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FEATURE: ARTICLE

There is a right to life; is there a right to die?

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Euthanasia (Greek meaning 'good death') is the act of ending a life to relieve pain and suffering. Passive euthanasia is legal in New Zealand in the form of the right to refuse medical treatment, while active euthanasia is illegal and punishable by imprisonment. Legal (distinct from moral and spiritual) arguments for and against legislation allowing active euthanasia fall onto the human rights affirmed by the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights, and in New Zealand, the Bill of Rights Act.¹⁻³ These documents confer an express right to life, but not to die, and legal arguments for a right to die seek an interpretation that would make it unjust for the State to interfere with a citizen's choice to die.

Voluntary euthanasia occurs when a conscious and rational patient gives express and informed consent to an action, or withdrawal of treatment, that will result in the ending of life. This is distinct from its speculative and involuntary forms, which lack the same degree of consent. Passive voluntary euthanasia is the refusal of treatment that may otherwise prolong life and is legal in New Zealand and protected by section 11 of the Bill of Rights Act: the right to refuse to undergo medical treatment.³ Active voluntary euthanasia, or assisted suicide, is an action undertaken by a person other than the patient with the intent of ending life. It is an unlawful act that, independent of motivation, constitutes murder under section 167 of the Crimes Act.⁴ Section 179 states that assisting suicide is illegal, while the act of taking one's own life is not.⁴ This means that the law separates the State from an individual's choice to end their own life, actively or passively, so long as no other party takes part. This can be argued as discrimination against those that are physically unable to commit suicide as it limits their ability to exercise their rights. Human rights fundamentally confer to all people the freedom to make choices about how they live their life. It is therefore unjustified to have a blanket ban preventing a conscious and rational terminally ill patient and a consenting party from acting on the

patient's desire to end their life, particularly when society has the necessary tools to consider the merits of arguments for and against, on a case by case basis where necessary.

RIGHT TO LIFE

Article 3 of the Universal Declaration of Human Rights proclaims that "Everyone has the right to life, liberty and security of person".⁵ The right to life is phrased by article 6 of the ICCPR as "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".¹ Section 8 of the Bill of Rights Act states that "No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice".³

The right to life given in these articles is not a guarantee or protection against death, which is both inevitable and often unpreventable; however it certainly prohibits unjust deprivation of life against the will of the right holder. An element of choice can be inferred from the right to life as it is clearly not interpreted as a requirement to live due to the right to refuse treatment and the legality of suicide. It can therefore be implied that it protects the right to choose whether or not to continue living. The word 'arbitrarily' in the ICCPR text restricts deprivation of life without regard to the facts and circumstances, which means there may be situations where choice or judgement is applicable to the continuation of life. If assisted suicide were to be made lawful, it would enable an otherwise unable patient to exercise the right to choose to end their life. Vitally, this would not be inconsistent with the rights imposed by these articles.

In contrast, article 2 of the European Convention on Human Rights states:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;*
- (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;*
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection."*²

This does not provision for the additional right to die to be conferred, unlike the Universal Declaration of Human Rights, the ICCPR or the Bill of Rights Act because it explicitly states the situations that do not contravene the order that "No one shall be deprived of his life intentionally". That the right to life implies a right to choose to not continue living may still be inferred however, as was argued in *Pretty v United Kingdom*:

*"...the Article recognises that it is for the individual to choose whether or not to live and so protects the individual's right to self-determination in relation to issues of life and death. Thus a person may refuse lifesaving or life-prolonging medical treatment, and may lawfully choose to commit suicide. The Article acknowledges that right of the individual. While most people want to live, some want to die, and the Article protects both rights. The right to die is not the antithesis of the right to life but the corollary of it, and the State has a positive obligation to protect both."*⁶

This argument was rejected by the European Court of Human Rights, concluding that the right to life is unconcerned with what a person chooses to do with their life:

*"Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."*⁶

Arguing that the right to life also grants a right to death may be unfounded, but there is compelling reason to support an additional right to choose whether to live or die. It seems that the right to life is not inconsistent with a right to die, but is not sufficient to protect assisted suicide alone.

FREEDOM FROM DISCRIMINATION

People should not be prevented from enacting their own decisions with regard to the manner of their death and this is illustrated by the legality of suicide and many life-threatening behaviours. A patient should not have to endure a painful or undignified death only because their status or physical state prevents them from executing a painless or dignified suicide. For example, commission of suicide by starvation or suffocation may be the only legal options available to a patient, both of which would be considerably more uncomfortable and less humane than administration of a lethal dose by a cooperating physician.

The right to freedom from discrimination in section 19(1) of the Bill of Rights Act supports this position.³ This right of a patient, that is physically unable to commit suicide, is contravened by prohibiting assisted suicide because they are deprived of the choice of suicide, while others that are able-bodied are allowed to do so. Non-discrimination rights call for reasonable assistance to be provided to a disabled patient in order to exercise their liberty and it is a breach of these rights to withhold such an option. In *Rodriguez v British Columbia*, Lamer CJ of the Canada Supreme Court held the view that:

*"...persons with disabilities who are or will become unable to end their lives without assistance are discriminated against by that provision since, unlike persons capable of causing their own deaths, they are deprived of the option of choosing suicide."*⁷

It is accepted that universal prohibition of assisted suicide is not directly discriminatory. However, non-discrimination rights extend further to ease the burden placed on those that are placed in an unfair situation due to disability. The purpose of non-discrimination rights:

*"...is not to punish the discriminator, but rather to provide relief for the victims of discrimination...if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory."*⁶

The counter argument raised in *Pretty v United Kingdom* was that the option of suicide was not a right. Furthermore, the legality of suicide does not intend to condone the act, but is because a suicide victim cannot be charged and penalty for attempted suicide does not act as a deterrent:

*"The law confers no right to commit suicide. Suicide was always, as a crime, anomalous, since it was the only crime with which no defendant could ever be charged."*⁶

There is acceptance that a form of discrimination may take place in restricting the choice to die, but because that choice is legal only for the intent of preserving life (in the case of suicide attempt), it cannot be concluded that the State is obligated to protect it.

FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION

Section 13 states that "Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference".³ The rights extended by section 13 of the Bill of Rights Act can be interpreted as a requirement that the State does not interfere with a patient's belief in assisted suicide. While there is no argument that a person is free to hold beliefs and opinions, this right does not allow corresponding actions to be defended on the same grounds. Assisted suicide as a manifestation of a belief in it was likened to "attack[ing] places where experiments are conducted on animals" by Lord Steyn in response to arguments on behalf of Dianne Pretty.⁸ The right is certainly not grounds alone for conferring a right to die, but is still an important point against all moral and spiritual arguments for prohibition of assisted suicide. Furthermore, the right to freedom of thought is declared as an explicit human right rather than one that is inferred from other protections. It is also distinct from freedom of expression. Without expression, thought cannot be monitored, which brings into question the rationale behind the right if it cannot be practically revoked and laws against it cannot be enforced. Perhaps as mankind's greatest asset, thought is protected above all else and interpretation of the right should be able to extend to action in some circumstances.

RIGHT TO PRIVACY AND AUTONOMY

The Bill of Rights Act does not affirm a right to privacy, but the right exists in article 17 of the ICCPR and article 8 of the European Convention. Given that the manner and timing of a person's death is a private affair, it may be argued that respect for a patient's private life may protect them in exercising their choice to seek assistance to end life.

Respecting the decision to end one's life is coupled with concepts of security, dignity, liberty and autonomy, which are fundamental principles underlying human rights. With regard to the right to privacy, the European Court of Human Rights "considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."¹⁶ This demands that with regard to the right to privacy, the State respects autonomy: "the ability to conduct one's life in a manner of one's own choosing".⁶ Based on this principle of autonomy, one may exercise the choice to die by refusing medical treatment and this holds to exercising the choice to end life. A right to autonomy was acknowledged by the European Court, accepting that a law against assisted suicide interfered with Dianne Pretty's privacy rights and that the law would therefore have to be justified under art 8(2) of the European Convention:

*"The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1) of the Convention."*¹⁶

Article 8(2) allows interference of privacy by a public authority where it is "in accordance with the law and is necessary in a democratic society... for the prevention of disorder or crime, for the protection of health or morals".² Similar provision is made for lawful interference in the ICCPR. As judgement is made by the State on what constitutes lawful interference with privacy and therefore autonomy, this right is not breached by prohibition of assisted suicide for the purpose of protecting health. In response, it was argued that Mrs Pretty did not need protection, and that the ban did not take into account her situation as a mentally competent adult, who was not vulnerable:

*"The applicant argued that it was disproportionate to impose a 'blanket ban' which applied both to those who did and to those who did not need the protection of the law."*⁸

The Court did not consider the ban disproportionate, due to the

seriousness of the risk of abuse and harm that the ban aimed to prevent in addition to the flexibility of enforcement:

*"The Government have stated that flexibility is provided for in individual cases by the fact that consent is needed from the [Director of Public Prosecutions] to bring a prosecution and by the fact that a maximum sentence is provided, allowing lesser penalties to be imposed as appropriate."*⁶

Dianne Pretty's case went no further with this argument, but it was again raised in *Purdy v Director of Public Prosecutions* in 2009, where the flexibility of enforcement was queried. As enforcement is meant as a deterrent and should be in the public interest, it was held by the Court that policy detailing the flexible process of enforcement should be provided to Ms Purdy. Though this result did not find a direct right to die, it did require a thorough and transparent justification to interfere with Ms Purdy's autonomy right. This right to autonomy respects the right to choose to die and act on this choice in private, only to be subject to interference that is consistent with act 8(2) of the European Convention.

CONCLUDING REMARKS

Human rights are testament to the progress of civilisation. They aim to protect the good aspects of human nature, allowing mankind to live as equals, while placing as little restriction as possible on absolute liberty. When the wording of documents affirming human rights is argued to great extent as in the *Pretty* and *Purdy* cases, it is disappointing that civil law can encroach on so many vital freedoms that are often taken for granted. When the ICCPR and European Convention were ratified, degenerative disease and certainty of diagnosis did not exist as they do today. That a right to die was not provisioned then does not mean it would remain absent if the drafts were proclaimed today or in 50 years' time. On the contrary, the values of freedom and security that founded these rights may not exist today as they did in the aftermath of the world wars. Faith must be placed in the human rights framework as a set of principles that can be enforced and will ensure, to the extent that is possible, that the progression of civilisation will continue to yield a better world. That the above cases were decided by law, rather than bias, power or emotion is a positive result and highlights the success of the framework. Though it may seem inherently human to assist another in their death to end their suffering, the consequences of the Court breaching human rights would be to undermine their very achievements. In a world where human rights are not observed by every State, it is important to stand, and even suffer, by them if by example it may one day mean that the entire world can enjoy what is right. A right to die has not been inferred by the human rights affirmed, but nor has an obligation been bestowed on any State to prohibit all acts of assisted suicide. New Zealand therefore has the freedom to decide democratically if death should be a legally accessible right.

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