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CRIMINALIZATION DILEMMAS IN THE CASE OF A LEGAL GOOD IN THE FORM OF HUMAN LIFE

Abstract

In this work, the author addresses the problem of the value of life in making criminalization decisions. There is a fairly common view that human life is the most important value. However, the statements of philosophers, lawyers, and ethicists indicate that many times for a person in a specific situation there are values more valuable than life itself, understood as biological existence. Therefore, the question arises whether and to what extent the dilemmas related to the assessment of the value of life against the background of other legal goods should be taken into account by the legislator. The author, based on the statements of specialists in the field of ethics, philosophy and theory of law, points out some of the most important theses relating to the criminalization of behavior against life. The starting point for creating new types of prohibited acts should be respect for the right to self-determination, which may be limited only in exceptional situations. And one of the recent conclusions is that acts of assisted suicide and euthanasia at the express, voluntary request of a fully informed person should not be punishable.

KEYWORDS

value of life, criminalization, euthanasia, hierarchy of legal goods

SŁOWA KLUCZOWE

wartość życia, kryminalizacja, eutanazja, hierarchia dóbr prawnych

INTRODUCTION

Reflections of lawyers, ethicists, theologians on the protection of life typically start from the argument that human life is the most precious good because it conditions the use of all other goods. However, Tokarczuk argues that this argument relates to typical, normal (average) situations. He points out that every time other values anchored in life lose all their worth and significance, the sense of life also loses value¹. The question about the place of life among other values is of immense significance for criminalization decisions and this issue is the subject matter of the present reflections. As Hobbes argues, the fear of death is a major source of states and law².

Being aware of the obvious, it should be pointed out that the scope of criminalization varies in historical terms – certain acts cease to be a criminal offence, whereas others, previously permissible, become an offence³. History shows that the perception of human life, its relevance and significance, and its place against the background of other values has been subject to change. The question is whether in modern times there are limitations of the criminalization of behavior against human life.

It is clear that human life is the highest value in the public, cultural and often media perception. It is assumed that the concept that “human life has an inherent value” has religious and philosophical roots⁴. As representatives of the human species, humans are aware of their own life, but also of their own death and its significance, which means that the perception of human life gains a special perspective in human reflection. In the light of many international and constitutional regulations, its protection is the most important duty, and its violation – the worst human act. It is often indicated that the level of the protection of life is a measure of the democratization of a state⁵.

¹ R. Tokarczuk, *Prawa narodzin życia i śmierci*, Lublin 1984, p. 20.

² I. Ziemiński, *Śmierć jako źródło i przedmiot prawa. Stanowisko Thomasa Hobbesa Część I: Śmierć jako źródło prawa*, ‘Studia z Historii Filozofii’ 2021, No. 3, p. 201.

³ L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warsaw 1990, p. 16.

⁴ E. Wick, *The Right to Life and Conflicting Interests*, Oxford 2010, p. 22.

⁵ See: B. Przybyszewska-Szter, *Wolności i prawa osobiste*, (in:) M. Chmaj (ed.), *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej*, Warsaw 2008, p. 99.

LITERATURE REVIEW AND DISCUSSION

As Yakovlev mentions, a definition of what is criminal and what is not criminal, what is criminally illegal and what is only immoral is subject to a constant change from society to society and from epoch to epoch: “at the same time, when the English stopped burning witches at the stake, they began to hang forgers of banknotes”⁶. The evolution of the right to life proceeded in a discontinuous manner, which is characteristic of the evolution of human rights *in genere*. It is a widely held belief that the attempts to locate human rights invariably lead to religious systems because they were the primary source of rights and the foundation for the development of ideas. It is noted that according to the oldest sets of law, the idea of the protection of human life first emerged in the legal norms of Judaism⁷. One should not lose sight of the fact that steps against murders were taken in the so-called Urukagina’s Code (c. 24th century BCE)⁸. Moreover, the oldest extant law code in the world – the Sumerian Code of Ur-Nammu, written c. 2100-2050 BCE, contained a norm “If a man commits a murder, that man must be killed”, and the Babylonian Code of Hammurabi, composed three centuries later, laid down the law of retaliation: “an eye for an eye, a tooth for a tooth”⁹. Homicide¹⁰ and patricide were punishable in ancient Egypt¹¹.

Hobbes argues that death is the source and object of the social contract, forming the basis for a state and the law. In that philosopher’s opinion, as long as a state and regulations protecting life do not exist, the threat of being killed is more real than natural death resulting from the laws of nature. The law does not guarantee immortality, yet it may reduce the fear of sudden death¹². To paraphrase Hart, it may be stated that criminalization, as a legislative process, is a “step from the pre-legal to legal world”¹³. As Wilenmann summarizes the international literature, abstract criminalization conditions connected with justice are generally called for. The limits of good criminal law legislation are established by sub-

⁶ A. Yakovlev, *Social Functions of the Criminalization Process*, (in:) HEUNI, *Selected Issues in Criminal Justice*, Helsinki 1985, p. 27

⁷ R. Grabowski, *Prawo do ochrony życia w polskim prawie konstytucyjnym*, Rzeszów 2006, pp. 18–19.

⁸ J. Finegan, *Archaeological History Of The Ancient Middle East*, New York and Oxon 2019, p. 46.

⁹ M. Lang, *Historyczny rozwój prawnej ochrony życia ludzkiego od czasów najdawniejszych po współczesność*, *Studia z zakresu nauk prawnoustrojowych*, ‘Miscellanea’ 2012, No. 2, p. 15.

¹⁰ W.W. Hyde, *The Homicide Courts of Ancient Athens*, ‘University of Pennsylvania Law Review’ 2018, No. 66, https://scholarship.law.upenn.edu/penn_law_review/vol66/iss4/3, pp. 325–331 (accessed 14.01.2024).

¹¹ J. Ślęzak, *System kar i represji w starożytności*, ‘Studia Gdańskie. Wizje i Rzeczywistość’ 2014, No. 11, p. 75.

¹² I. Ziemiński, 2012, *op. cit.*, pp. 202, 213–214.

¹³ H. Hart, *The Concept of Law*, Oxford 2012, p. 94.

stantive conditions, such as the harm principle, Kantian liberal sovereignty, legal moralism, *Rechtsgutslehre*, the operative construction of constitutional rights or any other specification of the principles of justice or general legal values. Any criminalization decision that does not meet the relevant requirements of substantive justice or does not comply with the relevant legal values would therefore be unlawful¹⁴.

It is worthwhile to look at criminalization as a decision-making process. As Yakovlev writes, criminalization of acts can be defined as a social and juridical process of identifying those acts of individual conduct which can be deemed dangerous for the dominant social relations, and qualifying them in law as criminal, criminally punishable, and unlawful. The author adds that the criminalization process depends on the social scale of normative values which are codified into rules of law but which also exist informally as societal norms and professional ethics. The social functions of the criminalization process are characterized by a discrepancy. On the one hand, the criminal law cannot avoid polarizations rooted in social consciousness and stereotypes, but on the other hand, it cannot be identified with those stereotypes. In reacting to social realities, the criminalization process influences the development and improvement of social relations and updates the existing social class structures¹⁵.

In the Polish school of criminal law theory, criminalization is presented in terms of five essential steps. The first is to identify in social reality the behavior perceived by the public as dangerous for legal goods, that is behavior that violates or endangers them to an extent that exceeds socially accepted limits. The second step is to consider the need for a criminal law response. The third step is to assess the usefulness of establishing a sanctioning standard. The fourth is to assess the proportionality of the criminal law response. Finally, the fifth is a possibility of formulating a prohibition in a manner that takes into account the principles of criminal law, with the principle *nullum crimen sine lege* being at the forefront¹⁶. However, one must remember that “it is easy to produce criminal law, much harder for it to be adequately “recognized” – a recognition which transcend the criminal legal order and condition its legitimate scope of protection. The content of recognition is clear in traditional penal law, much less so questions of greater complexity, such as economic matters”¹⁷.

From the perspective of the subject of this analysis, the first step of the proposed criminalization model is of immense importance. Given that a legal good is a starting point for an assessment of its violation, it is necessary to examine a list

¹⁴ J. Wilenmann, *Institutional Response to Criminalization Decisions*, ‘International Journal of Law, Crime and Justice’ 2017, Vol. 49 (June), pp. 22–34.

¹⁵ A. Yakovlev, 1985, *op. cit.*, pp. 24–39.

¹⁶ J. Kulesza, *Zarys teorii kryminalizacji*, ‘Prokuratura i Prawo’ 2014, No. 11-12, pp. 92–93.

¹⁷ F.R. D’Avila, A.G. Saavedra, *Legal Good and Recognition: A Study of Axel Honneth’s Social Theory*, ‘Dans Droit et société 2’ 2011, No. 78, p. 336.

of social values of interest to law, which thus obtain the status of a legal good. It is clear that no legal act or international treaty contains a closed list of such values. It is impossible to draw up a full indisputable enumeration, but it can certainly be assumed that such a list is not invariable – it depends on the place and time, and more precisely, on the public perception of the world in a given place and at a given time. An attempt to draw up such a list should be accompanied by a definition of the legal good itself. It is indicated that a historically dated and organized community recognizes the existence of certain social realities as good and desirable, and it strives to keep them intact. But the “criminal” legal good is not – or at least should not be – created by law¹⁸. Ingarden distinguishes three types of values: moral (righteousness, honesty), cultural (cognitive, social) and vital (health, joy of life); however, he does not consider his enumeration a closed list and he does not describe the relations between those values¹⁹. Many philosophers and lawyers have attempted to define and indicate socially valuable values (Plato and Aristotle, St. Thomas Aquinas, D. Ricardo, and also K. Marx).

It is clear that human life occupies a prominent place in the said list of social values, although it should be remembered that the prohibition on taking life has not always been a universal norm in the subjective sense – it did not apply to all representatives of the human species on an equal basis. In ancient regulations, the type of penalty was determined, among others, by the status of the victim and the perpetrator – that is membership in: *awilum* (full citizens – descendants of the original conquerors, members of local families, nobles), *muszkenum* (original inhabitants, free subjects, liberators), *wardum* (male slaves), or *amtum* (female slave)²⁰. The disadvantaged groups included, for example, peasants in a feudal state, the so-called outlawed, sometimes women (even the 1810 French codification had a provision on the exclusion of criminal liability of a husband for killing his wife caught in an act of adultery, and those provisions were repeated in state regulations in Texas and Mexico), and children (under Visigoth law, a father was permitted to kill his own child with impunity)²¹. Slaves formed a separate group. An in-depth analysis of the legal aspects of slave killing was carried out by Fede. He indicates, *inter alia*, that only after independence, particular North American states attempted slave law reform, including the homicide laws. The tendency was to equate the murder of a slave with the murder of a free white man, but the practice allowed for so many exceptions that only a few masters were executed for killing their own slaves. Almost all of these men were outcasts in their communities. American slave law proclaimed that slaves were entitled to the same protection as whites, but in practice the law operated to serve the master’s economic

¹⁸ *Ibidem*, p. 336.

¹⁹ R. Ingarden, *Czego nie wiemy o wartościach*, (in:) R. Ingarden, *Studia z estetyki*, vol. 3, Warsaw 1970, pp. 220–257.

²⁰ J. Ślęzak, 2014, *op. cit.*, p. 76.

²¹ M. Lang, 2012, *op. cit.*, pp. 16–19.

interests²². Today the value of human life may sometimes depend on a person's sex²³ or age²⁴. However, the value of human life is so high and unquestionable in a modern democratic state that the criminalization of its violations – in the common opinion – does not require justification and occurs in all civilized states. The prohibition on killing has also been subject to objective limitations. In several cultural traditions, practices such as suicide²⁵ or euthanasia have been widely accepted²⁶. On the other hand, “in the middle of the century the gravest crime was sacrilege – defamation of God, defilement of sacred things, then atrocities and sodomy, and only after that murder and theft. (...) far from prohibited, killing of deformed children in Ancient Sparta was even made into law; killing in pursuit of vendetta was considered as a debt until recently”²⁷.

Nowadays the argument that human life is the highest and supreme good is treated almost like an axiom. In legal sciences life is primarily identified with the most important legal good. The legal scholarship and judicial decisions in the area of constitutional, civil and criminal law have reiterated that life is of primary importance from a perspective of other human rights – it is the real fulfilment of all the other rights and freedoms. Hobbes argues that the prohibition on murder does not require any additional justifications, since the evil of murder could only be missed by one who wanted to be killed by another; but such persons, in Hobbes' opinion, do not exist²⁸. There are views that “where the protection of a fundamental good – human life – is at stake, neither the principle of subsidiarity of criminal law nor the criterion of criminalization costs is a sufficient reason for abandoning criminal law protection”²⁹. In turn, all legal regulations that decriminalize behavior causing death are to mean an unjustified and unacceptable weakening of the criminal law protection of life.

It turns out that the argument that “life is the highest value” has undergone some corrections both in the past and now. In general terms, human life is not the supreme value for everyone and in all situations – it is not always a value for

²² A. Fede, *Homicide Justified: The Legality of Killing Slaves in the United States and the Atlantic World*, Athens, GA 2017.

²³ C. Warrick, *The Vanishing Victim: Criminal Law and Gender in Jordan*, ‘Law & Society Review’ 1993, Vol. 39(2), pp. 315–348.

²⁴ O. Sitarz, *International Law and National Law of Selected Countries on the Issue of Infanticide*, (in:) M. Półtorak, I. Topa (eds), *Women, Children and (Other) Vulnerable Groups. Standards of Protection and Challenges for International Law*, Berlin 2021, pp. 263–280.

²⁵ J. Neeleman, G. Lewis, *Suicide, Religion and Socio-Economic Conditions: An Ecological Study in 26 Countries*, ‘Journal of Epidemiology and Community Health’ 1999, No. 53, pp. 204–210.

²⁶ K. Ebbott, *A “Good Death” Defined By Law: Comparing The Legality Of Aid-In-Dying Around The World*, ‘William Mitchell Law Review’ 2010, Vol. 37(1).

²⁷ A. Yakovlev, 1985, *op. cit.*, pp. 27, 29.

²⁸ I. Ziemiński, *Śmierć jako źródło i przedmiot prawa. Stanowisko Thomasa Hobbesa Część I: Śmierć jako przedmiot prawa*, ‘Studia z Historii Filozofii’ 2013, No. 2(4), p. 105.

²⁹ M. Gałązka, *Glosa do uchwały SN z dnia 26 października 2006 r.*, I KZP 18/06, ‘Przegląd Sądowy’ 2008, No. 2.

which everything else must be sacrificed, and it is not always a value that must never be sacrificed for another value.

First of all, though to be observed merely in passing, the death penalty, that is taking human life, has accompanied humanity for thousands of years and it is still carried out in many countries to this day. Significantly, the death penalty has been imposed for violations of goods other than life. Theft³⁰, adultery, blasphemy, and spirit conjuring³¹ were punishable by death. An argument was even put forward that calling for the death penalty was a way to fight for the recognition of the sanctity of human life³². In the Polish Criminal Code of 1969, the death penalty was envisaged for, among others, the so-called great economic fraud (Article 134(2)). Today, it is argued that the execution of one death penalty prevents seven or eight homicides a year³³ or even 150³⁴, but still the death penalty is imposed for drug trafficking, blasphemy, corruption, or unlawful sexual behaviour in certain parts of the world³⁵. Even today, there is an argument that from the perspective of attaining eternal life, the death penalty may be mercy³⁶. Yakovlev writes about so-called institutionalized (i.e. legitimized) violence, i.e. cases when killing is construed as a security measure³⁷.

A new value – the quality of life – appears as a separate legal good on an increasingly frequent basis in the modern world³⁸. Some link the quality of life to the concept of life, others use a contrast. One can recall, for example, Reagan's words from 1983: "Every legislator, every doctor, and every citizen needs to recognize that the real issue is whether to affirm and protect the sanctity of all human life, or to embrace a social ethic where some human lives are valued and others are not. As a nation, we must choose between the sanctity of life ethic and

³⁰ J. Ślęzak, 2014, *op. cit.*, p. 75.

³¹ J. Salij, *Kościół wobec kary śmierci*, 'Chrześcijaństwo-Świat-Polityka' 2015, No. 19, pp. 10–11.

³² *Ibidem*, p. 10.

³³ I. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 'American Economic Review' 1975, No. 65, p. 397.

³⁴ H. Dezhbakhsh, J.M. Shepherd, *The Deterrent Effect Of Capital Punishment: Evidence From A "Judicial Experiment"*, 'Economic Inquiry' 2006, No. 44, p. 512, R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warsaw 2006, p. 663.

³⁵ See: Amnesty International, Amnesty International Report 2020/2021. The state of the world's human rights, 07.04.2021, <https://www.amnesty.org/en/documents/pol10/3202/2021/en/> (accessed 14.01.2024).

³⁶ R. Kneblewski, *Niemilosierzna kara śmierci? Tuba Cordis – YT*, 2.09.2017, <https://www.youtube.com/watch?v=tAScJvZuCWl> (accessed 30.04.2022).

³⁷ A. Yakovlev, 1985, *op. cit.*, p. 29.

³⁸ See also O. Sitarz, "Życie" i "jakość życia" w kontekście decyzji kryminalizacyjnych, (in:) B. Błońska et al. (eds), *O wolność i prawo. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Rzeplińskiemu*, Warsaw 2022, p. 872.

the <<quality of life>> ethic³⁹. There are arguments that the “quality of life” is a multidimensional notion, emotionally-charged, often in the nature of an ideological tool, evaluative, impossible to be unequivocally expressed, entangled in political and cultural contexts⁴⁰. At the same time, there are arguments that “the improvement in the quality of life is the attribute of the so-called <<civilization of death>>, which is spreading in affluent societies, is characterized by a mentality focused on efficiency and effortlessness, where the presence of the elderly and the sick seems costly and burdensome, and their lives are of no value”⁴¹. It is also argued that the distinction between a valuable and worthless life is the instrumentalization of human life⁴². In this context, it is useful to recall an assessment made by Minois, who describes Christianity “with its dolorism” as a religion that accepts sickness and suffering as an Act of God and affirms them as God’s gift for salvation⁴³. As it were, to confirm that argument, a reference is made to St. Thomas Aquinas: “If all pain that a human being experiences comes from God, then man should bear it patiently, both because it comes from God and because it is oriented towards good. Pain cleanses of sins, humbles sinners, and moves good people to love God”⁴⁴. Another reference is made to John Paul II: “the individual discovers the salvific meaning of suffering but above all that he becomes a completely new person”⁴⁵. It seems that such an approach in fact excludes the possibility of assessing the quality of life in terms other than “the sanctity of life.”

The opposite view is taken by Singer, who argues that medical decisions are frequently made in the health care on the basis of the quality of life criterion, but a different terminology is hypocritically used, of the type: “... the treatment would merely prolong dying,” “the treatment would be futile in terms of survival and would therefore be inhumane under such circumstances”. There is also a justification of the type: “bringing therapeutic benefits”⁴⁶. For example, studies indicate that, in Poland, companies applying for the inclusion of a given preparation

³⁹ P. Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics*, Melbourne 1994, p. 120.

⁴⁰ W. Wnuk, J. Marcinkowski, *Jakość życia jako pojęcie pluralistyczne o charakterze interdyscyplinarnym*, ‘Problemy Higieny i Epidemiologii’ 2012, No. 93(1), p. 22.

⁴¹ Z. Zdunowski, *O niektórych przejawach „cywilizacji śmierci”*, ‘Niedziela Ogólnopolska’ 1999, No. 36, www.niedziela.pl/artukul/63305/nd/O-niektorych-przejawach-cywilizacji (accessed 30.04.2022).

⁴² J. Habermas, *Przyszłość natury ludzkiej. Czy zmierzamy do eugeniki liberalnej?*, Warsaw 2003, p. 26.

⁴³ G. Minois, *Le Prêtre et le médecin. Des saints guérisseurs à la bioéthique*, ‘CNRS Editions’ 2015.

⁴⁴ D. Łukasiewicz, *Racjonalizacje cierpienia i zła w filozofii religii*, ‘Studia Religioznologiczne’ 2015, No. 48(3), p. 192.

⁴⁵ John Paul II, Pope, *Salvifici doloris* (“Redemptive suffering”) Apostolic letter 1984. https://www.vatican.va/content/john-paul-ii/en/apost_letters/1984/documents/hf_jp-ii_apl_11021984_salvifici-doloris.html (accessed 30.04.2022).

⁴⁶ P. Singer, 1994, *op. cit.*, pp. 120–129.

on the list of reimbursed drugs are obliged to submit a reimbursement application containing, among others, an economic analysis. The Polish guidelines prescribe that an economic analysis shall normally include a cost-utility analysis (CUA) or a cost-effectiveness analysis, while it is recommended that both analyses be performed simultaneously. Therefore, the analyses submitted in Poland also normally estimate QALY⁴⁷. Nowadays a new (?) approach to medicine is increasingly mentioned in literature. Musschenga argues that the ultimate aim of medicine and healthcare is not health or life extension as such, but maintaining or improving the quality of life⁴⁸.

It is necessary to highlight the apparent paradox present in the statements on values and the quality of life. Galewicz argues that “value” is most often referred to in two different senses: the first one that is sometimes defined as Kantian and in which value is equivalent to dignity – a quality of something that should be respected – and the second one in which value should rather signify a feature of good – something worth choosing, striving for, something to be wished for. The latter sense is of a teleological nature, so the value of life is understood as a certain good, a goal worthy of being pursued⁴⁹. Moreover, the time and scope of assessment, the assessing subject and the adopted criteria resulting from the worldview (e.g. religious) are important for that assessment. It may be the case that according to a particular worldview, these two senses cannot be separated, and they certainly may not be the basis for existential choices (e.g. religions that recognize the sanctity and inviolability of life).

A review of legal, sociological and philosophical literature shows that the term “quality of life” has been an important figure for describing many phenomena since the 1970s⁵⁰. Quality of life (QOL) is defined by the World Health Organization as “an individual’s perception of their position in life in the context of the culture and value systems in which they live and in relation to their goals, expectations, standards and concerns”. Constaza and others write: “While Quality of Life (QOL) has long been an explicit or implicit policy goal, adequate definition and measurement have been elusive. Diverse “objective” and “subjective” indicators across a range of disciplines and scales, and recent work on subjective well-being (SWB) surveys and the psychology of happiness have spurred renewed interest”. In their opinion “Quality of Life (QOL) is the extent to which objective human needs are fulfilled in relation to personal or group perceptions

⁴⁷ K. Stańczak-Mrozek, E. Biłant, K. Mućka, *QALY jako miara jakości życia*, Warsaw 2019, p. 14.

⁴⁸ A.W. Musschenga *The Relation Between Concepts of Quality-of-Life, Health and Happiness*, ‘The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine’ 1997, Vol. 22(1), pp. 11–28.

⁴⁹ W. Galewicz, *Czy wartość życia wzrasta wobec bliskiej śmierci?*, ‘Roczniki Filozoficzne’ 2017, Vol. LXV(4), <http://dx.doi.org/10.18290/rf.2017.65.4-1>, p. 6.

⁵⁰ A. W. Musschenga, 1997, *op. cit.*, pp. 11–28.

of subjective well-being (SWB). Human needs are basic needs for subsistence, reproduction, security, affection, etc. SWB is assessed by individuals' or groups' responses to questions about happiness, life satisfaction, utility, or welfare. The relation between specific human needs and perceived satisfaction with each of them can be affected by mental capacity, cultural context, information, education, temperament, and the like, often in quite complex ways⁵¹. A brief perusal of literature makes it possible to give this concept three different meanings: 1) "quality of life" as human dignity (its cause or derivative) or as the essence of humanity; 2) "quality of life" as an assessment of value and the price of duration for an individual human being, 3) "quality of life" as the (material, environmental, legal, etc.) conditions of life of particular social groups or particular human beings. The second meaning set out above will be the subject of further reflections here. Consequently, apart from the biological duration of a living organism, as a synonym of life, a second parameter emerges – its quality, which co-defines human life, or at least, strongly determines it. The simplest (although definitely not easy) tools for defining that quality were developed for the administration of medical care. A tool known as QALYS is a measure that allows a comparison of the costs and medical effects of a therapy⁵². The literature review shows that every manner of the conceptualization of the health-related quality of life should refer to three areas: feelings, functioning and future⁵³. In turn, Singer argues that the quality of human life comes down to four classes: having awareness and maintaining autonomy, having willingness to last and the ability to enjoy memories, having the ability to make physical, social and intellectual contacts and having a family thanks to which there is a social bond⁵⁴. It is also useful to recall the concept of the tripartite division of the meaning of the quality of life put forward by Musschenga: 1. quality-of-life as (the degree of) normal functioning (as a member of the biological species *homo sapiens*); 2. quality-of-life as (the degree of) satisfaction with life; and 3. quality-of-life as (level of) human development⁵⁵.

In an attempt to formulate independently the assessment parameters for the quality of life, as an aspect of that life, that is to assess the value and the price of duration for an individual person, I propose that three elements be referred to: a given person's possibility to make decisions, the possibility to put the decision into effect and the (physical and mental) pain of existence. The quality-of-life level will therefore be a resultant of three factors.

In the light of the above, it is necessary to confirm the argument that the quality of life is an independent individual and social value and, as such, it may

⁵¹ R. Constaza et al., *An Integrative Approach to Quality of Life Measurement*, 'Research, and Policy, Surveys and Perspectives Integrating Environment and Society' 2008, No. 1(1), pp. 17–18.

⁵² P. Vardy, P. Grosch, *The Puzzle of Ethics*, Oxon and New York 1997, p. 161.

⁵³ *Ibidem*, p. 15.

⁵⁴ P. Singer, 1994, *op. cit.*, p. 209.

⁵⁵ A.W. Musschenga, 1997, *op. cit.*, pp. 11–28.

be compared with the good in the form of life (itself), in a sense of biological duration. It is clear that typically the protection of one of them also means the protection of the other – the protection of the quality of life often leads to its prolongation. However, it may be the case that these two goods are in conflict, it is impossible to ensure life/duration and, at the same time, ensure a life of a satisfactory quality. It seems that this state of affairs can be amply illustrated by the so-called time-trading method for estimating the utility of life, as a key parameter for measuring the quality of life. The time-trading method involves showing an interviewee two options. One is to remain in the current state of health for the rest of their life. The other is to enjoy total health for a certain number of years, after which sudden death occurs. An interviewee marks an age to which they are willing to shorten their life to regain total health in the questionnaire on an axis with a scale of age⁵⁶.

A detailed analysis of international treaties concerning the issue of human rights shows that although the right to life is placed high, it is not the highest in the hierarchy of human rights. Some authors point out that the international law of human rights sets the quality-of-life parameter higher than the fact of being alive⁵⁷. Further, the case-law of the European Court of Human Rights emphasizes that Article 2 of the European Convention on Human Rights (ECHR) also includes the right to life of an appropriate quality. A life of suffering is an example of a conflict between the duration of life and its quality. The provision of exceptions to the right to life due to a lack of the appropriate quality of life (among other things, the admissibility of euthanasia) shows that ECHR assigns more value to the quality of life as a process than to life as a state of human existence⁵⁸.

The quality of life is not the only legal good that may be a value higher than biological duration. It is difficult to indicate other values that may turn out to be more important than human life, but the contemporary world undoubtedly points to some of them.

The on-going war in Ukraine provides evidence that, in individual and social perception, territorial integrity and independence may be more important than life. “Русский мир” proposed by Putin shows that it is well-founded to argue that also democracy and civil rights are – in extreme situations – worth a human life. The history of numerous countries provides similar examples.

⁵⁶ K. Stańczak-Mrozek, E. Biłant, K. Mućka, 2019, *op. cit.*, p. 9.

⁵⁷ E. Zielińska, *Prawo do życia*, (in:) E. Łabęcka (ed.), *Szkola Praw Człowieka. Teksty wykładów*, Warsaw 1996, p. 168; P. Kuczma, *Prawna ochrona życia*, (in:) M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław 2014, p. 32.

⁵⁸ K. Borkowska, *Życie ludzkie jako przedmiot ochrony przepisów prawa ze szczególnym uwzględnieniem momentu objęcia ochroną*, ‘Security, Economy & Law’ 2018, No. 1(XVIII), DOI 10.24356/SEL/18/2, pp. 40–59; P. Sieghart, *The International Law of Human Rights*, Oxford 1983, p. 130; Judgment of the European Court of Human Rights of 29 April 2002, *Pretty v. UK*, Application no. 2346/02.

At the same time, for many people it is religious values, and above all eternal life, that is more important than earthly life. This may be illustrated by the refusal of blood transfusions by Jehovah's Witnesses. The believers base their position on the words of the Holy Scriptures: "Every moving thing that liveth shall be meat for you; even as the green herb have I given you all things. But flesh with the life thereof, which is the blood thereof, shall ye not eat" (Genesis 9, 3–4). "And whatsoever man there be of the House of Israel, or of the strangers that sojourn among you that eateth any manner of blood; I will even set my face against that soul that eateth blood, and will cut him off from among his people" (Leviticus 17, 10). "Therefore I said unto the children of Israel, No soul of you shall eat blood, neither shall any stranger that sojourneth among you eat blood" (Leviticus 17, 12). "For it is the life of all flesh; the blood of it is for the life thereof: therefore I said unto the children of Israel, Ye shall eat the blood of no manner of flesh; for the life of all flesh is the blood thereof: whosoever eateth it shall be cut off" (Leviticus 17, 14). "Only thou shalt not eat the blood thereof; thou shalt pour it upon the ground as water" (Deuteronomy 15, 23). "For it seemed good to the Holy Ghost and to us to lay upon you no greater burden than these necessary things; that ye abstain from meats offered to idols, and from things strangled, and from fornication: from which if ye keep yourselves ye shall do well" (Acts 15, 28–29). Jehovah's Witnesses refuse transfusions of whole blood, of red and white corpuscles, platelets and plasma. They also refuse both natural and recombinant haemoglobin, although positions differ among them regarding blood-derived products such as albumin, immunoglobulin and coagulation factors⁵⁹. For example, The Belgian Advisory Committee on Bioethics stated in "Opinion no. 16 on refusal of blood transfusions by Jehovah's Witnesses" that if a major Jehovah's Witness who is *de facto* and *de iure* of sound mind refuses a life-saving blood transfusion, the physician is obliged to respect his or her wishes, even if to do so means that the patient will die. It does, however, add a list of conditions that must be met – among other things, the patient must reiterate his or her refusal even after being informed of the consequences and should be able to discuss the issue *tête-à-tête* with the physician; the physician must obtain the patient's signature on the release of liability form; the patient must not suffer from any psychiatric syndrome that might prejudice his or her ability to make a decision. In turn, if the parents of a minor Jehovah's Witness who is incompetent refuse permission for a life-saving blood transfusion, the physician may decide not to respect the parents' wishes⁶⁰.

⁵⁹ C. Petrini, *Ethical and Legal Aspects of Refusal of Blood Transfusions by Jehovah's Witnesses, with Particular Reference to Italy*, 'Blood Transfusion = Trasfusione del Sangue' 2014; No. 12 (Suppl. 1), pp. 395–401.

⁶⁰ Belgian Advisory Committee on Bioethics Opinion No. 16 relating to the refusal of blood transfusion by Jehovah's Witnesses, March 2002, https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/7986420/Avis%20n%C2%B016%20du%2025%20

Another very topical issue is the refusal by some Christians to take an anti-Covid vaccine that uses cell lines from aborted embryos⁶¹. Although the biggest denominations finally officially accepted vaccines, religious anti-vaccine movements emerged in many countries⁶². Other religious practices that contradict the principles of medical knowledge are described in the literature: treatment by praying⁶³. All this radical behavior poses a threat to the life of a specific person, but in individual situations it is respected by the legislations of almost all countries if the will relates to one's own life.

The international community does not give consent to honor killings performed to "save" the family honor at the expense of another person. This is expressly provided for in the Istanbul Convention, which inspired amendments to law, for example in Turkey⁶⁴.

Another area "competing" with life and its duration in the biological sense is the right to self-determination. Human autonomy is in fact an aggregate of all (mentioned and unmentioned) competing values – the right to choose the quality of life, the right to live according to one's religious beliefs, etc. Sometimes, a human's freedom and right to self-determination are independent (autonomous) values. Extreme sports can be an example of freedom in strong competition with human life. Although the list of extreme sports is not indisputable, as is their legal admissibility, it is widely held that public acceptance, and frequently the subsequent legal acceptance, leads to condoning behavior that could lead to human death. In turn, Barczak-Oplustil argues that sports rules "allow for exposing a given good to a much greater degree of risk than "ordinary" rules of conduct⁶⁵. More importantly, the pleasure derived from the sport and the spectators' enjoyment are the rationale for that type of sport⁶⁶. Standen writes: "The solution to the vexing problem of the use of criminal regulation in sports contests lies within a jurisprudential approach not yet taken in any of the decided cases, either within

mars%202002%20relatif%20au%20refus%20de%20transfusion%20sanguine%20par%20les%20T%C3%A9moins%20de%20J%C3%A9hovah.pdf (accessed 12.11.2022).

⁶¹ KEP, *Position of the Team of Bioethics Experts of the Polish Episcopal Conference on Vaccines 2021*, 28.12.2020, <https://episkopat.pl/zespol-ekspertow-ds-bioetycznych-kep-ws-szczepionek-przeciwko-covid-19/> (accessed 27.02.2022).

⁶² M. Kreidler, *No Major Religious Denomination Opposes Vaccination, but Religious Exemptions May Still Complicate Mandates*, CNN Health, 09.09.2021, <https://edition.cnn.com/2021/09/09/health/covid-vaccine-religious-exemptions-khn/index.html> (accessed 12.11.2022).

⁶³ C.W. Laughran, *Religious Beliefs and the Criminal Justice System: Some Problems of the Faith Healer*, 'Loyola of Los Angeles Law Review' 1975, No. 6(1).

⁶⁴ U. Mammadova, K. Joamets, *Istanbul Convention, Honour Killings and Turkey's Experience*, 'ICLR' 2021, Vol. 21(1).

⁶⁵ As quoted in: M. Grudecki, *Kontraty po zaustawowe w polskim prawie karnym*, Warsaw 2021, p. 419.

⁶⁶ *Ibidem*, p. 409.

the United States or within Canada or Germany-other countries with substantial jurisprudence on this issue”⁶⁷.

In summary of this short overview of values that are potentially in conflict with life understood as biological duration, it is necessary to conclude that the right to self-determination, human autonomy is many times more valuable than life. The concept of human autonomy becomes *sui generis* a collective category that contains not so much other values (such as independence, faith, love), but a possibility of choosing them in a situation when life is a conflicting legal good.

The issue of a conflict of goods in the law-making process has been frequently discussed in the literature. It is undeniably the most difficult element of the criminalization decision. Consequently, it is underlined that “the justification of the draft law introducing or abolishing criminalization should contain a very detailed picture of the conflict of values or goods, and a balance of profits and losses related to the entry into force of the law should be presented”⁶⁸. This legitimate demand should be strengthened – a diagnosis of a possible conflict of values should also be made while a penal provision is in force if there are reasons to claim that, due to social, cultural changes, a previously absent (or imperceptible) conflict emerges, or where a conflict that requires a different legislative decision occurs. Social and cultural changes in many places in the world lead to a change in the perception of voluntary death (and even of the participation of other persons in it, see euthanasia).

The contemporary legislator in many countries tends to overlook the fact that there are goods or values that are more important than human life, or that this list follows the changing culture and axiological assumptions, or that the legislator may not extend its empire unreasonably, violating the right to self-determination. The failure to take into account the quality of life in the criminalization dilemma must not be supported by the argument of the sanctity of life. As McMahan rightly points out, there is no such acceptable basis for the sanctity of life that all human beings have, and have it equally, while non-human animals would have none at all⁶⁹. Consequently, the sanctity of life must not be the only argument resolving the dilemmas related to a hierarchy of legal goods.

I believe that the specific relation between life and freedom can be amply illustrated by Hobbes’ words, who justifies the right to self-defense as follows: “The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own

⁶⁷ J. Standen, *The Manly Sports: The Problematic Use of Criminal Law to Regulate Sports Violence*, ‘Journal of Criminal Law and Criminology’ 2009, Vol. 99, p. 642.

⁶⁸ A. Zoll, *Potrzeba racjonalności w reformowaniu prawa karnego*, (in:) T. Bojarski, A. Michalska-Warias, I. Nowikowski, K. Nazar-Gutowska, J. Piórkowska-Flieger, D. Firkowski (eds), *Teoretyczne i praktyczne problemy współczesnego prawa karnego*, Lublin 2011, p. 23; M. Królikowski, R. Zawłocki, *Kodeks karny. Vol. I. Część ogólna. Komentarz*, Warsaw 2021, pp. 10–12.

⁶⁹ J. McMahan, *The Ethic of Killing: Problem at the Margins of Life*, Oxford 2002, p. 599.

nature; that is to say; of his own life”⁷⁰. This freedom is the basis for a decision on the protection of life.

Even acknowledging that one of the two purposes of criminal law is to express disapproval of a certain type of conduct on the basis of the axiological assumptions adopted by the ruling majority⁷¹, ongoing monitoring of those assumptions must be carried out and “the non-ruling minority” must also be accommodated. I believe that it is too far-reaching to argue that the legislator is entirely exempted from the requirement to justify the upholding of the criminal prohibition on a violation of life, since its validity is to result clearly from civilizational roots and centuries-old tradition⁷². It seems that centuries-old legislative tradition is not enough to dispense with a consideration of the need to criminalize certain behavior. An example of the negative impact of an established legal practice may be an extremely late decriminalization of suicide in England and Wales. It took place as late as 1961, although it is assumed that the previous criminalization did not reflect the actual public opinion and medical and legal practice⁷³.

At this point, it is necessary to pay attention to one very important aspect of the whole issue. A certain pattern should be noted – a legislator’s declaration of the sanctity of human life and an absolute prohibition on violating it ultimately does not always correspond to legal regulations. It may in fact be the case that a voluntary death is not unlawful. However, where human life is one of the conflicting goods, the legislator does not in general allow for making an entirely free choice. A human can therefore legally give up his or her own life on an exceptional basis (in some countries), but the state indicates the premises for the giving-up. For example, euthanasia is legal only in the case of a severe, incurable disease. A higher evaluation of the quality of life is admissible, but even that term is understood in biological terms (disease, pain, etc.). In exceptional cases, states also allow a voluntary death in defense of honor and freedom, but only when it concerns the honor and freedom of a nation or state.

A similar conclusion is drawn by McMahan, who argues that there are reasons to believe that most advocates of the sanctity of life recognize that it may be outweighed. He believes that opposing suicide and euthanasia, most of those persons admit that there are certain other cases in which it becomes permissible to kill a human being⁷⁴.

It is true that there is no “right to death” in international law. Such a “right” cannot be inferred from the ordinary meaning of any human rights document. On

⁷⁰ T. Hobbes, *Lewiatan, czyli materia, forma i władza państwa kościelnego i świeckiego*, Warsaw 200, pp. 210–211.

⁷¹ A. Zoll, 2011, *op. cit.*, pp. 29–30.

⁷² *Ibidem*, pp. 29–30.

⁷³ J. Neeleman, *Suicide as a Crime in the UK: Legal History, International Comparisons and Present Implications*, ‘Acta Psychiatrica Scandinavica’ 1996, Vol. 94(4), pp. 252–257.

⁷⁴ J. McMahan, 2002, *op. cit.*, p. 596.

the contrary, human rights documents call on states to protect life. For example, in 1999 the Parliamentary Assembly of the Council of Europe recommended that member states “respect and protect the dignity of terminally ill or dying persons in all respects [...] by upholding the prohibition against intentionally taking the life of terminally ill or dying persons” (Recommendation 1418 (1999), para. 9). In Resolution 1859 (2012) para. 5, the Assembly stated, “Euthanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited.” However, it must be recognized that the protection of life should not be carried out against the will of a human being – the holder of that right. Just as there is no longer any doubt that autonomy expressed through informed consent is a fundamental value in bioethics⁷⁵, which is consistent with the principles formulated by Beauchamp and Childress (respect for autonomy, beneficence, non-maleficence, justice)⁷⁶. To paraphrase Kant, criminal law and criminalization decisions are or should be the overall conditions under which the will of one human being can be joined to the will of another according to some general norm of freedom. Yakovlov is also right when he writes: “The social derivations and the historically conditioned categories of law cannot be viewed as eternal and unchangeable “objective” substances (“things”); otherwise the materialization of the concept of crime can close the way to a constant and unavoidable critical reappraisal of the given concept, and bringing the criminalization process (and, of course, decriminalization) in line with the pressing needs of social development, with the changing social conditions, values, and ideals. The criminalization process should be oriented towards the social realities, and above all, towards possible social consequences which may find expression in purely economic categories, and, what is most important, in the form of socio-psychological costs. Among them, the socio-psychological effect of criminalization of the self-consciousness of persons falling within the ambit of the criminal law occupies a place which is of no small importance”⁷⁷.

CONCLUSIONS

Summarising the arguments presented above, it should be noted that the category of the quality of life is an important, and for some the primary good, which as such should be taken into account when balancing values; life in a sense of biological duration is not always the highest value; apart from the quality of life,

⁷⁵ A.R. Jonsen, R.M. Veatch, W. LeRoy, *Source Book in Bioethics. A Documentary History*, Washington DC 1998.

⁷⁶ T. Beauchamp, J.F. Childress 2012, *Principles of Biomedical Ethics. 7th ed.*, Oxford 2012.

⁷⁷ A. Yakovlev, 1985, *op. cit.*, p. 36.

it is possible to indicate other values more precious than life itself, which can be included in the collective category – the right to self-determination; criminalization decisions should be based on the same hierarchy of values as in other social areas – there are no values proper for a given social area or branch of law⁷⁸; the system of values is uniform in all areas (although it does not have to be identical for all); the dominant value is the right to self-determination and legal (direct and indirect) paternalism connected with the protection of life is justified only in exceptional situations, exclusively in relation to specific groups of subjects; acts consisting in assisting suicide and euthanasia at a clear, voluntary request of a fully informed person should not be criminalized.

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⁷⁸ R. Blicharz, M. Pietrzyk, *Kilka uwag o wartościach w prawie w ogóle* (in:) A. Matan (ed.), *Administracja w demokratycznym państwie prawa*, Warsaw 2022, pp. 73–86.

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