EUTHANASIA – A COMPARATIVE STUDY FROM LEGAL PERSPECTIVE

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ABSTRACT

Euthanasia has become a debating topic around the world especially after the recent tragic case of Terri Schiaovo. Whether to permit Euthanasia or not is among the most contentious legal questions. Euthanasia, by definition, means the practice of assisting severely ill people to die, either at their request or by taking the decision to withdraw life support .The motive of the person who commits an act of euthanasia is to benefit the one who is suffering from terminally ill disease. Stedman's Medical Dictionary has two citations: 1) "a quite, painless death"; and 2) "the intentional putting to death by artificial means of persons with incurable disease or illness to death. This topic is far from simple as it raises not only legal but also ethical issue. When faced with their loved one's pain and suffering, many believe that it is part of civilisation to let them die in most dignified way and as painless as possible. On the other hand, anti-euthanasia group believe that it is God that gives life and, therefore, only God should take it away. Euthanasia involves killing and all killing is morally wrong. The paper will examine the present state of the law in selected jurisdiction around the world. Particular attention will be focused on the differential treatment of the law in those countries. Special reference will also be made to a recent case of Terri Schindler Schiavo (1963-2005).

INTRODUCTION

The word "euthanasia" is of Greek origin which signifies a good and honorable death.[4] Belgian law on euthanasia, which came into force on 23 September 2002, defined this term as "an act on purpose, performed by third person, in order to end life of a person who has requested for this act. (Article 1)[5] Vatican's Declaration on Euthanasia, on the other hand, referred this term as "an action or an omission which of itself or by intention causes death, in order that all suffering may in this way be eliminated".[6] It is pertinent to note that this term is not limited to putting to death only incurably ill persons. A compassionate killing may take place though the victim may not be incurably or terminally ill.[7] In this sense, we may conclude that euthanasia involves two important elements, namely, putting a person to death and for compassionate reasons. In using the term euthanasia, it is important to distinguish a number of vague terms relating to this practice, namely, passive and active euthanasia, voluntary, non-voluntary and involuntary euthanasia, and physician assisted suicide. Active Euthanasia is action taken for the purpose of causing or hastening death whereas passive euthanasia means action withheld for the purpose of causing or hastening death.[8] On the other hand, voluntary euthanasia occurs when a terminally ill patient request for their life to be ended by a doctor. However, it should be noted that if the person with the illness is not considered mentally competent to make decisions about their treatment, such an act might constitute murder. When a person's life is ended, without their consent, even though they are competent and able to make decisions about their treatment, this is called as involuntary euthanasia. Whereas non-voluntary euthanasia referred to cases where there is no consent or request by the patients due to their inability to do so.[9] Distinction should be made between euthanasia and assisted suicide. The former refers to intentionally killing by act or omission of a dependant human being for his alleged benefit whereas the latter is defined as when a person provides another person with the information, guidance and means to take his own life with the intention that it will be used for this purpose. As such, when a doctor helps his patients to kill themselves it is called "physician assisted suicide".[10]

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[4] http://www.religioustolerance.org/euth1.htm. 9.08.2003
[5] http://www.vesv.org.au/docs/belgium.htm, 8.07.2005-voluntary Euthanasia society of victoria inc.
[6] http://dalessio.topcities.com/hli2.htm- 07.07.2005
[7] John Keown, "Physician Assisted Suicide and the Dutch Supreme Court", *The Law Quarterly Review*,July 1995, Vol[7] http://www.religioustolerance.org/euth1.htm. 9.08.2003. 111,pp.394-395
[8] http://dalessio.topcities.com/hli2.htm-07.07.2005
[9] http://www.nhsdirect.nhs.uk/en.asp?TopicID=775&AreaID=5151&LinkID=4226-07.07.2005
[10] http://members.aol.com/wutsamada2/ethics/essays/hauser.htm-Brianne Hauser-08.07.2005

Battle over Euthanasia: Who makes death decision?

On March 31, 2005[11], the world watched in shock and horror the demise of Terri Shiavo, 41. Why does her demise becomes an issue? It was not the usual kind of death. After a rigorous battle by her family, they eventually lost it. It was ruled by the court that she was in persistent vegetative state (PVS) and wished to die. Her cause of death was by dehydration, that is, by removing a feeding tube from her profoundly cognitively body.[12]

From the fact of the case, we can see that Terri Schiavo suffered brain damage in 1990 when her heart stopped briefly because of a possible potassium imbalance brought on by an eating disorder. She could breathe on her own, but had to rely on the feeding tube to keep her alive, lapsing into a persistent vegetative state. This case had been debated over the past fifteen years by her family, the state of Florida and the Federal Government of the United States.

In 1998, Terri's husband, named Michael Schiavo, petitioned the circuit courts in Pinellas County, Florida for the authority to have the feeding tube keeping his wife alive, removed. He argued that his wife should be allowed to die because she would not have wanted to live in a permanent vegetative state without conscious awareness but her parents insisted she could recover with treatment and wanted their daughter to remain alive.
In 2000 Circuit Judge, George W. Greer approves Michael Schiavo's request to have Terri's feeding tube removed, agreeing that she had told her husband she would not want to be kept alive artificially. However, the ruling was then set off in 2001 through both Florida state courts and federal court. So the tube was reinserted. Two years later, after hearing medical testimony, Greer found no evidence that Terri had any hope of recovery and again ordered the tube removed for the second time. Less than one month later, he stayed his order so that the Court of Appeal could review the case. Six days later, again the feeding tube was ordered to be reinserted by the governor after the Florida Legislature, in emergency session, passed a bill that gave the Florida Governor, Jeb Bush the power to intervene in the case. The Bill, which was famously called "Terri's Bill" aimed at preventing the removal of Terri Schiavo's feeding tube. It allowed Bush to order doctors to restore Terri's feeding tube. The bill would block doctors from denying food or water to someone in a persistent vegetative state, including in cases where family members disagreed on whether to maintain feeding. Then, the patient would be kept alive unless he or she had expressed different wishes in writing. That bill, however, was struck down by the Florida Supreme Court whereby the court upheld a lower ruling that said "Terri's Law," was unconstitutional.[13] The decision stated that the law violated the separation of powers clause in the state constitution and essentially allowed the state legislature to authorize the Governor to overturn a lower court decision ending Terri's life. It was an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. It was also ruled that the legislation violated Terri's due process rights and her right to privacy under the state constitution.
Over the past 20 years, Florida courts have held that the right to privacy includes the right to make personal medical decisions without interference from the state. The leading Florida case on the right to die is the Florida Supreme Court's 1990 ruling in *Re: Guardianship of Browning 568 So.2d 4 (Fla.1990)*. In this case, Estelle Browning was 86 when she suffered a debilitating stroke that left her severely brain-damaged. As she could no longer swallow, feeding and hydration tubes were inserted into her stomach. A year before she became ill, Browning had executed a living will stating that she did not want life-prolonging procedures in the event of a terminal illness. Two years after Browning's stroke, her legal guardian filed a petition in probate court to have the feeding and hydration tubes removed. The probate judge denied the petition on the basis of Florida's 1987 Life-Prolonging Procedures Act, which allows patients to refuse medical treatment under certain circumstances. At the time, the act did not identify sustenance as a life-prolonging treatment that could be waived through oral or written directives. (In 1990, the Legislature later amended the law to include food and hydration to the list of procedures a patient could waive through advance directives).[14]
On appeal, the Court of Appeal quashed the decision of the trial judge on the basis that Browning had the right to refuse sustenance in accordance to the right of privacy. The decision was later affirmed by Florida Supreme Court where Justice Rosemary Barkett in his ruling held that the right to privacy and

[11] http://www.internationaltaskforce.org/iua32.htm-07.07.2005
[12] Wesley J. Smith, http://www.internationaltaskforce.org/uia29.htm-07.07.2005
[13] http://www.cnn.com/2004/LAW/09/23/schiavo/ 01.09.2005
[14] http://abstractappeal.com/schiavo/browning.txt - 01.09.2005

freedom from intrusion into one's own body is "rooted in our nation's philosophical and political heritage". Thus, it was ruled that both competent and incompetent patients have the constitutional right to refuse medical treatment, even if it leads to death. The crucial element in these cases, they said, is to determine the patient's wishes. The appointed guardian has the sole responsibility of carrying out the decision the patients would have made for themselves, known as substituted judgment. The guardian's duty is the same whether the patient had expressed their wishes in writing, such as in a living will, or orally in conversations with others before they became incompetent. In cases involving oral statements, the burden of proof lays on the guardian that the patient would have preferred to die. Once this burden is met, the state cannot intrude unless it has a compelling interest great enough to override the fundamental right to privacy.[15]

In comparison, in the Terri case, the Governor's lawyers argued in their briefs to the Supreme Court that *Browning* is not controlling precedent because Estelle Browning was much older than Terri Schiavo, had a living will and did not have any family members who objected in removing the feeding tubes. They argued that Terri's Law is consistent with the state's compelling interest to protect the life of Florida citizens, especially those who are disabled and vulnerable to exploitation. As Terri Schiavo had no living will stating whether she wished to be kept alive using life-prolonging procedures, it was unclear what she really wanted. The judge, however, ruled that oral testimony provided by Michael Schiavo and other witnesses proved by clear and convincing evidence that Terri would have preferred to die. Terri Schiavo then died on March 31, 2005, 13 days after almost two weeks of unsuccessful legal action to restore her feeding tube.[16]

The effect of this case is that any Floridian who entered into a living will (denying themselves artificial life support) prior to 1999 can be adversely affected by the case law Terri's situation has created. The provisions of food and fluids, supplied through a gastric feeding tube can now be withheld without the express consent of the patient. People see this as not only discriminating against those unable to defend themselves and those with profound neurological disabilities, but directly impacts people from all walks of life who depend on assisted nutrition and hydration.

Euthanasia: Law Position in selected countries

Oregon Death with Dignity Act 1994 (ODWDA), also known as Measure 16 of 1994, was passed in November 1994 and took effect in 1997 after long and winding battle in court to make it effective. (full text: Oregon Death with Dignity Act 1994 http://oregon.gov/DHS/ph/pas/ors.shtml). The law permits an adult, who must be resident of Oregon, to request to his physician to end his life in a humane and dignified manner. The patient must be a capable person, suffering from a terminal disease, has made the request voluntarily, in a written form.(section 2.01,127.805, ODWDA).The Act does not allow a physician to administer the lethal dose by himself, it is the patient who is required to take the final act that brings about death.[17] In this sense, it is safe to conclude that the ODWDA actually authorises physician-assisted suicide and not euthanasia. In 2004, it was reported by the Oregon Department of Human Services (ODHS) that a total of 37 patients ingested the prescribed lethal dose and died under ODWDA. Forty doctors wrote 60 lethal doses of barbiturates, 35 patients took the drugs and died in 2004. The remaining 25 patients who did not take the drugs, 13 died naturally of their illnesses, while 12 were still alive on December 31,2004. (Seventh Annual Report on Oregon's Death with Dignity Act,10/3/05,p.16)[18] ODWDA among others stipulates that the physician must determine that the patient is terminally ill, capable and is making a voluntary and informed request. He must also confirm the patient's diagnosis, prognosis, and voluntariness. A valid request shall be substantially in the form described in 127.897 s.6.01 of ODWDA, dated by the patient and witnessed by at least two individuals who in the presence of the patient, attest that it is their believe that the patient is capable, acting voluntarily and is not being coerced to sign the request. The patient must make one written and two oral requests and a prescription of a lethal dose can only be written 15 days after the initial oral request, and 48 hours after the written request. All information must be documented in the medical record and the Health Division is required to review the records annually. From the above discussion, it is

[15] http://www.floridasupremecourt.org/pub_info/summaries/briefs - 02.09.2005

[16] http://www.usatoday.com/news/graphics/schiavo_timeline/flash.htm

[17] Cheryl K.Smith, *"Safeguards for physician-Assisted Suicide:The Oregon Death With Dignity Act"*, in Sheila A.M.McLean (ed.), *Death,Dying and the Law,* Dartmouth, 1996,pp.73-74.

[18] http://www.internationaltaskforce.org/iua32.htm-07.07.2005

submitted that the paramount consideration is not for the patient's benefit but actually the law is legislate to protect the physician who commits the act.

In 1995, Australia's Northern Territory passed a legislation legalising active euthanasia (the Rights of the Terminally Ill Act 1995). The law went into effect in July 1996. However, the legislation was repealed by the Australian Senate on March 25, 1997 as it showed to be in conflict with national views.[19] Under the repealed Act, upon a request made by a terminally ill patient, a physician is allowed to assist with the termination of a patient's life but the patient must be of 18 years of age. The Act also contained provisions of keeping records and reporting. During the eight months the law was in effect, four deaths occurred under its assisted-suicide provision (Rita L. Marker, p2).

On the other hand, since 1973, the Netherlands courts have authorised euthanasia under certain conditions in spite of prohibiting article of 293 of its Penal Code.[20] The disparity between article 293 and the actual practice of active euthanasia raised a debate which forced the legislators and Dutch government to come out with a solution (refer to the District Court of Alkmaar (10 May 1983), Court of Appeals in Amsterdam (17 November 1983) and Supreme Court's decision (27 November 1984)). In 1984, an euthanasia case was brought before the Supreme Court which concerned with a practice of euthanasia on a 93 years old woman, suffering from several diseases.[21] The court at first instance has acquitted the doctor but decision has been reversed by Court of Appeal. From evidence, it was found that the patient suffered terminally with no prospect in substantial improvement in her condition. At one time she had a relapse, and after she was lucid again, she requested explicitly that euthanasia be carried out. The doctor decided to adhere to her request because of her unbearable suffering. The Supreme Court in its decision, has reversed the decision made by the Court of Appeal and referred the case to the Court of Appeals of The Hague. The Supreme Court based its decision on the conflict of duties. It was ruled that the Court of Appeal failed to investigate whether and to what extent, by looking at professional medical judgment, increasing deterioration of the patient's personality were to be expected; and whether there is possibility of new serious relapses which may deny her to die with dignity; and whether there had been ways to alleviate her suffering. Based on this, the appeal was allowed (refer also the High Court of the Hague, Case no. 79065, Oct 21, 1986). Similarly, in the case of Dr. Chabot, even though the Supreme Court restored the conviction, the court had declined to inflict any punishment on the doctor, reasoning that in order to raise the defense of necessity, the patient's unbearable suffering need not arise from somatic pain, nor need the patient be terminally ill.[22] As such, it is safe to conclude that voluntariness and personal liberty and autonomy are the centre of the introduction of euthanasia in the Netherlands. The pronouncement of this judgment reflects the openness of judiciary to accept the practice of active euthanasia. Thus, it was not surprising to note that in April 10, 2001, The Netherland became the first European country to legalise euthanasia.[23] The Termination of Life on Request and Assisted Suicide (Review Procedures) Act has amended sections on criminal code, specifically stipulates that the offences of euthanasia and assisted suicide are not punishable if they have been "committed by a physician who has meet the requirements of due care" that are described in the act and if they have informed the municipal "autopsist" in accordance with the Burial and Cremation Act.[24] With the inclusion of "due care" requirements under the new law, it seems that the law recognises the used to be "criminal act" as one of the medical treatments. Under the law, the patient must freely choose to die and make such request on several occasions. The patient must be in severe pain and the patient's doctor must get a second opinion from another doctor agreeing to the request. In addition, the law also permits minors between 16 and 18 to request that their lives be terminated and although parents or guardians must be consulted, they have no authority to prevent the requested death. Similarly, children between 12 and 16 may also request euthanasia but a parent or guardian must agree with the decision. It should be noted that the law also recognises the right of doctor to carry out euthanasia based on written advance request for death (Termination of Life on Request and Assisted Suicide (Review Procedure) Act-Chapter II.Due Care Criteria, section 2(3)), and

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[19] Rita L. Marker, *"Assisted Suicide & Death With Dignity: Past, Present & Future"*, http://www.internationaltaskforce.org/rpt2005_3.htm-07.07.2005

[20] H.J.J.Leenen,"Supreme Court's Decisions on Euthanasia in the Netherlands, *Medicine and Law,*vol. 5, 1986, p.349

[21] Ibid.

[22] John Keown, "Physician Assisted Suicide and the Dutch Supreme Court", *The Law Quarterly Review,* vol.111, July 1995,pp.394-495

[23] http://news.bbc.co.uk/1/hi/health/background_briefings/euthanasia/2600923.stm- 07.07.2005

[24] http://www.internationaltaskforce.org/rpt2005_3.htm -07.07.2005

although the person must be at least 16 years old to be euthanized, there is no requirement that one must be at least 16 when the request is put in writing.

Another country which poised to legalise euthanasia is Belgium and on May 28, 2002 the Belgian law on euthanasia was passed and came into force on September 23, 2002 (Text: the Belgian Act on Euthanasia of May 28,2002, *European Journal of Health Law, vol. 10,pp.329-335 (2003)).* The criminal code remains unchanged but euthanasia is permitted, subject to prescribed conditions.[25] The law limits euthanasia to competent adults and emancipated minors and the patient must be capable and conscious at the time of his request; the request is made voluntarily without elements of duress or outside pressure; the patient is in hopeless medical condition and complaints of constant and unbearable physical or mental pain which cannot be relieved; and he has complied with the conditions and procedures prescribed by the present law. To avoid prosecution, among others the doctor must respond only to a voluntary, free will, written and well-thought-out request by a patient suffered incurable medical condition and experiencing unbearable physical or mental pain. In addition, the patient must be informed of their health conditions, life expectancy, any possible therapies including palliative care, and the consequences of their decisions. The doctor must also be competent with the nature of the medical condition, and certain that there are no other reasonable solutions.[26] On the other hand, if the doctor refuses to perform euthanasia, he must transfer the patient's medical record to a colleague of the patient's choice.

CONCLUSION

The debate as to who should make death decision is far from over. This issue tends to invite disproportionate attention from the legislature, policy-maker as well as laymen. The proponent of euthanasia believes that even though life need to be preserved, self-determination and personal autonomy must always prevail, especially where lives had become burdensome as a result of "torturing and lingering pain". In other words, the patient autonomous choices need to be respected as long as those choices do not result in harm on others. On the other hand, the opponent of this practice contended that euthanasia is unnecessary due to medical advances where nowadays most countries manage to provide both palliative care and hospice care. In addition, it is hard to justify the competency and voluntariness of the respective patient while making such a decision.

When analyzing individual self-determination, personal autonomy and liberty, the authors believe that the doctrine of substitute judgment also need to be highlighted. The doctrine which stated that the guardian ad litem will have the sole responsibility in determining the patient's true wishes is left with loopholes. This is due to the fact that without living will, it is difficult to establish the real wishes of the respective patient. This test requires a detailed inquiry into the patients' view and preferences to determine how he would have responded had he been competent to make a decision. And such decision is very subjective one. Even the courts are in disagreement as to the degree of evidence required to adopt the test.

The authors also believe that in justifying euthanasia, it may lead to diversion of Hippocratic Oath upheld by medical practitioners. The oath among others require them to try to their best ability to treat and preserve the patient's life and not simply succumb to outside pressure, in line with its essence, "may I care for others as I would have them care for me".

It should be noted that the general position in law is that euthanasia is strictly prohibited. In those legal systems, the motive of the accused person is irrelevant, as long as the accused has the knowledge that death would result from his actions, or he has an intention to kill, the act of euthanasia is regarded as murder. On the other hand, a different approach taken by some countries where the motive such as to relieve unbearable pain and suffering or acting on the patient's request and consent is recognized not only as a mitigating factor, but also may acquit the accused from being charged for murder. In this respect, the authors are of the opinion that legislature need to be far more circumspect in legislating such a law, taking into consideration the moral and ethical values, as well as the religion, in balancing the immediate interest of the respective patient.

To conclude, it is submitted that, the time has come for us to take another look at the whole of the jurisprudence in this area. We believe that even though personal autonomy and liberty should be

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[25] South Australian Voluntary Euthanasia Society (SAVES), *"Voluntary Euthanasia in Belgium"*, http://www.saves.asn.au/resources/facts/fs26.htm- 08.07.2005

[26] Ibid.

upheld, still the paramount consideration should be given to the religion, ethical and moral values. Thus, the sanctity of life should prevail.

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