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10 Mission (Im)Possible: Defending the Right to Die

Violeta Beširević [*]

10.1 The Triumph of an Idea

> *I do not want my life to end violently. I do not want my mode of death to be traumatic for my family members. I want the legal right to die peacefully, at the time of my own choosing, in the embrace of my family and friends.*[1]

This is the claim Gloria Taylor, the patient diagnosed with a fatal neurodegenerative disease, made before the Canadian Supreme Court when she challenged the Criminal Code blanket prohibition on assisted dying. Ms. Taylor asserted that the prohibition allegedly violated her rights to life, liberty and security and to equal treatment by and under the law, ensured in Articles 7 and 15 of the Canadian Charter of Rights and Freedoms.[2] Relatives of Kathleen Carter, who, somewhat earlier, was helped to die in assisted-suicide clinic in Switzerland, joined Ms. Taylor in her claim.[3] In a unanimous 9-0 *decision* announced on 6 February 2015, the Canadian Supreme Court upheld the assertion of two now-deceased women. It partially invalidated the prohibition on physician-assisted dying

> insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.[4]

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1 *Carter v. Canada* (Attorney General), 2015 SCC 5, para. 12.

2 *Id.*, paras. 2, 11.

3 *Id.*

4 *Id.*, para. 4. The Supreme Court has given Parliament a year to enact a new law. Important to note is that this ruling goes against the preferences of Parliament, which overwhelmingly rejected a proposal to legalize euthanasia in 2010, by a vote of 228 to 59.

After the Columbian Constitutional Court, which in 1997 ruled in favor of medical assistance in dying on autonomy-based reasons[5], the Canadian Supreme Court is the first court of final jurisdiction in which the right to die claims have triumphed on the similar grounds.[6] Namely, the Canadian Supreme Court underlined that since "an individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy", her choice about the end of her life is entitled to respect.[7]

However, many will not agree with this ruling. The opponents of assisted suicide and mercy killing are firmed in their believe that already morally and legally recognized right to forgo pro-life treatment and an alleged right to assisted suicide/death cannot be lumped together under the rubric of the right to die, because they differ much in important respects, particularly with regard to a society's basic conception of personal autonomy and dignity.[8]

On the practical level, the opponents' position prevails: despite persistent and frequent cases in which terminally or incurably ill people seek death, most of the right to die claims have not be legally condoned and in most jurisdictions assisted suicide and/or mercy killing are still outlawed. Apart from Columbia, the total ban has been lifted only in the Netherlands, Belgium and Luxemburg.[9] In Canada and the Canadian province of Quebec, as well as in the US states of Oregon, Washington, Montana, New Mexico and Vermont assisted suicide is legally permissible, but not mercy killing. To the list of exceptions, one should add Switzerland, which has always allowed assisted suicide for non-selfish reasons, Great Britain, which permits prosecutorial discretion in cases of assisted suicide,[10] and Japan in which the case law seems to condone the both, mercy killing and assisted suicide.[11] What distinguishes most of these jurisdictions from Columbia and Canada is the fact that the

5 Constitutional Court of Colombia, Constitutional Claim Decision C-239/97, May 20, 1997. In a six to three decision, the Constitutional Court ruled that no physician should be held criminally responsible for taking life of a terminally ill patient who has given clear authorization for doing so. The reasons for such a ruling were grounded on the determination that an individual's autonomy in some circumstances prevailed over the state duty to protect life.

6 Previously, the claims concerning autonomy and dignity-based right to die were defeated in the US Supreme Court (*see Washington v. Glucksberg*, 117 S. Ct. 2258, 1997), the Hungarian Constitutional Court (*see Decision No. 22/2003*) and the Supreme Court of India (*see Gian Kaur v. State of Punja*, (1996) 2 SCC 648).

7 *Carter v. Canada*, para. 66.

8 Y. Kamisar, 'The Rise and Fall of the "Right" to Assisted Suicide', *in* K. Foley & H. Hendin (Eds.), *The Case against Assisted Suicide: For the Right to End-of-Life Care*, The Johns Hopkins University Press, Baltimore, 2002, p. 72; for a general discussion *see e.g.* K. Foley & H. Hendin (Eds.), *The Case Against Assisted Suicide: For the Right to End-of-Life Care*, The Johns Hopkins University Press, Baltimore, 2002; Y. Kamisar, 'Are the Distinctions Drawn in the Debate about End-of-Life Decision Making "Principled"? If not, How Much Does It Matter?', *Journal of Law, Medicine and Ethics*, Vol. 40, No. 1, 2012, pp. 66-84.

9 For general discussion, *see* the Report of The Royal Society of Canada Expert Panel: End of Life Decision Making (2011), https://rsc-src.ca/sites/default/files/pdf/RSCEndofLifeReport2011_EN_Formatted_FINAL.pdf.

10 *See* in H. Biggs & S. Ost, 'As It Is at the End so It Is at the Beginning: Legal Challenges and New Horizons for Medicalised Death and Dying', *Medical Law Review*, Vol. 18, No. 4, 2010, p. 437.

11 For the status in Japan, *see* D. Mendelson & T.S. Jost, 'A Comparative Study of the Law of Palliative Care and End-of-Life Treatment', *Journal of Law, Medicine and Ethics*, Vol. 31, No. 1, 2003, pp. 136-137.

legality of medical assistance in dying in these jurisdictions was mostly achieved through non-punishability of a physician's acts, and not on the rights-based approach.

Now, there are many for whom the recognition of the right to die remains a bad idea. Such conviction is either fundamentally religious or when it is secular – it echoes moral dogmas concerning suicide and the sanctity of life. At best, it derives from the belief that if legally sanctioned, dignity claims and the right to self-determination would result in many unwanted deaths and abuses and undermine the ethical integrity of the medical profession. Hence, there are two kinds of arguments advanced against the legalization of medical assistance in dying: one – doctrinal, according to which the medical practices amounting to assisted suicide and mercy killing are intrinsically wrong regardless of circumstances, and the other – social or practical, according to which the legalization is so much connected with risks and difficulties that it cannot be sustained.[12]

> In this article I have chosen to consider the two following interrelated questions: Whether the ideas of autonomy and dignity can bring about legal sanction of a right to die. If a right to die bears legal significance, what is the best strategy for its institutionalization?

However, since few issues are as volatile and riddled with confusion as the right to die, I need first to explain the conflicted meaning of the right to die and the present forms of its legal effectiveness.

10.2 Vocabulary and Law: What Is Outlawed and What Is Put into Law

The issues of 'who lives, who dies and who decides' have become increasingly topical ever since the achievements of the modern medicine not only helped to prolong life over previously unimaginable boundaries, but also prolonged the illness, suffering and pains. In addition to the improved medical technology, the appraisal of civil rights talk in 1960s and 1970s and the emergence of rights of informed consent and informed refusal, have also influenced the appraisal of the debate about life and death choices and revival of an ancient debate on euthanasia, now also frequently running under the guise of the right to die.

However, the members of the contemporary debate have never had a complete control over the terms and definitions they use. Thus, what does one talk about when she talks about the choice to choose the time and manner of her death? What is the implication of the phrase 'death with dignity' used in the Oregon and Washington assisted suicide laws? Whether one talks about euthanasia or a right to die? Does a right to die refer to euthanasia

12 I discuss validity of these arguments in Beširević 2006, pp. 23-153.

or these terms amount to different claims? Does the right to die encompass only the right to refuse pro-life treatment or only the right to assisted suicide/death, or it encompasses both rights? What about administration of painkillers that may cause earlier death: does the practice of the administration of terminal sedation amount to euthanasia or a right to die or to "comfort care only"?

Some, including myself, associate euthanasia with an action or omission undertaken with the intent of bringing about death of a terminally or incurably ill patient in order to end her pain and suffering. On this account, starting from the principled doctrines of criminal law, administration of drugs or lethal injection with the intent of causing the death of the patient, supplying a lethal pill or advising about methods that lead to death, administration of palliative drugs in dosages capable to hasten the death of the patient, non-treatment of treatable condition, withholding or withdrawing of life supporting systems, and the regime of do-not-resuscitate order, fall within the ambit of euthanasia. I also find no difference between euthanasia and the requests for acknowledging the right to die. On the contrary, the right to die is modern euphemism for euthanasia, accepted mostly to avoid undermining ethical integrity of medical profession.

In contrast, in approving or condoning tragic choices, the majority of scholars and public policy makers have taken less principled approach with an aim to satisfy on one side, the values of autonomy and personal dignity, and on the other side, the need to protect innocent human life. Consequently, the issue of terminology and classification of a particular medical treatment largely depends upon a type of treatment as well as a jurisdiction involved in the discussion. The approaches taken in the US and the Netherlands best illustrate this point.

In the US, except in the very early stage, the term euthanasia never figured prominently in the discussion about withdrawal/withholding medical treatment. Although in the first breaking case of Quinlan, decided back in 1976 by the New Jersey Supreme Court, the term (passive) euthanasia had been used in the discussion about legal concerns involved in the dispute, the case was decided on the rights-based approach: the Court ruled that the federal constitutional right to privacy was broad enough to embrace the patient's decision to terminate life-sustaining medical treatment.[13] This conclusion had been reaffirmed in a number of cases litigated in this country during 1970s and 1980s.[14] After it left enough time for the case law to develop, the US Supreme Court in *Cruzan* ruled that (for the pur-

13 *In re Quinlan*, 70 N.J. 10, 355 A. 2d 647 (1976), pp. 663-664.

14 *See e.g. Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417(1977); *Satz v. Perlmutter*, 362 So. 2d Fla. Dist. ct. App. (1978); *Eichner v. Dillon*, 73.A.D.2d.431, 426, N.Y.S.2d 517, (1980); *In re Spring*, 380 Mass 629, 405 Ne2d 115; *In re Conroy*, 98 N.J 321, 486 A2d 1209 (1985); *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P2d 647; *Bouvia v. Superior Court (2d Dist.)*, 179 Cal. App. 3d 1127, 225; *Bartling v. Superior Court (2d Dist.)*, 163 Cal. App. 3d 186, 209; *Foody v. Manchester Memorial Hospital*, 40 Conn. Supp. 127, 482 A2d 713; *St. Mary's Hospital v. Ramsey*, Fla. App. D4 465 So2d 666; *Lane v. Candura*, 6 Mass. App. 377,376 Ne 2d 1232, 93.

pose of that case) the US Constitution would grant a competent person a constitutionally protected right to refuse lifesaving nutrition and hydration.[15] The Court found that the liberty interest protected by Due Process Clause of the Fourteenth Amendment, justified this presumptive right.[16] During the battle for the legal recognition of an alleged right, the term 'right to die' has been coined and nowadays it is widely used. However, for many the term is only significant in cases of non-treatments, but not in cases related to requests for physician's assisted suicide and mercy killing.

Across the ocean, in the course of defining what euthanasia meant as a matter of Dutch law, the State Commission on Euthanasia, proposed in its Report of 1985a distinction to be made between practice of euthanasia and so-called 'false forms of euthanasia' which included withholding or withdrawing of treatment acceptable from the point of criminal law.[17] Up until the *Stinissen* case, there were disagreements as to the nature of artificial nutrition and hydration. In *Stinissen*, first the district, and then the appellate court ruled that this procedure should be considered as medical treatment.[18] Thus, like in the US, in the Netherlands withdrawal/withholding treatment has never been treated as a category of euthanasia, as well.

However, in both countries legalization of other forms of medical assistance in dying turns to be a nut hard to crack. In the Netherlands, a request to legalize mercy killing and assisted suicide (commonly termed 'active euthanasia') has never been formulated in terms of the right to die. Back in 1984, The Dutch Supreme Court ruled that the respect for the right to self-determination and assistance to a fellow human being in need, guarding his dignity and ending his unbearable suffering, cannot be considered a view so generally accepted as correct throughout society, that it can support conclusion that euthanasia is legally permitted and therefore not punishable.[19] Instead of searching for the rights-based concept, the Dutch had searched for doctrinal theory available in criminal law that might legitimate practice manifestly contrary to the prohibition of assisted suicide and killing on request. In the courtrooms, the defense of necessity was the long-serving idea to justify mercy killing and assisted suicide. Yet, ultimately, the Dutch have responded to the tension between the traditional rule against intentional killing of an innocent human being and the contemporary moral sentiment that in some cases active euthanasia is morally justifiable, by creating a ground for exemption from punishability of doctors if they report their

15 *Cruzan v. Director Missouri Department of Health*, 497 U.S. 261, 110 S.Ct.2841 (1990), pp. 279, 288.

16 *Id.*

17 J. Griffiths, A. Bood & H. Weyers, *Euthanasia and Law in the Netherlands*, Amsterdam University Press, Amsterdam, 1998, p. 71.

18 *Id.*, pp. 77-78.

19 *See* the *Schoonheim* case. The English translation is available in Griffiths, Bood & Weyers 1998, pp. 325-326.

actions and show that they have satisfied the statutorily defined due care criteria.[20] Practically, this means that mercy killing and assisted suicide are still criminal offences, but the Criminal Code has been amended to exempt doctors from punishability if certain conditions are met.[21] The similar, non-punishability-based approach has been taken also in Belgium and Luxemburg. Remarkably, in all the three jurisdictions, the term euthanasia has been widely used and it figures prominently even in the titles of their assisted suicide laws.[22]

Not, in the US, however. There, over the years the term euthanasia got negative connotation, associated with suicide, killing by physicians, moral wrongfulness and illegality.[23] For these reasons, the term was mostly dropped out of the use, and today, among the scholars the choices people should or should not have with regard to death are discussed under the guise of physician–assisted suicide or physician-assisted death. The term euthanasia is not used in either one piece of the state legislation or in the court's decision by which physician-assisted suicide has been legally approved. On the contrary, the state legislation allowing medical assistance in dying in Oregon, Washington and Vermont has transformed the crime of assisted suicide into medical treatment if a physician provides the assistance. At the same time, these laws explicitly forbid a physician or any other person to end a patient's life by lethal injection, mercy killing, or active euthanasia.[24]

Why vocabulary matters? It matters because it does not only indicate the present legal regime (a 'good' practice, like withholding/withdrawing treatment is put in the law, while a 'bad' practice, like euthanasia, is still outlawed), but predominately testifies about a society's approach towards its obligation to protect the innocent human life as well ethical integrity of medical profession (a physician's help in non-treatment cases does not amount to act of killing as it does in cases of euthanasia).

Now, upon an assumption that life is not preferable to death in circumstances of painful and incurable illness, in many jurisdictions an argument from autonomy (somewhere, like in Hungary, in combination with dignity), proved to be a strong basis for upholding the right to forgo pro-life treatment. Although the initial position is very similar, auton-

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20 *See* Review procedures for the termination of life on request and assisted suicide and amendment of the Criminal Code and the Burial and Cremation Act (Termination of Life on Request and Assisted Suicide (Review Procedures) Act) from 1 April 2002.

21 Note that these conditions work *ad personam* and not *ad rem*: if the conditions are met, they exclude punishability only if a doctor and nobody else has committed the act.

22 *See* The Belgium Act on Euthanasia of May 28, 2002, in *Ethical Perspectives*, 2002, No. 2-3, pp. 182-188. For the law of Luxemburg, *see* Legislation Reglementant Les Soins Palliatifs Ainsi Que L'euthanasie Et L'assistance Au Suicide (Legislation Covering Hospice Care, Euthanasia and Assistance to Suicide) www.legilux.public.lu/leg/a/archives/2009/0046/a046.pdf.

23 T.L. Beauchamp, 'The Right to Die as the Triumph of Autonomy', *Journal of Medicine and Philosophy*, Vol. 31, No. 6, 2006, p. 652.

24 *See* Section 127.880 s.3.14. of the Oregon Death with Dignity Act (Revised Statutes), Section 18 of the Washington Death with Dignity Act (Initiative Measure no.1000), and §5292 of the Vermont's Act Relating to Patient Choice and Control at End of Life.

omy/dignity-based approach proved to be far less successful in pushing for legalization of the right to assisted suicide/death, which, as it is alleged, also falls within the ambit of the right to die. In the next sections, I will consider this controversy. My predominant concerns are the legal responses connected with end-of-life decision-making. Therefore, what I say about autonomy and dignity will be more tied to law and less to philosophy.

10.3 Building a Right to Die: What Is Autonomy for?

10.3.1 The Inventory of the Conflicting Arguments

The inventory of the most important arguments offered in support of a wide-ranging right to die can be reduced to the following: the respect for personal autonomy entitles a terminally ill person to decide about a time and manner of her life. Just as a person has the right to determine the course of his or her own life, a person also has the right to determine the course of his or her dying.[25] In Dworkin's view this implies that every competent person has the right to make momentous personal decisions, which invokes fundamental religious or philosophical convictions about life's value for her.[26] The fundamental value of autonomy would be violated if others (the state, the doctor) could continue a person's life against her will, which would make that life one without freedom and autonomy.[27]

Those who oppose the mutation of the right to die into a right to assisted suicide/death insist that the right to die cannot mean anything else but 'a right to resist' a direct invasion of bodily integrity.[28] To explain their resistance to legalization, the opposers offer either ethical or practical arguments.

From an ethical point of view, one possible way to call into question recognition of the wide-ranging right to die is to 'moralize' autonomy. The opposers assert that legalization would violate a famous means/ends formulation of categorical imperative, meaning it would amount to treating persons as a means rather than as an end.[29] Thus, Velleman argues that the exercise of autonomy choices looks like playing with dynamite that could always blow up: to permit oneself the choice of suicide for the sake of one's autonomy is

25 *See e.g.* M. Battin, 'Ethical Issues in Physician-Assisted Suicide', *in* M. Uhlmann (Ed.), *Last Rights?: Assisted Suicide and Euthanasia Debated*, Ethics and Public Policy Center and William Eerdmans Publishing, Washington, D.C., and Grand Rapids, Mich., 1998, p. 116; M. Otlowski, *Voluntary Euthanasia and the Common Law*, Clarendon Press, Oxford, 1997, p. 189; P. Admiraal, 'Voluntary Euthanasia: The Dutch Way', *in* S. McLean (Ed.), *Death, Dying and the Law*, Dartmouth Publishing Company, Hampshire, 1996, p. 115.

26 R. Dworkin, 'Introduction to Assisted Suicide: The Philosophers' Brief', *The New York Review of Books*, Vol. 44, No. 5, 27 March 1997.

27 H. J. J. Leenen cited in Griffiths, Bood & Weyers 1998, p. 170.

28 Kamisar 2002, p. 72.

29 J. D. Velleman, 'A Right to Self-Termination?', *Ethics*, Vol. 109, No. 3, 1999, pp. 613-620.

to treat the single exercise of that autonomy as worth the sacrifice of one's autonomous oneself.[30] A similar claim comes from the proponents of personhood theory. They find that the right to die is not capable of moral justification, as to endow a person with such a right means to place the person into the personhood paradox: if a rational, autonomous and self-aware person wishes to destroy an ultimate value, *i.e.* life, then the person is to negate the value that he or she has.[31] Keown offers another argument: he claims that if it is seriously immoral intentionally to kill an innocent person, it is difficult to see how choice to kill, whether another or oneself, can command moral respect. According to him, it is a reason enough to use the criminal law to deter the implementation of such choices.[32] Similarly, it is asserted that the value of autonomy lies not in making just any choice but the choice consistent with sound moral values. According to Raz, an exercise of autonomy merits respect only when it is exercised in accordance to a framework of sound moral values.[33] Since the choice to kill oneself is not consistent with the principle of the sanctity/inviolability of human life, then it cannot be seen as the exercise of one's autonomy.

Some find that a comprehensive right to die does not make sense neither from a practical perspective. Assistance in dying in medical context violates autonomy of those who wish to die because it necessarily involves some kind of pressure: true autonomy is rarely possible and many who request active death help do this as a result of depression and inadequate palliative care or as a result of physicians' or family influence.[34] Besides, if the practices of assisted suicide and mercy killing become common, people will feel more pressured to die for the benefit of others.[35] In other words, we will encourage excessive altruism, which is now forbidden even in cases of organ donation where the donors are willing to do it.[36] Another way to test this subject is to assert that autonomy poses a slippery slope to non-voluntary euthanasia: if autonomy merits respect, then how can self-determination have any limits, that is to say – why to limit the right to assisted suicide/death only to the competent terminally ill persons for the relief of suffering?[37] Lastly, it is claimed that a choice to die is socially formed: it involves a doctor who should help a patient to die.[38]

30 *Id.*, p. 625.

31 For more *see* M. Ford, 'The Personhood Paradox and the "Right to Die"', *Medical Law Review*, Vol. 13, No. 1, 2005, pp. 80-101.

32 J. Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalization*, Cambridge University Press, Cambridge, 2002, p. 55.

33 J. Raz, *The Morality of Freedom*, Clarendon Press, Oxford, 1988, p. 412.

34 *See e.g.* Keown 2002, p. 56. For influential discussion of the role of family members in end-of-life decision-making *see e.g.* J. Sándor, 'Ethical and Legal Debates on a Dignified End-of-Life and the Role of the Family in Hungary', *in* B. Feuillet, K. Orfali & T. Callus (Eds.), *Families and End-of-Life Treatment Decisions. An International Perspective*, Bruylant, Bruxelles, 2013, pp. 211-221.

35 J. Baron, *Against Bioethics*, The MIT Press, Cambridge, Mass. and London, 2006, p. 93.

36 *Id.*

37 *See e.g.* D. Callahan, 'Reason, Self-Determination and Physician-Assisted Suicide', *in* Foley & Hendin (Eds.) 2002, p. 62.

38 Keown 2002, p. 57; *see also* Callahan 2002, p. 60.

Since 'active' assistance in dying is morally wrong, a doctor cannot be obliged to do what is wrong even if one's choice to die is made freely and rationally.

I have drawn the positions of both sides. It is time to enter my view into perspective.

10.3.2 Autonomy in Death and Dying Law

Autonomy is a moral category. The capacity of individuals to choose and pursue their particular life-plan gives individuals their special moral status. Autonomy matters because it gives us status of moral persons. For human beings have the capacity to choose in accord with their reason, they possess certain moral rights. In turn, there is a correlative duty of others to respect these rights. Accordingly, the autonomy principle does not affirm benefit – instead it requires respect. Exactly what these rights of autonomy are is a matter of controversy. One-possible feature is that they are concerned with areas of an individual's conduct that is essentially self-regarding. Another is that they are not unlimited rights – instead, they are limited by other persons' rights, the principle of non-injury, by contract or other moral considerations. Consequently, autonomous rights are not overriding moral values.[39]

In the sphere of law, autonomy has been closely attached to the idea of freedom (*e.g.* in law of contracts) and the right to personal liberty. Autonomy and liberty imply that an individual has a right to hold certain views, to make one's choices and to act on the basis of one's personal values and beliefs. Autonomy, whether understood as a right, capacity, discretion or condition to make self-affecting decisions without interference of others, took on significance in many areas of one's life. Thus, our personal choices with whom to live and whom to marry, whether or not to beget a child, choices of sexual orientation, personal identity and many others are protected by law. The protection is often granted under the notion of privacy. There are those who argue that autonomy is the underlying concern behind the protection of free speech and freedom of religion.[40] Some constitutions expressly protect autonomy: for example, the German Basic Law specifies that the right to the free development of one's personality protects the inner sphere of personality which is in principle subject only to the free determination of the individual.[41]

Noninterference with one's choices has not only become a favorite liberal stance but also a constitutionally recognized principle. However, because individual rights, including

39 For influential reading of autonomy, *see e.g.* T. Hill, *Autonomy and Self-Respect*, Cambridge University Press, Cambridge, 1991, J. Feinberg, *The Moral Limits of the Criminal Law. Volume 3, Harm to Self*, Oxford University Press, New York, 1986, pp. 27-51; I. Berlin, 'Two Concepts of Liberty', in his *Four Essays on Liberty*, Oxford University Press, Oxford, 1969, pp. 118-172.

40 *See* in John H. Garvey, *What Are Freedoms For?* Harvard University Press, Cambridge, Mass., 1996, p. 23.

41 *See* Art. 2 (1) of the German Basic Law.

the rights of personal autonomy, are grounded into society, two issues have been the subject of a constant philosophical and legal debate: (a) where are the limits of autonomy; and (b) can a person choose what is bad for him.

As to the first, the fact that an individual is not an 'isolated island' but has been integrated into society has yielded another fact – that some choices get more protection than others. The issue of protection depends on balancing process between an individual's rights of personal autonomy and other legally protected interests and values. Thus, from the perspective of the rights model, the controversy of the right to die is often limited to the relationship between the right to self-determination and the right to life.

The second dilemma – can a person choose what is bad for him – revolves around the issue of whether the good is prior to the right. There is a variety of answers and many of them are reflected in debating the right to die. Yet, the central one for resolving the dilemma about legalization of all forms of the right to die is the answer to the question of whether law supports personal choices only when they are tied to the good or it is sufficient for the legal sanction that an individual's choice is made freely and rationally.

A great deal of the debate turns on whether a terminally or incurably ill patient has or does not have capacity to make a decision about assisted suicide/death. If a patient is competent, then an argument from autonomy suggests the following: in case that rational autonomy includes some minimum capacity to see causal connections (a possibility to understand what will happen as a result of a certain act), capacity to create values and not merely to discover them, and self-respect in the sense of keeping our interests (choices) in line with the personal standards we set for ourselves, then the right to assisted suicide/death for those who have not lost capacity for even minimally rational, autonomous living should be sustained.[42] The autonomy principle is not a beneficial principle – it is a respecting principle. Accordingly, others' attitude towards one's interest to refuse life sustenance or to end life with assistance requires respect. These interests merit moral respect because it is important for the patient to decide how and when to die. Since law should be and is shaped by moral aspiration, it is perfectly *right* to insist on legal recognition of such right. Whether it can be intruded upon with special justifications is a different issue.

Now, in many jurisdictions the respect for a patient's bodily autonomy, *i.e.* the right of the individual to decide what will be with her body, served to identify another interest important to her – that of declining treatment even if it may lead to death. This interest has also been recognized as a legal right. Consider for example the conclusion of the European Court of Human Rights in the case of *Pretty*:

42 This argument is reconstructed from Hill. *See* Hill 1991, pp. 95-103.

> In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult, would interfere with person's physical integrity[…] As recognized […] a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life.[43]

In so far as refusal of treatment does not mean the right to assisted suicide/death, many will agree with this conclusion. I, however, find the following to be true.

First, the right of a person to decide what will be with her body is not exhausted with the right to refuse pro-life treatment. The logic of the bodily autonomy argument also demands the recognition that bodily autonomy is at the core of the right to assisted suicide/death. By choosing to end life with a help of a physician, the patient also decides what will be with her body – she either authorizes violation of her body, *e.g.* by administration of a lethal injection, or she self-administers the death inducing drug. The Canadian Supreme Court in *Carter*, in which it authorized physician's assistance in dying, put special emphasize on this argument.[44]

Second, it is not only that empirical account of bodily autonomy command recognition the right to assisted suicide/death. Such recognition steams from two additional moral reasons, which promote autonomy. On one hand, human dignity (understood here as a concept tied to autonomy) conditions this recognition. Kant claims that respect for autonomy derives from the recognition that all persons have unconditional worth and capacity to determine their destiny.[45] This unconditional and intrinsic worth, which is a basic component of human dignity, demands a respect to be given to individual's choices. Note that the nature of such respect is not abstract: it is direct and requests not only non-intervention but also an action to enable an individual to act autonomously. As Hill asserts, respecting individuals' autonomy means granting them at least the opportunity to make their crucial life-affecting choices in a rational manner.[46]

On the other hand, the recognition of the patient's right to assisted suicide/death is compelled by the reason of consistency. Consistency is one of the virtues of moral life.[47] The need to be consistent demands the respect to be given to the patient's choices in all similar situations. At present, the patient is allowed to choose non-treatment practically

43 *Pretty v. the United Kingdom*, ECHR (2002), No. 2346/02, at 63.

44 *Carter v. Canada*, paras. 65-69.

45 *See* Hill 1991, p. 34.

46 *Id.*, p. 48.

47 G. Hermerén, 'The Debate About Dignity', *in* Council of Europe, *Euthanasia. Volume I: Ethical and Human Aspects*, Council of Europe Publishing, Strasbourg, 2003, p. 47.

in all possible situations, while she is precluded to opt for more direct physician's assistance in dying.

It is useful to stress that these moral categories and virtues – human dignity and consistency – have got their legal recognition: while dignity has become the substantive law in some jurisdictions, consistency is virtually present in all liberal democracies – it is expressed in the principle of non-discrimination and the rule of law.[48]

10.3.3 On 'Immorality' of Assisted Suicide and Mercy Killing

It is often said that the choice to kill an innocent human being cannot command a moral respect and therefore should be subject to criminal sanctions. This refers both to assisted suicide and mercy killing.

In case of a suicide, a key 'immorality' argument comes from Kant.[49] Starting from the premises that the real meaning of our humanity lies in the fact that we are rational beings with autonomy of the will and that therefore we should never treat humanity (autonomy and rationality) simply as a means, but always as an end in itself, Kant articulates his argument against suicide (and, as some assert, by implication against mercy killing and assisted suicide) in the following way:

> If [a human being] destroys himself in order to escape from painful circumstances, he uses a person merely as a means to maintain a tolerable condition up to the end of life. But a man is not a thing, that is to say, something which can be used merely as a means but must in all his actions be always considered as end in himself. I cannot, therefore, dispose in any way of a man in my own person so as to mutilate him, to damage or kill him.[50]

Readings of a very different kind have been mounted concerning this statement. First of all, philosophers and other scholars disagree over the issue of whether it refers to suicide in all or only in particular cases. There are thinkers who argue that Kant rejects suicide in all cases making plain that (a) only the most compelling moral reasons could ever justify suicide, and that (b) such reasons are virtually non-existent.[51] In line with this is the assertion that Kant finds suicide immoral since it destroys the morality itself rooted in

48 *Id.*

49 For detailed analysis of Kant's approach toward suicide, *see* M. Uhlmann, 'Western Thought on Suicide: From Plato to Kant', *in* Uhlmann (Ed.) 1998, pp. 39-44; *see also* Hill 1991, pp. 85-103.

50 I. Kant, *Fundamental Principles of the Metaphysics of Morals*, 1785, T. K. Abbott trans. from German, p. 45, http://www2.hn.psu.edu/faculty/jmanis/kant/Metaphysic-Morals.pdf.

51 Uhlmann 1998, p. 43.

one's own person.[52] On his part, Feinberg holds that Kant treats suicide as action, unconditionally prohibited by the moral law, and beyond the pale of anyone's sovereign control.[53] Others, however, hold that this statement refers only to particular cases of suicide. According to them, Kant does not treat suicide as always wrong – he justifies those based on obligatory ends and rejects those committed in order to obtain benefits or escape harms.[54]

Although the most assert that Kant opposed suicide as a morally wrong act, some authors think that Kant's position towards suicide can be reconciled with an individual's decision to end life for escaping pain and suffering. Thus, Hill, who favors suicide to end a gross irremediable pain, holds the following: while it is true that suicide to end pain places cessation of pain, as a relative and conditioned value, above humanity (rationality and autonomy), which has worth that admits no equivalent, it is also true that Kant himself left rationality and autonomy relatively undefined.[55] If autonomous choices are to be valued because an individual chooses them and, if we are to value individuals for their own sake independent of our own likes, then, Hill adds, self-regarding suicide in special circumstances is reconcilable with the spirit of Kant's humanity as an end in itself idea.[56]

Here is where 'immorality' arguments against mercy killing also come in. The argument implies, whether in religious or secular version, the supposition that human life qualifies as a basic value intrinsically worthwhile, not instrumental and not merely useful for achieving some other end.[57] Under this view, whatever the claims of autonomy, dignity and mercy may be, the intentional taking of human life is always wrong. I have commented elsewhere the implications of this argument. For the purpose of this discussion, I will emphasize two brief points. First, the command 'Thou shalt not kill' is of religious origin. The meaning it had when established has been seriously changed for different reasons, including not only implementation of different policy goals (war and crime prevention), but also for the recognition of autonomous choices (abortion and non-treatments). Second, some previously morally disputed choices and actions are nevertheless legalized or liberated from criminal sanctions. Abortion, contraception, adultery and non-treatments are good cases to prove that point.

Now, even if assisted suicide and mercy killing are 'immoral' – should morality be enforced? Some think that it should because the enforcement of a common morality is

52 T. L. Beauchamp, 'Suicide in the Age of Reason', *in* B. Brody (Ed.), *Suicide and Euthanasia: Historical and Contemporary Themes*, Kluwer Academic Publishers, Dordrecht, 1989, pp. 208-209.

53 Feinberg 1986, p. 94.

54 *See* J. Rawls, *Lectures on the History of Moral Philosophy*, B. Herman (Ed.), Harvard University Press, Cambridge, Mass., and London, 2000, p. 193; Velleman 1999, p. 616.

55 *See* Hill 1991, pp. 93, 101.

56 *Id.*, pp. 85-103.

57 N. M. Gorsuch, 'The Right to Assisted Suicide and Euthanasia', *Harvard Journal of Law and Public Policy*, Vol. 23, No. 3, 2000, pp. 698-699.

within the proper scope of the criminal law.[58] However, although the morality is not completely irrelevant for the criminal law, there are some areas of private life and individual choices that ceased to be a subject of a legal ban. Take same-sex marriages now sanctioned in several US states and some European countries. Or, consider that the life of homosexuals is protected under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, although many find this sexual orientation immoral. That different kinds of individual choices and law need not be at odds, testifies the observation of the European Court of Human Rights that the ability to conduct one's life in a manner of one's own choosing, may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned.[59] This is a legal reading of the famous Mills' stance that prevention of self-imposed harm is not a valid ground for interference with a person's autonomy choices.[60]

Therefore, 'immorality' of assisted suicide and mercy killing should not be a decisive argument against their legalization and in fact – it is no longer. Today, when law and a common (or majoritarian) morality do not always go hand in hand, many continue to consider the current prohibition of mercy killing and assisted suicide appropriate, this time, by appealing to some practical reasons.

10.3.4 The Right to Die and the Requirement of Voluntariness

One of the critical ideas offered against the far-reaching right to die is that a terminally or incurably ill individual cannot autonomously choose to die. The opposers raise doubt about the patient's ability to make self-regarding decisions while demoralized by the painful effects of incurable or terminal illness. They also argue that any self-made decision to terminate life under such circumstances essentially would result from the wish not to be a burden to relatives, from coercion coming from the side of family or physicians, or from excessive altruism. In other words, it is asserted that the request for 'active' assistance in

58 *See* P. Devlin, *The Enforcement of Morals*, Oxford University Press, Oxford, 1965.

59 *Pretty v. the United Kingdom*, at 62.

60 J. S. Mill, *On Liberty and Other Essays*, Oxford University Press, Oxford, 1991, p. 14. On this point, some may argue that it is impossible to rule out paternalism in all cases. To support their claim they can offer a hypothetical example of 'voluntary slavery' or more direct examples of driving a car without a seatbelt or driving a motorcycle without a protective helmet, which are autonomous but yet outlawed choices. A prohibition of 'voluntary slavery' may be justified by the principle of non-exploitation aimed not to prevent a person to be a slave but to prevent the other from being a slave owner. Opponents of assisted suicide and mercy killing then may argue that by the same token, the prohibition of active medical help in dying is justified by the principle not to kill others. Counterargument is that the former is an absolute principle while the later is not, that is that killing of others is permitted in certain circumstances. As to mandatory usage of seatbelts and protective helmets, one may claim that in such cases autonomy can be overridden by the public interests (*e.g.* by appealing to the great public costs), that is by the interest to prevent harm to others. For an extended discussion *see* Feinberg 1986, pp. 71-81, 34-142.

dying cannot be truly voluntary: instead of promoting, the practice in fact violates autonomy of those who wish to die.

The concerns are not without merits. It is reasonable to suppose that pain, mental agony or the side effects of pain-killing drugs can influence decisions made by patients who suffer from incurable illness. It might well be true that under such pressure, some patients would rather choose death than life, although it is not their genuine choice. It is also possible that some patients will be inconsistent in their choices, that is, would revoke once given request for assisted suicide/death, which in turn may create problems for those who defend the respect for autonomy principle.

Yet, it is also reasonable to suppose that some patients in such circumstances are capable of realizing their condition, are aware of depression and treatment options (or lack thereof) but are still able to make autonomous choice of death. Consider the case of Diane Pretty who petitioned the European Court for Human Rights alleging her right to die. When the legal controversy arose, she was at an advanced stage of motor neuron disease, paralyzed from the neck downwards, without decipherable speech and fed by a tube.[61] Her life expectancy was measurable only in weeks or months. However, her intellect and capacity to make decisions were unimpaired. Her ability to make a decision was recognized and respected by the Court: the Court did not *a priori* reject her choice to die. Instead, it subjected her claim to a balancing process.[62]

Clearly, both above-mentioned positions are equally true and merit recognition. But a closer inspection of the practice reveals that concerns regarding voluntariness of consent may arise essentially in all areas of medical practice, including cases of treatment refusals. Furthermore, the ability to exercise autonomy and self-determination can be easily checked and, if necessary, invalidated. Recall here Feinberg's stance that 'outer' interference in purely self-regarding matters is justifiable only when necessary to determine whether the person's choice is voluntary, hence truly her, or to protect her from choices that are not truly her.[63]

Consequently, the decision-making capacity of a patient cannot be explicitly denied just because he or she is in a terminal state of illness. The requirement of voluntariness has been in the focus of attention of those who drafted the existing laws on the right to die. For example, in order to be on the safe side, advanced directives, designed to secure autonomous choice of death in case of incompetency, include a revocation clause, *i.e.* the possibility to withdraw a previously given consent for assisted dying. In addition, it is

61 The disease is associated with progressive muscle weakness affecting the voluntary muscles of the body. Death usually occurs as a result of weakness of the breathing muscles, in association with weakness of the muscles controlling speaking and swallowing, leading to respiratory failure and pneumonia. No treatment can prevent the progression of the disease. *See Pretty v. the United Kingdom*, pp. 7-8.

62 *Id.*, pp. 35-90.

63 This position Feinberg calls 'the soft paternalistic strategy'. *See* Feinberg 1986, p. 61.

requested from doctors to obey legal requirements for obtaining informed consent that enables patient choice. Lastly, but not less importantly, involuntary euthanasia is ruled out as illegal since it implies an action performed against the will of the patient, while 'non-voluntary euthanasia' performed in cases where consent is missing, can be justifiable if an 'actual will' of the patient can be established or presumed or upon other standards different from autonomy but close to human dignity, *e.g.* upon the best interests standard.

The argument that identifies the right to assisted suicide/death with excessive altruism does not take into account the fact that the latter is usually connected with narcissism and individuals who love being the focus of someone's attention and admiration, while the former relates to terminally or incurably ill patients who do not necessarily possess such a characteristic. Although one cannot deny that a terminally and incurably ill patient can feel they are burden to relatives and loved ones, it is hard to accept that in the presence of gross pain and suffering the legalization of such an option would lead to social expectation of being willing to die for others, instead of being willing to die to end pain and suffering as well as undignified end-of life. The focus here is on pain and suffering not on personal characteristics that might imply excessive altruism.

There is a separate argument against legalization of physician-assisted suicide that considers assisted suicide in medical context to be a social act and not only as a personal matter of self-determination.[64] Hence, the impacts of the right to assisted suicide on the social policy are twofold: first, unlike in the typical case of suicide, the exercise of this right requires the assistance of a physician; accordingly, it regards not only the patient but the physician as well. Second, recognition of such right would mean the sanction of suicide: the message would be that suicide is morally, legally and socially acceptable.[65]

It is hard to deny that assisted suicide is a socially shaped act. Even if understood as the right of the patient to decide how and when to end her life, it is nevertheless also socially accommodated in order to be functional. Yet, this is not typical only for the right to physician-assisted suicide. Many autonomous choices recognized as legal rights are socially shaped or conditioned, or their exercise requests an assistance of others. Does the request to register marriage limit our right to marry? Is a decision to bear a child less autonomous since it requires a physician's assistance? Does the request to follow certain procedure (administrative or judicial) in the course of the gender reassignment, diminish the rights of transsexual persons to fully express their personality? Moreover, a closely related right to have artificial measures that prolong life withdrawn, can function only with a physician's help.[66] Therefore, the claim that the aspect of the right to die implying physician-assisted

64 Callahan 2002, p. 60.

65 *Id.*

66 A. B. Satz, 'The Case Against Assisted Suicide Reexamined', *Michigan Law Review*, Vol. 100, No. 6, 2002, p. 1405.

suicide is socially shaped cannot weaken the fact that central to the request to legalize the right to assisted suicide is the patient's autonomy.

The second premise that legalization of physician-assisted suicide would send a wrong message to the members of society can also be rebutted. Suicide is not legally prohibited. Moreover, a decision to commit suicide has been already, in one way or another, recognized as an autonomous decision. Consider, for example, social policy in non-treatment cases. Virtually, it is widely recognized that a competent patient can refuse any kind of medical treatment for any reason, including life saving or life sustaining treatment. Yet, this decision has not been termed as suicide on a false assumption that death in such cases is caused by 'nature', and not by the person's choice to terminate her life. But the question here is not whether assisted suicide should be generally condoned. It is an entirely different matter and to my knowledge no one argues in favor of that. What matters here is to allow a physician to aid a patient who suffers from incurable illness to end her life. To assist her to carry out her autonomous decision to terminate the life, like it has already been allowed to a physician to perform abortion upon request before fetal viability.

10.4 Building a Right to Die: What Is Human Dignity for?

10.4.1 The Inventory of the Conflicting Arguments

No argument has been more exploited in the contemporary debate on the right to die as the argument from human dignity – yet none has been less explained or employed in different terms.

Those in favor of the recognition are appealing to acknowledging the right to die with dignity or the right to dignified death. Under this appeal different things are claimed. Some point out to the way one lives and one dies and claim that one has a right to avoid intolerable pain and the indignity of living one's final days incapacitated and in agony.[67] In this context human dignity is about the way one dies (opponents would say – about conformity in dying). Others think that dignity demands respecting autonomous choices of a rational human being.[68] Third understand dignity also in terms of morality but separately from autonomy: they find dignity to be an intrinsic and unconditional worth all human beings

67 *See e.g.* Admiraal 1996, p. 125.

68 *See e.g.* the opinion of Helga Kuhse cited in: The Parliament of the Commonwealth of Australia, Senate Legal and Constitutional Legislation Committee, Report on Euthanasia Laws Bill 1996, (Euthanasia Inquiry 1997), p. 61. www.nt.gov.au/lant/parliamentary-business/committees/rotti/euthanasia97.pdf.

possess by a simple fact that they are human beings and that respecting this intrinsic worth require response to their suffering, their pain and their demands.[69]

In contrast, those who oppose legalization on a broad based dignity claims insist that 'active' assistance in dying stands contrary to human dignity. Precisely because of the respect for intrinsic worth individuals have, it is wrong to sanction the death of any individual.[70] If seen differently, human dignity would suggest that all who live in undignified form of existence ought to be killed.[71] Some thinkers, following most obviously Kant's approach, also dispute that it is dignified to seek escape from troubles for oneself.[72] Kass, for example, claims that if dignity were apprehended as the possibilities for human excellence then, death with dignity would mean a dignified attitude in the face of death. This, according to him, by no means implies assisted suicide or mercy killing.[73] Kass also finds dignity to be an undemocratic idea, something that cannot be demanded or claimed – accordingly – one has no more right to dignity – and hence to dignity in death – than one has to beauty or courage, desirable though these all may be. If one seeks to democratize this idea, one will end up on the sanctity of life ground.[74]

10.4.2 Dignity in Death and Dying Law

Indignity, caused by endurable pain and physical and moral suffering one feels in the process of dying, has been the most invoked reason for asserting any form of the right to die. Human dignity as the justification for allowing assisted suicide and/or mercy killing evokes the patient's desire not to be degraded as a human being. Terminal illness, despite all medical, nursing and palliative care, leads to physical and psychological exhaustion, incontinence, decubitus and fatigue, all considered by the patient to be the symptoms of degradation. In these terms the request for medical assistance in dying actually means the right to die in a dignified manner. In addition, dignity considerations in cases of medical assistance in dying imply not only a claim not to be degraded, but also a more active claim: to be respected as a person, *i.e.* to respect the person's judgment about the value of life,

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69 *See e.g.* L. Shepherd, 'Dignity and Autonomy After *Washington v. Glucksberg*: An Essay About Abortion, Death, and Crime', *Cornell Journal of Law and Public Policy*, Vol. 7, No. 2, 1998, pp. 431-466.

70 *See e.g.* British Medical Association, *Euthanasia: Report of a Working Party to Review the British Medical Association's Guidance on Euthanasia*, British Medical Association, London, 1988, p. 40. *See also* V. Rosenblum, 'Assisted Suicide in the United States: The "Compassion" and "Quill Decisions"', *in* Uhlmann (Ed.) 1998, pp. 548-549.

71 *See e.g.* L. Kass, 'Death with Dignity and the Sanctity of Life', *in* Uhlmann (Ed.) 1998, pp. 199-222.

72 Kant held that human dignity was "above all price" and could not be overridden by conditional values including pain and suffering. *See* Hill 1991, pp. 92-93.

73 Kass 1998, pp. 213, 217.

74 *Id.*

including the judgment that her life in circumstances of terminal illness and undue pain is meaningless. This is a side of human dignity that promotes autonomy.

Before I explain why I support legalization of a broad dignity-based right to die, an important footnote should be added here. As a legal value, dignity has not gotten one particular meaning, nor has it been precisely defined.[75] Within a particular jurisdiction, its meaning and significance is conditioned to a large extent by historical and cultural factors, as well as legal tradition. On one hand, it is claimed that human dignity is a notion which precedes human rights and belongs to pre-political or pre-judicial realm.[76] On the other hand, by using the terminology of rights, dignity is described as the right to be recognized as a person, the right to have rights or the right not to be humiliated. It has also been articulated as the right to subsistence.[77] Sometimes the meaning of dignity overlaps with other rights – in particular with the right to liberty, privacy or personal autonomy, or it acquires the meaning of equality. Different meanings of dignity are relevant in considering whether an argument from human dignity is compelling enough to press legalization of the right to assisted suicide/death in a particular jurisdiction. I will fix attention to this issue after I demonstrate why dignity consideration matters in asserting a comprehensive right to die.

I shall begin by reviewing human dignity considerations in non-treatment cases.

Kant's understanding of human dignity presupposes a minimum capacity and disposition to acknowledge rational and moral principles. So he attributed human dignity to all who possessed autonomy of 'will'.[78] As a consequence, it is debatable, especially now in the era of increasing powers of biotechnology, whether human dignity is inherently human or it is an acquired value.

To answer this, one first has to answer the question of who a person is. Because it falls beyond the scope of this chapter, I am not going to discuss all clusters of questions concerning human beings and the idea of person. Instead, in order to show that the idea of human dignity supports legalization of a comprehensive right to die independently from autonomy, and that dignity claims have been already accepted in the context of dying, I shall emphasize that few today accept Kant's understanding that human dignity necessarily

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75 For a detailed comparative analysis *see* N. Dorsen *et al.* (Eds.), *Comparative Constitutionalism: Cases and Materials*, West Group, St. Paul, MN, 2003, pp. 489-568. *See also* C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *The European Journal of International Law*, Vol. 19, No. 4, 2008, pp. 655-724.

76 M. Hailer & D. Ritschl, 'The General Notion of Human Dignity and the Specific Arguments in Medical Ethics', *in* K. Bayertz (Ed.) *Sanctity of Life and Human Dignity*, Kluwer Academic Publishers, Dordrecht, 1996, p. 93.

77 *See e.g.* the decision of the Indian Supreme Court, *Francis Coralie v. Territory of Delhi*, (1081) 1 SCC 608; AIR 1981, SC 746.

78 Hill 1991, p. 169.

presupposes autonomy. Otherwise, mentally disabled persons, for example, could be subjected to the cruel and degrading punishment or be enslaved, because they are not autonomous persons, meaning that society does not own them respect and protection. The modern laws, however, forbid such a treatment. The respect for dignity, embodied, for example in the Canadian law, prevents perpetuating or promoting the view that the individual is less capable or less worthy of recognition or value as a human being.[79] International human rights instruments provide for the same. The German and the Hungarian constitutions do not separate human dignity from human life. Consider now a particularly strong determination given in the German constitutional law:

> Wherever human life exists, it merits human dignity; whether the subject of dignity is conscious of it and know how to safeguard it is not of decisive moment. The potential capabilities inherent in human existence from its inception are adequate to establish human dignity.[80]

If this is so, then one can claim that incompetent patients qualify for the status of persons and, as such, are fully entitled to protection under homicide rules. There is a long-standing philosophical debate on this point from which I will borrow a presumption that all human beings in the moral sense (persons) are human beings in the genetic sense (members of Homo Sapiens) and vice versa, so that the two classes, while distinct in meaning, nevertheless coincide exactly in reality.[81] What follows, is that (a) all genetically human beings, including comatose (or other incompetent patients) have the right to life and that (b) unjustified violation of this right amounts to homicide. This does not imply that it is always wrong to terminate lives of incompetent patients. In absence of their expressed or presumptive will, other principles could serve to legitimize such an act, including human dignity and the principle of beneficence. A special aspect of human dignity – a claim not to be degraded as a human being– justifies medical intervention to terminate the life of an incompetent patient in case of terminal or incurable illness (so-called 'non-voluntary euthanasia'). Consider this point made by the American court in the *Saikewicz* case:

> To protect the incompetent person […], the State must recognize the dignity and a worth of such a person […] To presume that the incompetent person must always be subjected to what many rational and intelligent persons may

79 *Law v. Canada (Minister of Employment and Immigration)* para. 51.

80 *See Abortion Case I* (1975), available in English language in D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn., Duke University Press, Durham and London, 1997, p. 338.

81 *See e.g.* J. Feinberg, *Freedom and Fulfillment: Philosophical Essays*, Princeton University Press, Princeton, 1994, p. 39.

> decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality.[82]

Accordingly, the functions of dignity in cases of incompetent patients are twofold. In case when incompetents, *e.g.* children or mentally disabled persons, are exposed to unbearable pain and suffering, the respect for dignity prevents cruelty which would be continued if the patient's life were to be prolonged. In case of comatose patients who feel nothing and know nothing about what is happening to them (but still are human beings), the termination of their life prevents damage to their dignity, which would follow from the continuation of the administered medical regime. Therefore, dignity demands not only that competent patients' decisions about the refusal of treatment are respected, but also that incompetents are free from needless prolongation of anguish.

Now, there is a considerable body of rules that permits non-treatments with the aim and purpose to accord and provide as large a measure of dignity, respect and comfort as possible to every patient who requests the withholding/withdrawal of life sustenance.[83] Accordingly, under current policies, the appropriateness of stopping or withholding treatment from terminally ill (and other) patients has not been tied only to autonomy but also to human dignity considerations. Thus, the most forcible recognition that human dignity is a source of the right to refuse pro-life treatment comes from the Hungarian Constitutional Court. In its decision on euthanasia, the Court ruled that the decision of a patient to reject life-sustaining treatment is part of the right to self-determination which derives from human dignity.[84] Here dignity serves to protect individual autonomy of the terminally ill patients.

Although human dignity does not figure as prominent source of law in the American jurisdiction as it does, for example in Germany, the notable examples also come from the US. The *Conroy* court justified the withholding/withdrawal of life sustenance from incompetent patients upon their best interests, for which it found to extend to prevent an undignified life: the termination of treatment is justifiable if "the recurring, unavoidable and severe pain of the patient's life with the treatment would be such that the effect of administering life-sustaining treatment would be inhuman".[85] The first so-called 'right to die' statute, the California Natural Death Act of 1976, also recognizes dignity claims:

82 *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417(1977), p. 428.

83 *Bouvia v. Superior Court of the State of California for the County of Los Angeles*, 2d 179 Cal. App. 3d 1127, 225, p. 306. *See also* the Parliamentary Assembly of the Council of Europe, Recommendation 1418 (1999), Protection of Human Rights and Dignity of the Terminally Ill and the Dying, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16722&lang=en.

84 *See* Decision 22/2003 (IV. 28) IV. 5.

85 *In re Conroy*, 98 NJ 321, 486 A2d 1209, 48 ALR4th 1.

> in recognition of the dignity and privacy, which patients have a right to expect, the Legislature hereby declares that the laws of the State of California shall recognize the right of an adult person to make a written directive instructing his physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition.[86]

In less determined manner, dignity considerations have been given significance in the debate about non-treatment decisions in the Netherlands. The Dutch Commission on the Acceptability of Medical Behavior that Shortens Life (CAL) found that, in regard with comatose patients, the right to life was an insufficient condition to legitimize further treatment since this was inconsistent with human dignity, both because one (thereby) might be doing something that the person in question would not have wished, and because one prevented the dying process for coming to an end.[87]

In short, under current policies, the appropriateness of stopping or withholding treatment from terminally ill (and other) patients has not been tied only to autonomy but also to human dignity considerations. My next task is to explain why dignity considerations also play an important role in defending the right to assisted suicide/death.

10.4.3 The Ideas of Dignified Death and Undignified Life

The crucial issue in reconciling or making human dignity at odds with a broad comprehension of the right to die is considering whether dignity is the concept linked only to the sanctity of life or it is also concerned with the notion of quality of life.[88] To remind, the sanctity of life principle implies that human life is sacred/ inalienable/inviolable, has an intrinsic value and therefore must be respected and preserved. The quality of life consideration presupposes that dignity implies a quality of life consistent with the ability to exercise self-determined choices.[89]

Now, generalization about the sanctity of life and human dignity can be very misleading. In the words of the European Court of Human Rights, dignity in terms of sanctity of life is related to the general obligation to protect life as such. Thus, dignity of all humanity is not concerned with a quality of a particular life, but with the respect of life in a general

86 *See* Ch. 70.122.010 of the California Natural Death Act of 1976.

87 Griffiths, Bood & Weyers 1998, p. 129.

88 For expository purposes, the argument that pits dignity claims against courage in dying should be also mentioned here. However, in the present debate voices that require a "heroic death" in the conditions of unbearable pain and suffering are symbolic. This approach is mostly rooted in the Catholic Church teaching and as such it is closely connected with an issue of involving religious views in shaping public policy.

89 H. Biggs, *Euthanasia: Death with Dignity and the Law*, Hart Publishing, Oxford and Portland, 2001, p. 29.

sense.[90] Yet, as the German Constitutional Court noted in the famous *Mephisto* case, dignity resides not only in community but also in individuality. The Court referred to this aspect of dignity as "the social entitlement to value and regard" or as an entitlement "to respect [...] in the social sphere".[91] It concluded that the intrinsic dignity of a person consists of acknowledging him as an independent personality. The European Court of Human Rights has also given recognition to this aspect of dignity, for which it found to be embodied in the right to respect for private life:

> Many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.[92]

The problem then becomes to determine the forms of respect necessary to acknowledge and maintain the dignity of an autonomous individual.[93] As Hill claims, we acknowledge human dignity not only by promoting welfare and not violating rights, but also by honoring and respecting persons as rational/moral agents.[94] Thus, it is dignity that requires respect to be given to the value of those who are unable to exercise their choice to die. In this sense, to prevent the violation of respect for dignity of terminally ill persons means to prevent them from being "lowered or disparaged".[95] In other words, to subject a terminally ill person to pain and suffering, what those on life supporting measures may decline, is to downgrade the status of the former by placing a lesser value on their intrinsic human worth and vitality. For these reasons, a dignified death is one which accords with the patient's values and beliefs.

The ideas of dignified death and undignified life served for the recognition of the right to a physician-assisted suicide in the *Baxter* case, decided by the Montana's district court in 2008.[96] The Court underlined that individual dignity clause, embodied in the Montana's Constitution, has been interpreted in the case law as to demand "that people have for

90 *Pretty v. the United Kingdom*, pp. 37-40.

91 For a detailed discussion *see Mephisto Case*, 30 BverfGE 173 (1971), available in English language in Kommers 1997, p. 301.

92 *Pretty v. the United Kingdom*, at 65.

93 For a detailed discussion *see e.g.* R. Post, 'Dignity, Autonomy, and Democracy', *Working Paper 2000-11*, http://escholarship.org/uc/item/8h98x8h9.

94 Hill 1991, p. 170.

95 The German Constitutional Court concluded that it would be incompatible with human dignity, if a person, possessed of human dignity by virtue of his personhood, could be degraded or debased. *See Mephisto Case*, Kommers 1997, p. 302.

96 *Baxter et. al. v. Montana*, Montana First Judicial District Court, 5 December 2008, https://www.compassio-nandchoices.org/what-we-do/in-the-courts/baxter-et-al-v-montana/.

themselves the moral right and moral responsibility to confront the most fundamental questions of life in general".[97]

Accordingly, the idea of human dignity attached to the person seeking assistance to terminate a state of suffering, differs from the idea of dignity attached to the sanctity of life.[98] If the protection of an individual is restricted only to abstract dignity, the life of a particular individual will be at the mercy of others.[99]

In asserting the right to assisted suicide/death, one may also insist on different effects dignity claims have in non-treatment cases and cases concerning active assistance in dying. This I hold true for well-known reasons elaborated by Rachels.[100] I shall not repeat all of them here, but suffice it to say that human dignity is more preserved in cases of physician-assisted suicide and mercy killing than in cases of non-treatment. Namely, because allowing a patient to die can be a particularly unpleasant, slow and undignified process, a 'natural death', resulted from the refusal of treatment is accompanied by more suffering rather than less. By contrast, a lethal injection or drug to be given to the patient who requests help in dying, is suitable to be administered relatively quickly and without pain, and as such represents an act that rather preserves than violates human dignity.

10.5 Rights-Based v. Non-Rights-Based Legalization

Suppose now the most of us agree that, under certain conditions, different forms of medical assistance in dying should be available options to those who are terminally ill and whose pain and unbearable suffering cannot be effectively treated by palliative care. Then, the last issue that remains to be confronted is the issue of a *right* strategy to legalize a physician's aid in dying. In some countries those who argue in favor of assisted suicide and mercy killing have termed their arguments in terms of rights. In contrast, the legalization in the Netherlands, Belgium and Luxemburg has been achieved following non-rights discourse. Which approach should prevail?

Recall here that the Dutch Supreme Court in its first euthanasia case rejected the view that the right to self-determination was the basis for legalization of euthanasia. In order to pacify the issue, the Dutch then opted for the similar strategy they had employed in legalization of abortion.[101] First, euthanasia was defined as 'medical' issue concerning doctors rather than patients. Second, they decided to depoliticize the problem by separating

97 *Id.*

98 On this point *see also* S. Millns, 'Death, Dignity and Discrimination: the case *Pretty v. United Kingdom*', *German Law Journal*, Vol. 3, No. 10, 2002, paras. 8, 14.

99 *See* Decision 23/1990 of the Hungarian Constitutional Court, Chief Justice Sólyom, concurring.

100 J. Rachels, 'Active and Passive Euthanasia', *in* R. Baird & S. Rosenbaum (Eds.), *Euthanasia: The Moral Issues*, Prometheus Books, New York, 1989, p. 46.

101 *See* Griffiths, Bood & Weyers 1998, p. 12.

mercy killing and physician-assisted suicide from the less controversial non-treatment cases, to which they referred as to 'normal medical practices' justifiable upon the principle of autonomy. The issue thus became politically neutral. And third, in order to postpone the decision-making, the Dutch referred the problem to the various expert committees. In the meantime, the courts took the role of policymakers relying heavily on the opinions and judgments of medical professionals. During the whole debate, only a few opponents raised the voices against legalization. Overall, when the time came to decide on *de jure* legalization, mercy killing and physician-assisted suicide ceased to be social or political problem.[102]

Basically, three reasons explain the shift from the rights talk to a more pragmatic approach. The first is that suicide has never been illegal in the Netherlands. Accordingly, many moral and social charges accompanying suicide have been notably absent from the Dutch society. The second reason is closely related to the first. In the society that can be characterized in the words of secularization, individualism and democracy, even the opponents of euthanasia did not unconditionally subscribe to the sanctity of life principle which has been in other jurisdictions uncompromisingly opposed to the principle of autonomy.[103] Since the sanctity of life principle was not at the heart of the debate, it was not surprising why the debate shifted from moral and legal rights to the issue of legal policy, concerned only with an issue of what the law should be.[104] Thus, two pragmatic arguments – the slippery-slope argument and control arguments have taken the central position in debating euthanasia in the Netherlands. And third, as the Dutch commentators explain, the legalization is a result of the political life whose main characteristic appears to be an avoidance of frontal conflict and search for common ground to base political decisions.[105]

Now, aware of attention-getting effects of rights discourse and the powerful political impact of rights-based arguments[106], proponents of physician-assisted suicide and mercy killing in medical context have urged for the recognition of a wide-ranging right to die. So far, rights-based approach has triumphed only in Columbia and Canada. The outcome can be differently explained.

First, on the theoretical level, the rights-based approach has been criticized with different charges. Generally, it is claimed that a hair-trigger response to the rights claim deprives citizens of the information and a reasoned argument they need to hear in order to make choices among candidates, and to responsibly assess the long- and short-term costs and

102 *Id.*, pp. 86-88.
103 *Id.*, pp. 49, 190.
104 *Id.*, pp. 186, 183.
105 *Id.*, p. 87.
106 P. Lewis, 'Rights Discourse and Assisted Suicide', *American Journal of Law and Medicine*, Vol. 27, No. Part 1, 2001, p. 49.

benefits of proposed policies.[107] Besides, the rights talk too easily accommodates the immediate and the personal dimension of a problem, while it regularly neglects the moral, long-term and the social implications.[108] Sunstein observes that many claims based on rights, and especially claims for individual rights, tend to disguise the social character of rights and in particular the need for collective and communal support.[109] As a result, critiques are mostly directed against the rights which are "undesirable from social point of view" and not against those which seem to be socially desirable.[110] Sunstein identifies five different categories of charges against the rights "undesirable from social point of view". First, rights are charged as rigid and of absolutist character.[111] As such, they do not allow room for competing considerations and foreclose deliberation over complex issues which demand prudent and careful debate. Second, because they take form of general propositions, rights are indeterminate and unhelpful.[112] As indeterminate, they can just start the discussion and cannot settle the issue. Third, rights are unduly individualistic, and therefore they neglect the moral and social dimensions of important problems.[113] Next, rights are in essence undemocratic and prevent the existing distributions from being scrutinized and changed.[114] Finally, the focus on rights tends to crowd out the issue of responsibility.[115]

Many of the above-mentioned critiques prove important in debate on medical assistance in dying. Thus, some claim that rights-based arguments related to assisted suicide are indeterminate and therefore cannot resolve the conflicts between the competing rights – the right to life and the right to self-determination.[116] Mayo asserts that a right to die formulation implies a conflict that lacks rules and standards for decision.[117] Moreover, rights discourse misinterprets new experience in dying caused by technical revolution in medical context.[118] Lewis argues that because of indeterminacy, the rights-based arguments can be used both in favor and against the legalization of assisted suicide.[119] Opponents of legalization also claim that the proponents use the language of individual rights to have the matter resolved according to their own moral standards.[120] It is also argued that the political and popular power of rights often partially or wholly eliminates other forms of moral discourse,

107 M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, The Free Press, New York, 1991, p. 173.
108 *Id.*, p. 171.
109 C. Sunstein, 'Rights and Their Critics', *Notre Dame Law Review*, Vol. 70, No. 4, 1995, p. 730.
110 *Id.*
111 *Id.*, pp. 730-731.
112 *Id.*, pp. 731-732.
113 *Id.*, pp. 732-733.
114 *Id.*, pp. 733-734.
115 *Id.*, pp. 734-735.
116 Lewis 2001, pp. 71-72.
117 T. Mayo, 'Constitutionalizing the Right to Die', *Maryland Law Review*, Vol. 49, No. 1, 1990, p. 104. n. 7.
118 *Id.*, p. 155.
119 Lewis 2001, pp. 72-73.
120 L. Kass, 'Is There a Right to Die', *Hasting Center Report*, Vol. 23, No. 1, 1993, p. 37.

particularly arguments about duties.[121] Finally, it is said that the absolutist nature of rights rhetoric makes limiting rights a difficult task, and even more difficult in case of a personal choice to end life with assistance, since, as it is claimed, the right to self-determination cannot have any limits.[122]

> As for the practice, in rendering non-treatments legal, much help has come from the rights talk: a consensus has been reached that a competent patient has the right to forgo pro-life medical treatment.[123] Such consensus was almost exclusively built on the notion of individual autonomy and self-determination, which materializes by way of expressed and informed consent. Countries, however, took different position as to whether autonomy, which underscores the right concerned, has acquired meanings of bodily integrity, privacy, liberty or dignity. They also differ regarding the issue of whether a personal choice to refuse pro-life treatment classifies for constitutional or only for reduced level of protection. For example, the constitutional protection has been assumed in the United States. In other countries, the right to forgo life treatment has been framed as a statutory or common law right or both. Increasing commitment to the principle of personal autonomy is also reflected in the fact that the right to forgo pro-life treatment, in most jurisdictions, has not been limited only to terminally ill patients, but it is extended to all adult persons.

In the preceding sections I have presented my arguments why autonomy is also at the core of the right to assisted suicide/death in medical context. This does not mean that this is an absolute right and that the state's duty to protect life stops with the recognition of such right. Carefully drafted laws endorsing the right to assisted suicide/death in the form of privacy, liberty or security interests should, on one side protect individuals from abuses, and on the other, protect them from mob rule. Therefore, there is no reason for a state in which rights talk is the predominant legal discourse to legalize medical assistance in dying in a form of yet another individual right.

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121 Lewis 2001, p. 76.

122 *See e.g.* Callahan 2002, p. 62.

123 For US position *see Cruzan v. Director Missouri Department of Health*, 497 U.S. 261, 286 (1990); for UK position *see Re T* (adult: refusal of treatment), (1992) 4 All ER 649; *Airedale NHS Trust v. Bland*, (1993) 1 All ER 789; for the Canadian reference *see Rodriguez v. British Columbia* (Attorney General) (1993) 3 S.C.R. 519; *Nancy B. v. Hotel-Dieu de Quebec*, 69 CCC (3d) (1992); *Ciarlariello v. Schacter*, (1993) 2 S.C.R. 119; for the position in Australia *see Secretary, Department of Health and Community Services (NT) v. JWB and SMB*, (1992) 66 ALJR 300; for the position in the European countries *see* Council of Europe Steering Committee on Bioethics (CDBI), Replies to the Questionnaire for member states relating to euthanasia (2003), www.coe.int/t/dg3/healthbioethic/Activities/09_End%20of%20Life/INF%282003%298e_replies_euthanasia.pdf.

Although I have asserted that dignity considerations guide assistance in dying both in its active and passive forms, it is nevertheless questionable whether an argument from human dignity is compelling enough to press recognition of a broad right to die. Namely, given a considerable range of views on the human dignity concept, it is hard to predict whether dignity discourse is going to get some significance in legalization of the right to assisted suicide/death. A proclamation of fundamental right within a particular society depends on many factors.[124] Clearly, the most influential factor in proclaiming fundamental rights is a specific legal tradition. Therefore, the potentials of dignity argument to legitimize medical help in dying should be considered from the perspective of a particular jurisdiction. In jurisdictions in which dignity represents a source of judicial decision-making in the human rights context, the potentials of human dignity argument to invalidate the present prohibition of intentional killing as applied to dying patients should be relatively strong, as it was the case in Hungary where dignity played a decisive role in approving non-treatment decisions. Similarly, dignity, together with autonomy discourse, led to legalization of physician-assisted suicide in Canada, because in this country dignity concept has been frequently used as the basis of individual rights. In contrast, in the American legal tradition – liberty – not dignity – is mostly doing the work concerning the protection of personal rights, so it is questionable whether dignity can serve as principled basis for asserting an individual right that would render the present prohibition on assisted suicide and mercy killing unconstitutional, or liberty discourse would do the job, as it did in cases concerning the right to forgo pro-life treatment.

In sum, although rights-based model has a potential to press for legalization of physician – assisted suicide and mercy killing, it is not the exclusive one. The Dutch non-rights approach, based on doctrinal principles of criminal law, serves this purpose rather well: it preserves the criminal law principles and respects constitutional principle that the legislature is supreme in questions bearing on criminal liability. Besides, by opting for non-rights model, yet another pro-life and pro-choice conflict may be avoided in political arena.

10.6 Conclusion

I have arrived at the end of a long trail of arguments commonly raised in the contemporary debate on legalization of physician-assisted suicide and mercy killing. The debate gives rise to fundamental issues about the rights of an individual and the interests of society.

The chapter offers an account of the reasons why the value of autonomy and legalization of physician-assisted suicide and mercy killing are conceptually related. My central argu-

124 Thus, many Central and Eastern European countries (with a notable exception of Hungary) have abolished death penalty in the course of their efforts to join the EU without examining an assault it made on the right to life. Clearly, political factors were more influential than rights talk.

ments were legal rather than ethical, shaped under the influence of the present legal rules. The concluding thesis can be reduced to the following: if autonomy is at the core of the right to refuse life sustenance, so is at the right to assisted suicide/death. Whether this right should be legally effective is a different issue, separate from the issue of whether autonomy is argument capable of supporting the patient's request for aid-in dying.

Having in mind different meanings attached to the notion of human dignity, a separate issue is whether the dignity approach could help in justifying a wide-ranging right to die. Although dignity considerations are a core concern in pain treatment, it is less likely that, as a legal claim, the concept of dignity is compelling enough to press recognition of the right to assisted suicide/death, except in jurisdictions where it has been commonly used as a source of judge-made law in human rights context.

In this chapter, my predominant aim was not to show that the rights-based model was an exclusive option to legalize physician-assisted suicide and mercy killing. The experience from the Netherlands, Belgium and Luxemburg indicates that it is equally possible to achieve this goal under the doctrinal principles of criminal law. A decision which model to adopt depends mostly on tendencies and developments adopted in a particular legal tradition. What I wanted to demonstrate was that the enmity of those who oppose legalization of physician-assisted suicide and mercy killing cannot be lavished on autonomy and dignity claims raised by terminally or incurably ill patients.

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