action is medically unreasonable and is also privately rejected by the patients but who often bow to the pressure of the relatives. This happens despite patients' rights to relieve their suffering and pain and despite their right to choose how to live their life with a terminal illness. The rule of law and its protection of patients, even on less controversial issues such as accompanying the dying, cannot protect them from abuse. It is necessary to demystify death, which has been erased from everyday conversation, to allow dying and to let people die when their time comes, because it is a matter of respecting the limits of one's own dying.

Right to Life

The human right to life is not a legal right, but a natural right of the highest value, without which society cannot exist. The right to life is a foregone right. If the law were to establish a norm which, in principle, denied the right to life, it could not be a legal norm, since it would contradict the foundations of law. The human right to life is an essential and constitutive element of the protection of human dignity. Human life is a necessary precondition for the protection of dignity as a supreme constitutional value and idea. The inviolability of human life does not permit a restrictive or negative valuation of the life of the individual, a valuation which would define a human being as less useful or less worthy than others, or as unworthy of life altogether, on account of their physical or mental condition. The Constitution of Slovenia [7] commands an equal valuation of the life of all individuals and opposes the notion of a human as an object. Human beings are subject to rights and fundamental freedoms. The requirement of a categorically positive valuation of human life is clear from the provision of Article 17 of the Constitution.

The right to life is an inherent right of individuals and is closely linked to them. It can neither be transferred nor waived. The right to life cannot be the basis for the right to death, which is its substantive opposite. The inviolability of life does not confer on the individual a dispositive right over their own life, which would, for example, oblige the State to assist an individual in committing suicide. The Universal Declaration of Human Rights [8] guarantees the right to life in Article 3, which states that everyone has the right to life, liberty, and personal safety. The International Covenant on Civil and Political Rights [9] regulates the right to life in Article 6, which states that everyone has the inherent right to life. This right must be protected by law. No one shall be arbitrarily deprived of life. It is clear from international practice, the provisions of national constitutions and various international instruments that the right to life constitutes a general principle of international law [10].

Conclusion

The proposed Slovenian law on assisted voluntary end-of-life, which has been under public consultation since October last year, places the responsibility for assisting in the execution of a person on the chosen attending physician, which is contrary to the physician's mission of preserving life. In this context, I justifiably wonder what place life occupies in Slovenian society and how society protects human dignity as its individual and collective value. How much is life worth in Slovenian society? As I have already written, the realisation of life and its inviolability and sanctity are the central foundations of any human society. The case law of the ECtHR has taken the view that the right to life does not include the right to die. The question arises as to who can decide on assistance to end life voluntarily. Should requests be dealt with only by expert teams composed of doctors, philosophers, lawyers, and other professionals, or should such requests be dealt with by the courts? It is unacceptable for the decision to be in the hands of just one individual a doctor.

The value of life cannot be evaluated by the law. The medical profession can agree on the evaluation and determine from what point onwards it is unethical and contrary to medical science and the profession to artificially maintain someone in a state that does not constitute life. The Patient Rights Act contains a legal standard, that is, the principle of the greatest medical benefit for the patient. This standard means that hopeless treatment should not be continued, taking into account all the circumstances of the particular case and avoiding abuse of the law. The Patient Rights Act also gives patients the right to refuse medical care, for example to be put on a ventilator, and the doctor can take this into account. Such a waiver is not analogous to euthanasia. I have reservations about the substance for a simple, mundane reason – I have always seen law as an imperfect way of regulating human life because, as a lawyer, I must also be aware of the limitations of my profession. The law is rooted in humanity, which is also rooted in a profound awareness and acknowledgement that I can be wrong.

The famous saying *errare humanum est*, by which we justify our human and professional mistakes, encapsulates the primary characteristic of human existence. Legislation and regulation in the sphere of the end of our lives must have a safeguard that also allows for a return to the original state, for example, the reversal of a decision made because of one or another mistake. From a biological and psychological aspect, the process of natural dying is not just an event in the sense of someone flicking a switch to end a life. I have no medical or psychological knowledge myself, and I can only add that the process of dying is considerably more complex than it seems at first sight and that we are far from having the answers to the questions of the extent to which we can legally intervene in what is happening. It is a question to which we will all one day find the answer. That is why legal interventions in the final phase of our lives need deliberate and careful thought. Once death occurs, there is, unfortunately, no undoing it, no going back to the way things were.

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