Grounds and Necessary Conditions for the Legalization of Euthanasia

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1. Background

In December 1993, the media reported that the Dutch parliament had passed a bill on euthanasia, sending shockwaves around the world. The Vatican issued a critical comment saying that the Dutch were trying to do what the Nazis did, whereas in Japan, partly due to misleading reports in the media, there were contradictory whispered comments: one the one hand the Netherlands was said a scary place where one could not enter hospital without worrying, while on the other it was expected there would be euthanasia tours to the Netherlands. It is obvious that either comment was based on misunderstanding.

This Dutch legislation was in fact not the enactment of a single euthanasia law, but the amendment of one article in a previously existing Law Regarding the Disposal of the Dead, which is nothing more than stipulating the obligation to report any act of euthanasia.

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Moreover, the Dutch penal code, in addition to the act of homicide, provides for killing upon request (section 293 of the Dutch Penal Code) and assisted suicide (section 294); as no amendments were made to the stipulations of these laws, euthanasia is still considered to be an illegal punishable crime, both before and after the amendment.

However, in connection with the ageing of the population, and changes in the background conditions relating to medical care such as the advancement of medical technology and full provision of health insurance, euthanasia has been practised on 2300 people per annum in the Netherlands, mainly by home doctors (according to the 1991 Remmelink report, which is based on a nationwide survey). Ever since in 1984 the Supreme Court, dealing with a case of euthanasia, accepted a plea of necessity (force majeure) based on section 40[2] of the Penal Code, ruling that "a physician's duty to abide by the law and respect the life of his patient may be outweighed by the duty to help a patient who is suffering unbearably, who depends upon him and for whom, to end his suffering, there is no alternative but death", euthanasia has been dealt with as permissible as long as it is carried out in order to relieve unbearable pain based on judicial precedent, even though it is an illegal act prohibited under criminal law. The above amendment of the law constitutes a legal confirmation of this practice.

Since in Japan there has been no nationwide survey on euthanasia

(2) "Anyone who commits a criminal act to which he was forced by necessity will not be punished"

as in the Netherlands, the reality is unknown. Moreover, euthanasia is not only illegal under criminal law, but there also has been no precedent where it has been viewed as legal. However, in a decision given on the 22nd of December 1962 by the Nagoya High Court, which received international attention, while the defendent in the case under consideration was found guilty, the court gave a general ruling stating that the illegality would be nullified if the following six conditions were met: 1) Incurable illness, 2) The presence of unbearable pain, 3) The objective of easing of such unbearable pain, 4) A sincere request or consent on the patient, 5) Conducted by a physician, 6) Ethical proprietry of method. More recently, in the first case where euthanasia was practised by a physician, the Yokohama district court on the 28th March 1995 again found the defendant guilty, but gave as a general ruling the necessary conditions for the legality of the three categories it established, "death with dignity", "indirect euthanasia" and "active euthanasia". It is not possible to say that the necessary conditions for legality have been established, but Japan has reached the stage where it has begun to feel its way towards the legalization of euthanasia.

This paper considers the grounds and necessary conditions for the legalization of euthanasia on the basis of the above-described situation in Holland and Japan.

2. The meaning of euthanasia

The term "euthanasia" is not a legal term, and is used in various

senses throughout the world.

Firstly, there is the concept of Death with Dignity, which is similar but not identical to euthanasia. The progress of medicine makes artificial preservation of the function or organs such as heart and lungs possible through measures such as artificial respiration, administering drugs, and supplying nutrition, even if the patient has fallen into a state from which there can be no recovery due to irrevocable ceasing of brain function. This may be a biological form of life, but certainly no human life. As a result, one now continously sees "chilly death surrounded by machinery, and ugly death linked up with tubes". Death with dignity is an attempt to refuse this kind of unsightly death and allow the patient to meet death with human dignity (also called natural death). The meaning of accepting the concept of death with dignity is that if the patient has in advance expressed the will not to have his life prolonged and the physician takes medical action such as disconnecting the respirator in accordance with this will, not only will he not held legally responsible, but that it is his duty to do so.

Whereas death with dignity is a passive form of action that consists of refusing medical treatment, euthanasia is a active form of letting die. One can distinguish three forms of euthanasia.

The first is known as "passive" euthanasia. It refers to the shortening of like through not carrying out treatment, as in for instance stopping transfusion because it prolongs pain in a case where

life can be prolonged by blood transfusion. This is also called "euthanasia through non-action"and "assisting with death by leaving to die". Negative euthanasia does not differ much from death with dignity in the sense that the time of death is quickened by the failure to give medical treatment.

The second form is "indirect euthanasia", which is also known as "therapeutic euthanasia". This is a case where the amount administered as medically established form of painkilling in terminal treatment inevitably leads to a shortening of life, as when, for instance, the patient's life is shortened as a result of the side-effects of an increased dose of a strong painkiller such as morphine used to remove pain. This is also called "assisting death that accompanies shortening of life as a derivative result".

The third form is "active euthanasia", also called "homicidal euthanasia", which refers to the action of actively terminating life by injection or administering drugs etc. in order to let the patient die peacefully. This is also known as "assisting to die with the intention to shorten life".

Since the Remmelink Report of 1991, the first two forms of euthanasia are thought of as part of a physician's day-to-day duties, and are not included under the concept of euthanasia in the Netherlands; only active euthanasia is dealt with as euthanasia.

Euthanasia is defined as follows: Euthanasia is an intentional termination of a patient's life at his own request. (See the Remmelink

Report metioned below)

By contrast, in Japan all of the above forms are discussed as part of the concept of euthanasia as a useful distinction of the line between legality and illegality.

3. Contemporary approaches towards the problem of human life

In the past, it was accepted that human life was controlled by God, and peoples' attempts to tamper with it were thought of as blasphemy. This position gives absolute dignity to human life as received from God, and denies any interfering or tampering with it.

However, the progress of science has gradually removed the veil from the mystery of life, and begun to challenge God. Artificial tampering and interference is now seen at all stages of life, from birth via maintenance to its end. From the religious position of the sanctity of human life this constitutes an unethical act.

Here, a new way of dealing with the ethics of human life in a so-to-speak utilitarian fashion attempts to view the value of life not from a religious perspective, but from the dimension of secular "individual happiness". From this position a life consisting only of pain is not worth living, as human beings are happier with pleasure than pain.

However, if one legitimizes infringement on human life, then there

is a danger that this leads to a policy of eliminating the socially weak, where it is possible to rid society of those percived to be useless. It was in fact euthanasia from a humanistic perspective which allowed the terminally ill with unbearable pain to die a peaceful death that provided the theoretical basis for the ethnic cleansing policy of Nazi Germany which followed the path of mass liquidation. This illustrates the fact that legitimizing infringement on human life, no matter how noble the motive, leads to dangerous thinking that treats the value of human life lightly.

On the other hand, the interference with human life at the cutting edge of contemporary medicine indubitably concerns the issue of "the quality of life" to a larger or lesser degree, and this appears an irreversible development. The problem of infringement on human life needs to be taken beyond the realm of ethics and must be dealt with as a legal problem from a contemporary perspective, and which must set the limits as to its permissibility.

The fundamental legal principle regarding interference with human life must be sought in the "dignity of the individual", which is also the basic angle from which the issue of euthanasia needs to be considered.

4. Pain-killing treatment and euthanasia

Traditionally, the argument concerning euthanasia was conducted on the basis of "liberation from unbearable pain". However, with the

progress in pain-killing treatment and its universal application, most of pain that previously were thought could be eliminated only through death, can now be allieved through medical measures, causing a change in the basis of the euthanasia issue. In Japan, "death with dignity" is legally permissible, as are the similar "passive euthanasia" and "indirect euthanasia", but regarding "active euthanasia" the opinion denying its legality is gaining the upper hand, judging it "allowing not to eliminate pain but the person who endures the pain is a contradiction in terms of standard logic".

However, the first argument against this is, if at this point in time each terminal patient tormented by pain can really be said to be enjoying the benefit of pain-killing treatment. It is said that with the phenomenal progress in the treatment of acute pain of cancer patients, which is the form of pain feared most, 90% of patients can be sedated, but this is nothing more than an abstract medical possibility in therapeutic technology. Unless each patient can be guaranteed sufficient analgesic treatment not as an abstract possibility, but as a real and concrete possibility, the exclusion of active euthanasia from legal forms of euthanasia may be said to fulfil not even the traditional need for euthanasia, which needs to eliminate acute pain worse than death.Before declaring all forms of active euthanasia illegal, a medicosociological survey of analgesic medicine is indispensable.

The second argument is that present pain-killing treatment cannot be said to be functioning properly for patients such as those suffering from terminal cancer, who are attacked by intermittent acute pain.

As present pain-killing treatment permits the elimination of pain within the physican's norm of duty, provided the pain at the time is eliminated, the remaining part of the life must be preserved as much as possible, regardless of its quality. As a result, the patient dies gradually in a cycle of being tormented by pain when awake, while in a trance when free of pain until reaching the moment of "the last breath". How can the nation order a terminal patient approaching death fluctuating between pain and semiconsciousness, to live until the final stage in spite the patient's sincere wish to be despatched? Why is the patient not allowed to die until having experenced a full course of pain?

Is it not the essential aim of euthanasia to see pain and its elimination, the repetition of waves of painful consciousness and semi-consciousness relief as "pain overall" and liberate the patient from such pain as well? From the patient's point of view, this problem does not concern the compassion of someone taking action, nor the physican's basic logic, but his own choice concerning the "quality of life" between a "life of great pain" and a "death of little pain".

In this way, the problem of euthanasia needs to go beyond the question of pain-killing treatment, requiring treatment as an issue concerning the quality of life.

5. Self-determination and euthanasia

If one sees euthanasia as an issue concerning "quality of life", this inevitably leads to the question as to who makes the decision regarding the quality.

The way of thinking that distinguishes "good life" and "bad life", and allows the possibility of terminating "bad life" depending on the circumstances itself challenges the taboo of sanctity of human life. Therefore, the traditional grounds for justifying euthanasia were sought in the areas of medical treatment and humanitarianism, which were not in conflict with the taboo of the sanctity of life.

If one thinks a little further, however, one realizes that the basis for the decision by the person taking the action (the physician) under the name of "treatment" or"compassion" has in fact been "quality of life". Rational humanitarianism tends towards social and objective considerations rather than subjective compassion. If one takes a utilitarian view of things, "quality of life" itself becomes the object of consideration, and the grounds for justifying euthanasia are sought in the principles of superior benefit and comparison of benefit and protection of the law. As a result, it becomes impossible to prevent occurrence of the phenomenon of which one must be most cautious if one approves of active euthanasia, genocide aimed at the elimination of the socially weak.

The decision regarding the quality of life must therefore rest with

the will of the patient himself, which gives rise to the argument of self-determination. Therefore one must consider this issue by recognizing that if there is anyone to whom belongs the right to choose whether to continue a life of great pain or have a peaceful death, it can only be the patient himself. In concrete terms, when weighing the benefit of "necessity" as a reason for nullifying illegality, the choice of whether to give priority to a life of pain or a painfree death must be seen to become conclusive only when the patient himself has made the decision. Under normal circumstances, the weighing of benefit is carried out in an objective and utilitarian way, but since the issue of euthanasia concerns only the patient himself, a third party is not in a position to reach a conclusion on behalf of the patient on the basis of objective weighing of benefit. Therefore, self-determination of the patient is an essential element of the euthanasia issue.

The reason why self-determination is important is not because it guarantees the right choice, but because it guarantees a personal choice. Even in the event that the choice appears foolish to others, opposing it denies the status of the patient as an independent entity. The duty of the nation is to guarantee each individual such autonomous existence as widely and fairly as possible.

Having said this, there are times when self-determination is restricted-firstly, when it is harmful to others, and secondly, when the possibility of autonomous existence is preserved for the benefit of the patient. The second reason gives rise to the grounds for the punishability of "killing upon request". Life is a biological foundation

which makes autonomous existence possible; if the former ceases to exist, then so does the latter. Injuring oneself, no matter how foolish it may appear to others, is within the range of choice of self-determination, However, actions that bring about grave danger of life are prohibited because there is a danger that they will put an end the possibility of autonomous existence. In order to protect the continued autonomous existence of the individual, the nation, whose ultimate aim is the assurance of the individual's dignity, cannot be indifferent to the possibility that an individual may on the basis of mistaken judgment put himself in a disadvantagous position (discarding life, the biological foundation of autonomous existence). Killing upon request constitutes no less than a paternalistic interference on the part of the nation for the benefit of the patient himself.

Paternalism is permissible because of concern for a person's autonomy and freedom, and therefore in cases where there is no possibility of continued autonomous existence, and the sincerity of the wish to die is objectively guaranteed by facts, the grounds for the punishability of killing upon request, i.e. the paternalistic restriction on the right of self-determination of one's life must be rejected in favour of the patient's right to exercise the final self-determination (the realization of autonomous existence), and the patient's freedom of deciding how to continue to live (how to die) is guaranteed on the basis of his own choice. These are the grounds for nullifying the illegality of killing upon request.

This also provides an answer to the question which is frequently

posed concerning the argument for active euthanasia - if the relief from pain is the chief motive, why is the patient's self-determination so important, or conversely, if self-determination is so important, why does it require the existence of pain? In other words, since the choice between a painful life and a peaceful death must be the patient's decision, while on the other hand the nation has the duty of preserving autonomous existence for the patient's sake as long as there is the possibility of it, both aspects are necessary. This means that the idea of self-determination acts both as a brake to prevent abuse by not permitting euthanasia for patients who do not wish it, and implies that it will not do to fully recognize the patient's right to die.

In this way, the argument for active euthanasia aims to guarantee the patient'self-determination regarding his own life as long as the impossibility of autonomous existence and the sincerity of the wish to die are objectively assured by facts; the necessary practical conditions for euthanasia therefore need to decided on this basis.

6. The necessary conditions for active euthanasia

If one argues for active euthanasia on the basis of self-determination as above, the necessary conditions for its legality can be defined as follows:

a) The patient is medically considered to be incurably ill

b) The patient is physically suffering to an unbearable or severe extent

c) The patient has previously expressed his explicit will that his life be terminated

Regarding b), in the Netherlands the suffering may also be "mental suffering" (Supreme Court ruling of 21sty June 1994 in the Chabot case), but as mental suffering carries the risk of having to rely on the patient's subjective appeal only when it comes to assessing its presence and extent, it ought to be limited to physical suffering only, since the impossibility of autonomous existence and the sincerity of the wish to die are not objectively assured.

Regarding c), in the Netherlands active euthanasia is also permitted "when there is no request from the patient" according to the decree accompanying the amendment of the law, but as long as self-determination is regarded as the basis of euthanasia, it ought to be limited to cases where there is an explicit request from the patient.

Needless to say, euthanasia should not be permitted for incompetents such as people with congenital defects, the mentally handicapped, and comatose patients. Permission to interfere to end their lives on the basis of the argument of assumed consent would imply legal assistance for elimination of the socially weak, casting a dark shadow over the issue of euthanasia.

7. Supplementary comments

As argued above, the Dutch amendment of the law constitutes a

defacto legalization of euthanasia with reporting procedure. However, the penal code still treats euthanasia as a punishable illegal act. Therefore, the above amendment of the law means that legislation sanctions a situation whereby euthanasia is legal on the one hand, and illegal on the other. This contradictory measure may be assumed to have been taken in the Netherlands on the basis of the consideration that "approval on the one hand and illegality on the other - this duality acts as a safeguard freeing the patients from the worry that they may be driven to death, while enabling them at the same time to request a dignified death".

As a result, the legality of cases of euthanasia where it is not immediately clear if they are legal or illegal cannot be determined until indicted by the prosecution, decisions have been made in the first and appeal trials, and eventually by the Supreme court. Therefore physicians have to practice euthanasia under the risk of becoming a defendant and being found guilty in the future, a flexible practice that is unthinkable in Japan.

Dealing with the issue by skilful operation while exposing the physician to the risk of indictment and punishment cannot said to be an appropriate way of dealing with the extreme issue of life or death. As the Japanese way of dealing with abortion by decreeing the reason for blocking illegality by the Eugenic Protection Law illustrates, it is necessary to legally clarify the distinction between legality and illegality by giving preference to legislation of an Euthanasia Law that clearly states the necessary conditions for legality.