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The Discourses of Autonomy in the International Human Rights Law: Has the Age of a Right to Die Arrived? [1]

1. BACKGROUND

Hannah Jones, 13 years old, has turned down a lifesaving heart transplant to die at home with her family. Her leukemia was diagnosed when she was four; she later developed heart disease, and has endured chemotherapy and nearly a dozen operations. When doctors told her that without a heart transplant she would be dead in six months, she refused to go through with it. «I've been in hospital too much –I've had too much trauma». Hannah's mother and her husband decided that they needed to respect their daughter's wishes. The court lifted the order and Hannah may continue to refuse the treatment. [2]

This short extract from *Time* magazine does not cover a unique episode. In the first decade of XXI century, cases like Hannah's have made headlines around the world. To remind, in France, the year of 2003 was marked with calls for a «Loi Vincent Humbert», who was left blind, mute and paralyzed after a road accident in 2000. [3] His death in September 2003 initiated the long debate in the French parliament on legalization of active euthanasia. In the following year, a personal tragedy of Tereze Schiavo, who was for ten years attached to life-sustaining procedures, caused a significant constitutional crisis in the USA and a public debate comparable with a then ongoing debate on «war on terrorism». [4] More recently,

1 Research for this article was supported by Central European University Special and Extension Programs. The opinions expressed herein are the author's and do not express the views of CEU.

2 Nancy Gibbs: «Hannah's Choice: Saying No to a New Hear», *Time* Nov. 13, 2008, (available on-line at *http://www.time.com/time/world/article/0,8599,1858758,00.html*).

3 For more see Nuno Ferreira: «Latest Legal and Social Developments in the Euthanasia Debate: Bad Moral Consciences and Political Unrest», *Medicine and Law* Vol. 26 (2007) pp. 388-389, 394-396.

4 For more see Violeta Beširevic: «The Gods Must be Crazy: Does a Constitution Speak about Bioethics?», *The Annals of the Faculty of Law Belgrade, International Edition*, No. 1 (2007) pp. 110-132.

the Italian Court of Cassation upheld a lower court ruling which gave Mr. Englaro the right to remove feeding tubes that have kept his 37-year-old daughter Eluana alive since a 1992 accident left her in a vegetative state. [5] In contrast, in 2008, Debbie Prudy, who had multiple sclerosis, lost the case when she had sought a guarantee from the English High Court that her husband would not be prosecuted should he accompany her to the Dignitas *suicide clinic* in Zurich, Switzerland. [6]

These and similar cases, usually based on right to die claims, have provoked a deep division among members of contemporary societies who are prone to uphold such claims when they concern refusal of treatment and to reject them when they fall in the ambit of physician-assisted suicide. The jurisdictions that allow some or all forms a physician's assistance in dying are still in minority: the Netherlands, Belgium, Luxembourg and two American states, Oregon and Washington, opted for the reform and lifted bans on a physician's controlled assistance in dying. [7] To this list, Switzerland should be added as a country which has never prohibited assisted suicide except for the selfish reasons, as well as Colombia and Japan, where active euthanasia seems to be sanctioned by judicial practice. [8]

The contemporary debate on euthanasia was provoked by the achievements of the modern medicine, which not only helped to prolong life over previously unimaginable boundaries but also prolonged the illness and thereby, suffering and pains. Ever since the developments in medical technologies forced us to confront and question the concept of euthanasia and its legal status, the issue of a *right* legal intervention in the area of death and dying has occupied a high position on the list of contemporary radical disagreements. [9]

On one hand, it has become a truism that the respect for the patient's autonomy compels legalization of active euthanasia. This increasingly common assertion comes from those who advocate legalization on the rights-based approach: they put autonomy at the core of the right to end life with assistance which should, according to them, be assigned to the patient *in extremis.* [10]

On the other hand, the opponents assert that the right to forgo pro-life treatment and the right to end life with assistance cannot be lumped together under the rubric of the right to die because they differ much in important respects. [11]

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5 See at *http://www.findingdulcinea.com/news/Europe/2008/November/Italian-Court-Gives-Father-Right-to-Let-Daughter-Die.html.*

6 See *http://alexschadenberg.blogspot.com/2008/10/diane-purdy-loses-assisted-suicide-case.html.*

7 Oregon and Washington did it only in regard with physician-assisted suicide.

8 For a detailed discussion, see Violeta Beširevic: *Euthanasia: Legal Principles and Policy Choices,* European Press Academic Publishing, Florence, 2006.

9 Ibid.

10 What I call the right to end life with assistance embraces all forms of active voluntary euthanasia.

11 Yale Kamisar: «The Rise and Fall of the "Right" to Assisted Suicide», in Kathleen Foley and Herbert Hendin (eds.): *The Case against Assisted Suicide: For the Right to End-of-Life Care*, The Johns Hopkins University Press, Baltimore, Md. and London, 2002, p. 72.

The purpose of this paper is to examine whether asserting the right to end life with assistance at the universal level is a useful tool to resolve the controversy of euthanasia. My discussion is set up within the realm of international human rights law, a context, which raises also problems of its own, since some of the most basic questions of international human rights law have yet to receive conclusive answers.

To clarify from the beginning. My aim here is not to discuss whether competing claims about euthanasia make sense either from a legal or a moral point of view. [12] I will not speak about morality of a controlled assistance in dying. I am prone to believe that there will always be those who claim that euthanasia is «consenting adult killing» which, if legalized, will only lead to more killings and those who find that in the complex context of terminal illnesses, accompanied by pain and suffering, a controlled assistance in dying on demand is not intrinsically immoral.

However, the issue of legality can be settled without deciding on the rightness or wrongness of ending life with a physician's assistance. My main inquiry is whether turning to international law is a good strategy to remove the ban on mercy killing and/or physician-assisted suicide.

The inquiry requires a delineation of the idea of euthanasia and clarification of the vocabulary employed in death and dying law. Therefore, I will first recap the conceptual framework that surrounds the notion of euthanasia and the present legal status of the particular models adopted concerning the taking of life in the medical context.

2. VOCABULARY AND DEFINITION

Much of the confusion in the contemporary debate about euthanasia arises from the failure to agree on its definition. However, several points are beyond dispute. The first concerns the etymology. The term derives from the Greek *eu* and *thanatôs* and has been translated as «good death» or «easy and gentle death» or «dying well». Next, it is clear that in modern debate euthanasia is a term employed in a medical context, with usual reference to a terminally or incurably ill patient who is in a severe and unbearable pain or in some kind of incapacitating condition and is limited to the role of physicians. Thus, deaths brought about by other persons, a family member or a friend, are mostly excluded from the contemporary requests to make euthanasia legal. Finally, for many the concept of euthanasia alludes to a doctor's assistance in dying for reasons of compassion/mercy for the patient. However, beyond these points, there are many differences.

In the debate, euthanasia has several frequently conflicting references: «deliberately caused death» or «making decisions which have the effect of

12 For detailed discussion see Violeta Beširevic: *Euthanasia: Legal Principles and Policy Choices,* cit.

shortening the patient's life», or «consenting adult killing». [13] In the Netherlands, the only proper meaning of this concept includes termination of life by physician or his assistance in a suicide at the person's express and earnest request due to the lasting and unbearable suffering. [14]

Present-day difficulties in defining euthanasia result from the disagreement over the issue of which therapeutic approaches to the patient should be classified under this concept. Thus, many are ready to exclude from the notion of euthanasia withdrawal of life support systems, restriction or non-use of active treatment or resuscitation and administration of painkillers that may cause earlier death. For them, euthanasia only connotes injection of a lethal substance or supplying a lethal pill and advising about methods that lead to death.

Insisting on differentiation is not without reason: these treatments have not been sustained for legalization on equal footings. Thus, it has been accepted that the withdrawal of treatment is omission, and that death that follows comes from natural causes. In view of that, withdrawal of any kind of medical treatment, including pro-life medical treatment as well, is legal. Do-not-resuscitate orders have been widely accepted as devices, which prevent patients to undergo painful measures in case of cardiac or respiratory arrest. In more and more jurisdictions, the use of painkillers in dosages that may cause earlier death is also legal. [15] As said earlier, what is left illegal in almost every jurisdiction is the so-called active direct euthanasia, which includes mercy killing and physician-assisted suicide.

Where I differ from most of the participants in the debate is that I associate euthanasia with an action or omission undertaken with the intent of bringing about a patient's death on their demand in order to end their pain and suffering. Although inadequate and of limited nature, the main categorization in this article will refer to active and passive euthanasia whereas: active euthanasia embraces administration of drugs or lethal injection with the intent of causing the death of the patient (active voluntary euthanasia), supplying a lethal pill or advising about methods that lead to death (physician-assisted suicide), and administration of palliative drugs in dosages capable to hasten the death of the patient (active indirect euthanasia); passive euthanasia amounts to non-treatment of treatable conditions and withholding or withdrawing of life supporting systems, including non-use of cardiopulmonary resuscitation measures.

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13 See Philippe Letellier: «History and Definition of a Word», in *Euthanasia: Ethical and human aspects*, Volume I, Council of Europe Publishing, Strasbourg, 2003, pp. 13-22.

14 See Ubaldus de Vries: «A Dutch Perspective: The Limits of Lawful Euthanasia», *Annals of Health Law* Vol. 13 No. 1 (2004) p. 365.

15 See Jonathan Baron: *Against Bioethics,* MIT Press, Cambridge, Ma., 2006, p. 91. For more detailed overview, see Violeta Beširevic: *Euthanasia: Legal Principles and Policy Choices,* cit.

3. ASSERTING THE RIGHT TO DIE: NATIONAL PERSPECTIVES

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. Such consensus was built on the notion of personal autonomy and its basic paradigm: self-determination and express and informed consent.

The principle of autonomy amounts to the claim that the state should not interfere with the exercise of what is regarded fundamental freedom of an individual to decide on self-regarding issues. [16] At present, in all common law countries and in the majority of civil law countries, refusal of any recommended treatment is considered as a valid exercise of an individual's self-determination rights and has been articulated as the right to forgo unwanted treatment. [17] Countries that have recognized this right, however, have taken different views as to whether autonomy, which underscores the right concerned, has acquired meanings of bodily integrity, privacy, liberty or dignity. Countries also differ in the way and level of the protection given to personal choices. Some of them have approached 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 Untied States. In other countries, the right to forgo life sustenance has been framed as a statutory or common law right or both. By contrast, in some countries it has been proclaimed only at the level of code of medical ethics. Increasing commitment to personal autonomy is also reflected in the fact that the right to forgo pro-life treatment in some jurisdictions has not been limited only to terminally ill patients. [18] Simply put, an argument from autonomy (and somewhere, like in Hungary, in combination with human dignity), despite different regulatory regimes, proved to be a strong

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16 For influential reading of autonomy, see Thomas E. Hill: *Autonomy and Self-Respect*, Cambridge University Press, Cambridge, 1991, reprinted in 1992, 1995, and 2000; Joel Feinberg: *The Moral Limits of the Criminal Law. Harm to Self*, Vol. 3, Oxford University Press, Oxford, 1986, pp. 27-51; Isaiah Berlin: *Four Essays on Liberty,* Clarendon Press, Oxford, 1969, pp. 118-172.

17 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 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 SCR 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 elating to euthanasia* (2003) available on-line at *http://www.coe.int/t/dg3/healthbioethic/Activities/09_Euthanasia_en/default_en.asp*

18 This is the position in Serbia: practically an adult can reject any medical treatment for any reason, including that of life saving or life sustaining. See Article 33 (1) of the Serbian Heath Care Act of 2005.

basis for upholding an assumption that life is not preferable to death in circumstances of painful and incurable illness.

As for the legalization of active euthanasia in terms of individual autonomy, the situation differs dramatically, although the initial position is very similar. Thus, euthanasia proponents assert the respect for personal autonomy or self-determination entitles a terminally or incurably ill person to decide about a time and manner of their death. 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. [19] This is further specified by suggesting that every competent person has the right to make momentous personal decisions, which invoke fundamental religious or philosophical convictions about life's value for him. [20] The fundamental value of autonomy would be violated if others (the state, the doctor) could continue a person's life against his will, which would make that life one without freedom and autonomy. [21]

In some jurisdictions, such claims proved to be successful. In Belgium, autonomy turned to be the legitimizing principle in legalizing all forms of active euthanasia. Thus, in this country there is a consensus that the moral foundation of euthanasia is the right to self-determination of the patient: the free request of the patient is the ultimate justification of euthanasia. [22]

Some courts have upheld the requests for physician's assistance in dying in terms of individual autonomy. In *Compassion in Dying v. State of Washington,* Judge Rothstein considers the decision of a terminally ill person to end their life as the decision to involve the most intimate and personal choices a person may make in a lifetime and constitutes a choice central to personal dignity and autonomy. [23] In Japan, the Yokohama District Court in the *Tokunaga* case emphasized that the patient must express a clear wish to end life before a doctor may assist the request. [24] The Colombian Constitutional Court, which ruled in favor of the right to physician-assisted suicide, explained that every person can determine their own

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19 See *e.g.* Margaret Pabst Battin: «Ethical Issues in Physician-Assisted Suicide», in Michael M. Uhlmann (ed.): *Last Rights?: Assisted Suicide and Euthanasia Debated*, The Ethics and Public Policy Center and William Eerdmans Publishing Company, Washington, DC, Grand Rapids, Mi., 1998, p. 116; Margaret F. A. Otlowski: *Voluntary Euthanasia and the Common Law,* Clarendon Press, Oxford, 1997*,* p. 189; Pieter Admiraal: «Voluntary Euthanasia: The Dutch Way», in Sheila A. M. McLean (ed.): *Death, Dying and the Law*, Dartmouth Publishing Company Limited, Hampshire, 1995, p. 115.

20 Ronald Dworkin: «Introduction to Assisted Suicide: The Philosophers' Brief», *The New York Review of Books* Vol. 44, No. 5 (1997) March 27.

21 Leenen H. J. J. cited in John Griffiths, Alex Bood and Helen Weyers: *Euthanasia & Law in the Netherlands*, Amsterdam University Press, Amsterdam, 1998, p. 170.

22 See in John Griffiths, Heleen Weyers and Maurice Adams: *Euthanasia and the Law in Europe*, Hart Publishing, Oxford, 2008, p. 323.

23 *Compassion in Dying v. State of Washington*, 850 F. Supp. 1454, 1459-60 (W. D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *rev'd*, 79 F.3d 790 (9th Cir. 1996) (*en banc*).

24 See Alison C. Hall: «To Die With Dignity: Comparing Physician Assisted Suicide in the United States, Japan and the Netherlands», *Washington University Law Quarterly* Vol. 74, No. 3 (1996) n. 202, n. 211.

sense of life, whether it is sacred or not. [25] The Canadian Supreme Court, although eventually ruled against the legalization of physician-assisted suicide, has underlined that prohibition on assisting the patient to end her life, when illness has rendered her incapable of terminating life without such assistance, deprives the patient of autonomy over her person. [26]

Yet, for the time being, in most jurisdictions there is no intimation that the right to refuse any kind of medical treatment, including that of life-saving or life-sustaining, could be transmuted into a right to end life with assistance. Consider the following.

Most of the courts that discussed lifting the legal ban on mercy killing and/or assisted suicide in cases of terminally ill patients either minimized the value of autonomy claims or rejected any existence of the asserted autonomy rights. The Canadian Supreme Court, which discussed a patient's option for active euthanasia in terms of individual autonomy, ruled that a personal choice to end life with assistance should yield to the interests a state may claim in the dying process. [27] The US Supreme Court flatly rejected the argument that the right to end life with assistance derives from liberty (encompassing autonomy and self-determination) on the grounds of the absence of historical approval of such right. [28] This Court also rejected the constitutional challenge based on the antidiscrimination rule. [29] The Hungarian Constitutional Court was firm in its determination that active euthanasia is not about dignity and autonomy. [30] A patient's choice, the Court said, to end his or her life with assistance could not be regarded as a part of the right to self-determination, because its exercise could not be limited or even entirely prohibited since another person is involved in ending the patient's life. [31] In the United Kingdom, the House of Lords held that neither common law nor statute nor the European Convention for the Protection of Human Rights and Fundamental Freedoms [32] recognizes the right to assisted suicide. [33]

For the purpose of this discussion, equally important is the Dutch approach. Even though the patient's request is a prerequisite for lawful active euthanasia in the Netherlands, autonomy was not the legitimatizing principle. The Dutch preference for active euthanasia has more to do with the insistence by doctors and the Medical Association that under certain circumstances euthanasia is a

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25 See in Norman Dorsen, Michel Rosenfeld, András Sajó and Susanne Baer (eds.): *Comparative Constitutionalism,* Thomson West, St. Paul Mn., 2003, p. 568.

26 *Rodriguez, supra* note 16, p. 521.

27 *Ibid*. It also rejected the claims based on the right to security of the person, the prohibition against torture and the equality principle.

28 See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

29 See *Vacco v. Quill*, 117 S.Ct. 2293, (1997).

30 Decision No. 22/2003 (IV 28). For detailed discussion, see *e.g.* Petra Bárd: «Hungarian Constitutional Court Decision on Euthanasia –A Half-Hearted Ruling: Case Study of the Decision No. 22/2003 (IV. 28.) of the Hungarian Constitutional Court», *Revue of Constitutional Justice in Eastern Europe* No. 4 (2004) pp. 105-120.

31 Decision No. 22/2003 (IV.6.2.).

32 Hereafter: European Convention on Human Rights.

33 *R. (Pretty) v. the Director of Public Prosecutions*, (2001) U.K.H.L. 61.

legitimate medical procedure, than with a demand for patients' rights. In the Netherlands, the legal issue has never been formulated in terms of whether there is a right to die. [34] 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. [35] As soon as the autonomy argument had become disputable, the Dutch shifted the focus of the discussion from patients and their autonomy to doctors and their responsibility under criminal law. In my opinion, the point of departure was not substantial –the intention was to pacify the issue by using an alternative and only *prima facie* less disputable conception–. Instead of searching for rights-based concepts, the Dutch had searched for doctrinal theory available in criminal law that might legitimize a practice manifestly contrary to the prohibition of assisted suicide and killing on request. The idea accepted by the courts and all necessary medical and social institutions, which long served as justification for performing active euthanasia, was the defense of necessity. However, when finally statutorily authorized, a controlled assistance in dying, commonly termed active euthanasia, when performed by a doctor, was accepted on the ground of a special exclusion from punishability. [36]

In sum, when it comes to legalization of active euthanasia, in prevailing number of jurisdictions the rights talk based on individual autonomy turned to be mostly unsuccessful in making the case that an individual interest in dying «trumps» the state interest in preserving life and protecting vulnerable groups from abuses.

4. ASSERTING THE RIGHT TO DIE: INTERNATIONAL PERSPECTIVES

Since in most jurisdictions mercy killing and physician-assisted suicide is illegal, it was inevitable that patients and their family members would eventually turn to international law to remedy their position. This is not surprising having in mind that for decades international law has provided an autonomous set of legal norms to protect individual rights and impose obligations on the states to secure and implement them.

The European Court of Human Rights first confronted the issue of whether the European Convention on Human Rights compelled the legalization of assisted suicide. In the *Pretty* case, the European Court of Human Rights offered new

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34 See John Griffiths, Alex Bood and Helen Weyers: *Euthanasia & Law in the Netherlands*, cit. See also Ubaldus de Vries: «A Dutch Perspective: The Limits of Lawful Euthanasia», cit.

35 The *Schoonheim* case. The English translation is available in John Griffiths, Alex Bood and Helen Weyers: *Euthanasia & Law in the Netherlands*, cit., pp. 325-326.

36 See the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, which came into effect on April 1, 2002.

insights into the assisted dying. [37] It has resolved long lasting dilemmas about (a) whether the protection of the right to life stands contrary to the legalization of the right to die or the right to life speaks also about the right to die and therefore compels the legalization and (b) whether active euthanasia is about autonomy and dignity.

First, the Court resolutely rejected the suggestion that the right to life is about right to die or about decisional autonomy. No matter how extensive the interpretation of Article 2 can be, it cannot, without a distortion of language, be interpreted as conferring the 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. [38] Second, and the most important, this Court found that the request for the assisted dying was an important aspect of personal autonomy included in the notion of the private life protected by the Article 8 of the Convention. [39] Therefore, it shifted the discussion from the right to life sphere and recognized the point that the patient has the right to ask her choice to end life with assistance to be respected and that this respect is dictated by the values of self and dignity. [40] However, the Court did not find the blanket ban on assisted suicide disproportionate because such interference with one's personal choice was justified as necessary in a democratic society, for the protection of the rights of others particularly of the weak, vulnerable and those not in a position to make decisions about assistance in ending life. [41] One should have in mind that in this case the Court was predominantly concerned with the prosecuting policy of those who performed or assisted in euthanasia and not with the acceptability under the Convention of euthanasia itself.

Thus, international human rights law has already provided some very important answers regarding the nature and legal status of controlled assistance in dying. Therefore, this decision may favor a suggestion to raise the issue of the legal status of the controlled assistance in dying to the universal level, as well.

The relevant human rights norms can be found in the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Much guidance can also be found in the UNESCO's Universal Declaration on Bioethics and Human Rights which attempts to establish the conformity of bioethics with international human rights law. Thus, Article 5 of this Declaration speaks about autonomy and individual responsibility specifically providing that the autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected. In addition, in the same article for persons who are not capable of exercising autonomy, the Declaration envisages special measures to be taken to protect their rights and interests.

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37 *Pretty v. the United Kingdom*, Application No. 2346/02, Judgment of 29 April 2002.
38 *Ibid*. para. 39.
39 *Ibid*. para. 62-64.
40 *Ibid*.para. 64.
41 *Ibid*. para. 74.

Since neither of these instruments speaks about the right to end life with assistance, the competent authorities would have to engage in convincible and sustainable interpretation.

5. ADVANTAGES OF INTERNATIONAL ADJUDICATION AND INTERPRETATION

Apparently, several reasons favor resolving the legal status of controlled assistance in dying within the framework of international human rights law.

First, in this era of globalization rights discourse is present almost everywhere. In recent times, the scope of international human rights law has been extended significantly addressing now the rising number of biomedical issues. The most important policies to protect individual's interests and avoid abuses in the field of bioethics have already been formulated in terms of rights –the right to human dignity, the right to autonomy and self-determination, the right to informed consent, the right to refuse treatment, the right to relief of suffering according to the current state of knowledge, the right to know and not to know, the right to access to health and the right to physical and mental identity. Accordingly formulating a request for legalization of mercy killing and/or physician-assisted suicide in terms of global rights is not as odd as it may appear at first glance.

Second, it follows from the approach of the European Court of Human Rights that the patient has the right to ask their choice to end life with assistance to be respected and that this respect is dictated by the values of self and dignity. If the right to end life with assistance is about autonomy and human dignity, then we are faced with the right that transcends cultural diversity. The asserted right then falls within the realm of universal human rights which are color blind and direction blind: human rights knew neither right nor left, but only the human. [42]

Third, because there is a dispute about the nature of the right to end life with assistance, it is necessary to indicate at the international level why controlled assistance in dying is in conformity with personal autonomy and human dignity. This position is additionally backed by the norm in the UNESCO's Declaration on Bioethics and Human Rights, which provides that the preservation of cultural diversity cannot be invoked as a reason for infringing human rights especially those marked as fundamental such as the right to self-determination and human dignity. [43]

Next, it might be claimed that the individual countries cannot adequately address this challenge. Many states forbid mercy killing and physician assisted

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42 Hari Om Agarwal*: Implementation of Human Rights Covenants with Special Reference to India*, Kitab Mahal, Allahabad, 1983, p. 17.

43 Article 12 reads: «The importance of cultural diversity and pluralism should be given due regard. However, such considerations are not to be invoked to infringe upon human dignity, human rights and fundamental freedoms, nor upon the principles set out in this Declaration, nor to limit their scope».

suicide almost by accident and without a clear democratic judgment on behalf of the prohibition. The laws that embody these prohibitions are usually old and have not been enacted with anything like a comprehensive judgment that mercy killing and physician-assisted suicide should be banned under modern conditions. On the top of everything, each state adds a cultural flavor when regulating these practices. To remind, the US Supreme Court rejected to uphold assisted-suicide claims by openly stating that the right to end life with assistance is not the right that Anglo-American law traditionally protects. The universalistic claim of the right to end life with assistance makes possible a comprehensive judgment to be made about the nature of mercy killing and physician-assisted suicide and the formulation of transcultural standards.

Furthermore, there might be practical reasons, since the universal human rights framework provides a more useful approach for analyzing and responding to global medical challenges than any other framework within the biomedical tradition. [44] Controlled assistance in dying involves irrevocable actions that oppose a deeply rooted sanctity of life principle, so we need a strong framework and a common language to set up a new policy under modern circumstances. [45] Despite the existing problem of enforceability of the rights included in the basic universal human rights instruments, more rationally created and justifiable policy could be acceptable even if it is not clearly enforceable. By placing the responsibility for decision-making in those that have the power to persuade and convince, but not to enforce, we may avoid the abuse that comes from already powerful governments. [46]

At this point, some preliminary ends needs typing: a plea to recognize the right to end life with assistance would not transform doctors from healers to «killers»: this right should not be recognized as a claim-right. This would mean the absence of the correlative duties of others toward one, including the absence of a duty to cooperate in one's death, as well. Doctors' participation would be voluntary, without being based on their duty to cooperate with the patients' request.

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44 Jonathan Mann: «Health and Human Rights», *British Medical Journal* Vol. 312, No. 7036 (1996) pp. 924-925.

45 Human rights offer a strong framework and a common language, which may constitute a starting point for the development of universal bioethical principles. See in Helene Broussard: «The Normative Spectrum of an Ethically-Inspired Legal Instrument: The 2005 Universal Declaration on Bioethics and Human Rights», in Francesco Francioni (ed.): *Biotechnologies and International Human Rights*, Hart Publishing, Oxford, 2007, p. 114.

46 Robert Schwartz: «Bioethics Policy: Looking Beyond The Power of Sovereign Governments», *Houston Law Review* Vol. 33 (1997) p. 1.288.

6. THE LIMITATIONS OF RIGHTS TALK AND INTERNATIONAL HUMAN RIGHTS LAW

Clearly, anti-euthanasia advocates, those arguing from a moral relativistic position and undoubtedly some euthanasia supporters, would strongly oppose the idea of the universal right to end life with assistance. Consider now some possible arguments against universality approach.

First, the tool deployed for resolving the problem is in itself imperfect. For example, there is no complete agreement about the nature on human rights; i. e., whether human rights are to be viewed as divine, moral or legal entitlements; whether they are to be validated by intuition, custom, social contract theory, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially revocable, whether they are to be broad or limited in number and content. [47] At theoretical level, the rights discourse has been criticized as indeterminate, conclusory and over-simplifying, or as absolutist. [48] The opponents of rights talk also assert that it suppresses and distorts the debate. [49] The rights discourse has been seen as uncompromising and unresponsive to the accommodation of competing interests. Thus, it is claimed that human rights lack a significant concern for personal duties and for the common interest of society. [50] Therefore, it would not be useful to make use of one disputed concept to resolve the issue also disputable in itself.

In addition, the international human rights law suffers from its own imperfections. For example, there is a well-known argument from cultural imperialism: namely, that human rights are Western ideological concept of little relevance in African and Asian societies. [51] Remember Bangkok Declaration from 1993 issued by the Asian governments, challenging the universalism of human rights and criticizing the international human rights movement for being Western biased. [52]

Closely connected with this is an argument that that there is no such thing as universally valid moral doctrine. There are those who do not accept the idea

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47 See Burns Weston: «Human Rights», in Henry J. Steiner, Philip Aston and Ryan Goodman (eds.): *International Human Rights in Context: Law, Politics, Moral*, 3rd ed., Oxford University Press, Oxford, 2008, p. 478.

48 For detailed discussion, see e.g. Cass Sunstein: «Rights and Their Critics», *Notre Dame Law Review* Vol. 70 (1995) p. 727.

49 For more see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, The Free Press, New York, NY, 1991.

50 Cass Sunstein: «Rights and Their Critics», cit., at 732-735.

51 See in Christian Tomuschat: *Human Rights: Between Idealism and Realism*, 2nd ed., Oxford University Press, Oxford, 2008, pp. 82-96.

52 For more see Randall Peerenboom: «Beyond Universalism and Relativism: The Evolving Debates about 'Values in Asia'», *Indiana International and Comparative Law Review* Vol. 14 (2003) p. 1.

that individuals possess inherent rights. [53] Arguing from moral relativistic position – they assert that moral principles are ideas socially and historically shaped and valid only for those cultures and societies in which they originate. [54]

Along the same lines, there is a claim that even rational argument –that all human beings would like to pursue the good, the right and the just, fails to establish canonic moral doctrine because there is an overwhelming diversity regarding the just and good. [55] Not only do different views exist within one particular society, but even within regional framework, like for example in Europe, significant variations exist regarding the content, justification and interpretation of the rights. As a result, to accommodate national diversities, the European Court of Human Rights was forced to invent the doctrine of margin of appreciation. [56]

Finally, one can claim that the nature of the international human rights law further undermines universality –thus, so called soft-laws, which usually regulate biomedical principles, are not legally binding for the states–. Next, even when binding treaties are at stake, states may limit their obligations to reflect local traditions and values by imposing reservations. Moreover, in most instances states are chiefly responsible for the implementation of rights and therefore have a large role in defining what they mean within their jurisdiction. [57]

Now, it can be claimed that the strategy does not look promising also from the bioethics perspective. Namely, some argue that there is no such thing as global bioethics [58] or, at best, there is no global consensus on fundamental bioethical issues which underlines global bioethical policies validated in terms of universal rights. Rather, as they assert, there is a collapse of consensus –and they like to point to abortion, euthanasia or stem cell research. [59]

Additionally, that consensus is unsound testifies the fact that the Oviedo Convention, [60] which is the only intergovernmental binding instrument that comprehensively addresses the link between human rights and biomedicine, has generated disputes in many countries. A number of Western European states including Germany, France and the United Kingdom have not ratified the

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53 See in Roberto Andorno: «Global Bioethics and Human Rights», *Medicine and Law* Vol. 27 (2008) p. 11.

54 *Ibid*. See also in Henry J. Steiner, Philip Aston and Ryan Goodman (eds.): *International Human Rights in Context: Law, Politics, Moral*, cit., pp. 516-518.

55 See in Andrea Ott: «One Goal? One Consensus? One more Trip to The Drawing Board: A Review of Global Ethics: The Collapse Consensus», *Journal of Law, Medicine and Ethics* Vol. 35 (2007) p. 748.

56 For more on divergences among Western and European countries see Christian Tomuschat: *Human Rights: Between Idealism and Realism*, cit., pp. 82-85.

57 Randall Peerenboom: «Beyond Universalism and Relativism…», cit., pp. 18- 20.

58 Tristram H. Engelhardt: «Critical Care: Why There Is No Global Bioethics», *Journal of Medicine and Philosophy* Vol. 23, No. 6 (1998) pp. 643-651.

59 Tristram H. Engelhardt (ed.): *Global Bioethics: The Collapse of Consensus*, M & M Scrivener Press, Salem Ma., 2006.

60 The full title of this Convention is: Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.

Convention. The related argument is that a link between human rights and bioethics is problematic. The lack of signing and ratification of the Oviedo Convention is not due to simple omission but rather it should be seen as the consequence of concrete standpoints. [61]

Furthermore, it is possible to argue that the nature of the disputed practices does not allow the controversy to be resolved by referring to universal rights talk. For example, one can argue that the international law does not provide an adequate set of legal norms to resolve problems dependent on religious convictions, such as euthanasia. [62] Some authors have accused international law of tending to take the place of religion. [63]

Finally, the argument against the universal right to end life with assistance arises from the conflict of rights theory which underlines a clash between the same or different human right or rights, which is, or which are, held by the same or different rights-holder or holders. For some authors, the fact that mere rights are inconsistent with one another, represents a major obstacle to the universality of human rights. [64]

Many of the above-mentioned rights talk critiques prove important in the debate on active euthanasia. Thus, it is claimed 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). [65] According to some, the right to die formulation implies a conflict that lacks rules and standards for decision. [66] Moreover, it is asserted that because of indeterminacy, the rights-based arguments can be used both in favour and against the legalization of assisted suicide. [67] 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. [68] It is argued that in this way the political and popular power of rights often partially or wholly eliminates other forms of moral discourse, particularly arguments about duties. [69] Finally, it is said that the

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61 Judit Sandor: «Human Rights and Bioethics: Competitors Or Allies? The Role of International Law in Shaping the Contours of a new Discipline», *Medicine and Law* Vol. 27 (2008) p. 27.

62 Mark Modak-Truran: «Reenchanting International Law», *Mississippi College Law Review* Vol. 22 (2003) pp. 286-288.

63 *Ibid*. at 301.

64 See Philip Alston: «Human Rights in 1993: How Far Has the United Nations Come and Where Should It Go From Here?», in Manfred Nowak (ed.): *World Conference on Human Rights: the Contribution of NGOs: Reports and Documents,* Manz'sche Verlags- und Universitätsbuchhandlung, Vienna, 1994, pp. 13-22.

65 Penney Lewis: «Rights Discourse and Assisted Suicide», *American Journal of Law and Medicine* Vol. 27 (2001) pp. 71-72.

66 Thomas Mayo: «Constitutionalizing the Right to Die», *Maryland Law Review* Vol. 49 (1990) p. 105.

67 Penney Lewis: «Rights Discourse and Assisted Suicide», cit., pp. 72-73.

68 Leon Kass: «Is There a Right to Die?», *Hasting Center Report* Vol. 23, No. 1 (1993) p. 37.

69 Penney Lewis: «Rights Discourse and Assisted Suicide», cit., p. 76.

absolutist nature of rights rhetoric makes limiting rights a difficult task, which is even more difficult in case of a personal choice to end life with assistance, since the right to self-determination cannot have any limits. [70] Thus, what is asserted is 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 limit the right to obtain active euthanasia only to competent terminally ill persons for the relief of suffering?

7. CONCLUSIONS

I have arrived at the end of my discussion. My aim here was not to resolve but to catalyze a complex issue such as legalization of mercy killing and/or physician-assisted suicide.

In order to articulate the request for legalization of active euthanasia, two strategies have been deployed at the national level. The first is based on criminal law: it takes active euthanasia as a permissible medical practice and aims at acquitting doctors from criminal liability for an otherwise punishable act. The second is the rights-based strategy: it uses rights talk to provoke social and legal reform asserting that an individual enjoys a limited right to end life with assistance. Up to now, the model, which attempts to legalize active euthanasia from the point of view of individuals' rights, has been less successful in bringing the reform.

Yet ever since the European Court of Human Rights has resolved some basic issues concerning the nature of euthanasia in *Pretty*, it has not appeared so inapt to examine the potentials of the universal rights talk to press for legalization. When national laws prove to be of no avail, international human rights law is always an appropriate arena. In addition, it is not built on tradition and tradition is, along with various slippery slope arguments, the reason why the right to end life with assistance so far has not been given a modicum of effectiveness. As usually, looking into the past offers many problems, and few solutions.

Although the controversy over the nature of active euthanasia seems to be resolved by the international human rights law, it does not follow that it will automatically sanction the right to die in all its aspects. Framed in individual autonomy terms, the right to end life with assistance in medical settings will necessarily be subjected to balancing test against other interests protected on international level as well. In many years ahead, a result of such test will not probably favor its acceptance and effectiveness. However, the existence of human rights does not depend on the will of the State nor internationally on treaty or

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70 Daniel Callahan: «Reason, Self-determination and Physician -Assisted Suicide», in Kathleen Foley and Herbert Hendin (eds.): *The Case against Assisted Suicide: For the Right to End-of-Life Care*, cit., p. 62.

custom. [71] Since they are derived from the nature of human being, in the long run, any possible societal divergences will appear as secondary and significant. [72]

In the meantime, since general acceptance is not in the air, it is still on the «state laboratories» to decide whether to rethink and revise their traditional prohibition on assisted suicide in medical settings. Whether or not they will set the change on autonomy rights depends on political, legal, cultural, and religious tradition of each particular state. Until then, it goes without saying that they remain solely responsible for forcing terminally or incurably ill persons to suffer against their will.

71 Justice Tanaka. See in ICJ Report (1966) 250, p. 297.

72 Christian Tomuschat: *Human Rights: Between Idealism and Realism*, cit., p. 96.