



Assisted suicide through the prism of the right to life



Danuta Mendelson*, Mirko Bagaric

School of Law, Deakin University, Melbourne, Australia

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ABSTRACT

Part of the reason for the ongoing confusion regarding the status of assisted suicide is the cluttered moral and legal matrix that is normally invoked to evaluate the practice. It results in a calculus that is impossible to coherently unravel, allowing commentators to tenably assert any position. The authors attempt to inject clarity into the debate by focusing on the issue through the lens of the most important interest at stake: the right to life. It is arguable that while there are well-established exceptions to the right to life, they only apply where the right to life is itself at stake (such as self-defence). There is no sound argument for suggesting that the circumstances underpinning suicide constitute another exception to the right to life. Thus, suicide and assisted suicide are unjustifiable. An analysis of the empirical data in jurisdictions where assisted suicide has been legalised suggests that legalisation leads to an increase in assisted suicides. The adverse indirect consequences of the often ostensibly compassionate act of assisted suicide outweigh any supposed benefits from the practice. It follows that assisted suicide should lead to criminal sanctions. At the same time, it is important to acknowledge that, paradoxically, the right to life arguments against assisted suicide mandate greater community measures to eliminate or reduce the causes of suicide.

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1. Introduction

Suicide and assisted suicide raise complex moral, religious, cultural, medical and legal issues. The issues have been considered at length in the literature. Despite this (and, to some extent, because of this) the status of suicide and assisted suicide remains contentious. A key reason for the lack of clarity in this area is the emotive nature of the subject matter, and a suspicion that many of the doctrinal reasons advanced in the debate are driven (often subconsciously) by underlying moral and religious perspectives. This is to be expected. Issues of life and death are cardinal to human existence and fundamentally define the values and ethos of a society.

It would be unusual if debates on important topics such as assisted suicide were not influenced by the underlying moral and religious views of authors. And it is logically valid for people to agitate for a viewpoint which coheres with their fundamental beliefs and values. However, the debate can become confused and skewed when the doctrinal reasons underpinning arguments are not expressly articulated.

Another reason for the ongoing uncertainty regarding the status of assisted suicide is the number of often competing ideals and values that are relevant to the debate. Identifying and, seemingly simultaneously, weighing and conflating these issues arguably exhaust the bounds of plausible mental gymnastics.

It is important that legalisation of assisted suicide should be examined in the wider context of suicide. This analysis attempts to avoid the emotion and doctrinal confusion that has seeped into the debate on assisted suicide by undertaking a thorough examination of the importance of human life and the circumstances where this interest can be defeated by other interests. It concludes that the deliberate taking of life of another is wrong in all contexts, except for self-defence and in limited cases of necessity.

It could be asserted that 'the core argument [in this paper] cannot be true. Even if we assume that we have a right to life and it is the most important right, then it cannot be said that suicides are morally wrong. Suicide cannot violate that right. Death causes the person to cease to exist, which means that the person's rights cease to exist at the very moment of death. The deceased cannot have her rights violated because she does not exist to have rights or to be affected by them after her death. Therefore it is impossible for the right to life to prohibit suicide because it can never come into play. Even in assisted suicide, no rights are violated because the person has ceased to exist'. However, the fact that an interest ceases to exist after an act does not mean that the act does not violate it. A person's right to liberty ceases upon being sentenced to imprisonment for life. The fact that liberty no longer exists after the commencement of the jail term, does not mean that the judicial determination did not violate the right to liberty. The right to life to be violated does not need to be violated on a continuing basis to have been violated. The instant of death is the exact point that it is violated. The key argument of the analysis to follow is that assisted suicide should be rejected as a valid response to any human predicament because of the importance and inflexible character of the right to life.

* Corresponding author at: School of Law, Faculty of Business & Law, Deakin University, 221 Burwood Highway, Burwood, Victoria 3125, Australia.

E-mail address: Danuta.mendelson@deakin.edu.au (D. Mendelson).

This recommendation, however, is not definitive because, as is discussed below, the scope of this article does not allow for extensive examination of the other rationales that have been advanced in favour of assisted suicide.

What should be the appropriate response to suicide and assisted suicide? Whereas the move in most jurisdictions to decriminalisation of suicide is appropriate, the same conclusion does not apply in the case of assisted suicide. In theory, a tenable argument based on the right to and respect for personal autonomy can be made for legalising assisted suicide. Arguably, criminalising assisted suicide polarises the debate and discourages measured and nuanced discussion regarding the most effective approach to assisted suicide. Further, there is a perception that the motive for assisted suicide is often removed from the malevolent desires, such as anger and jealousy, that underpin most homicides.

However, these ostensibly appealing arguments are defeated by the overwhelming trend of the empirical evidence concerning the wider impact of legalising assisted suicide. Decriminalising assisted suicide seems to make bad things worse and leads to many more situations where life is cut short. Statistical data suggest that jurisdictions which have allowed assisted suicide tend to have higher rates of suicide.¹ Rather than leading to more compassion, assisted suicide appears to result in the more frequent destruction of the interest (life) upon which the capacity to experience the sensations which can incline some towards assisted suicide is contingent. Arguments in favour of assisted suicide are, hence, contradictory and should be rejected.

While assisted suicide should be a criminal offence, the right to life arguments which support that position also entail the imperative that more resources should be directed to discouraging individuals from taking their own life.

2. The current legal position

Suicide is the act of deliberately taking one's own life. Suicide is no longer unlawful in most Western jurisdictions. The rationale for decriminalising suicide does not reflect a diminution of the importance with which human life is held, but rather the reality that there are no reasons of justice or practical utility in subjecting suicide survivors to criminal sanctions. Effectively, it is an endorsement of the view that a person who is contemplating self-destruction will not be deterred by the threat of criminal sanctions, and the realisation that suicide survivors are more in need of help than state-imposed punishment.

Assisted suicide occurs when a person is aided in taking his or her life by another, for example, by being intentionally supplied with lethal drugs²; the patient dies not from their underlying disease but as a result of ingestion of the prescribed substances (see below).³ Assisted suicide with notable exceptions (some of which will be discussed below),⁴ remains a criminal offence in most jurisdictions.

¹ For example, in Belgium (population 11,007,020), where euthanasia and assisted suicide have been legal since the enactment of the Euthanasia Act 2002 (la loi du 28 Mai 2002 relative à l'euthanasie), suicide data show that in 2008, 1027 persons died by suicide (16.7 deaths by suicide per 100,000 citizens), excluding the over 700 deaths by euthanasia and assisted suicide. Commission Fédérale de contrôle et d'évaluation de l'euthanasie «Quatrième rapport aux chambres législatives (années 2008 et 2009)» of 8 June 2010, <http://www.dplace.be/ezo/downloads/Suicidaal%20Gedrag%20Vlaanderen.pdf>.

² In terms of outcome, this practice obviously has many similarities with euthanasia. The difference between active voluntary euthanasia and assisted suicide lies in who commits the last act. Their similarity lies in the involvement of another person to promote or bring about death.

³ For a discussion of distinctions between assisted suicide, euthanasia and palliative care see Danuta Mendelson, *Palliative Care, Assisted Suicide or Euthanasia? Toward a Common Discourse in the Terminology of Treatments at the End of Life*, 7(5) *Progress in Palliative Care* 230 (1999). For a more recent comprehensive definition of assisted suicide, see Michael Cholbi, *Suicide: the Philosophical Dimensions* (2011).

⁴ Assisted suicide was lawful in the Northern Territory for a short period in 1997, and is lawful in certain circumstances in the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, and Montana.

This coheres with the principle that a primary societal function of criminal law is to protect life. The state has an obvious interest in the preservation of human life, including the prevention of suicide.⁵

The legal status of assisted suicide has been considered by courts in numerous jurisdictions. The seminal judgments on this topic are illuminating, not so much for the conclusions reached but for the manner in which they often usefully highlight the underlying complex moral, social and medical considerations normally invoked in assessing the appropriateness of assisted suicide. In this article, the examination of assisted suicide will be normative in nature. While there is no necessary connection between the law and morality; moral issues necessarily play a cardinal role in the legal status of matters that are defining of the values of a society. Matters pertaining to life and death fall into this category. Hence the seminal cases on assisted suicide are replete with moral discourse and value laden conclusions. The moral reasoning in some of the judgments is questionable, but in considering the status of assisted suicide it would be remiss to ignore the thorough judicial examination that the issue has received, even though it is contextualised by an ostensibly legal framework.

The discussion below will encompass a brief discussion of legislation in relevant jurisdictions and several of the key legal judgments as a means of pragmatically highlighting the complex nature of the competing issues that are typically raised in the debate. Although the article examines common law jurisdictions; the facts, principles and approaches discussed below have broader applicability and resonance.

2.1. The seminal common law judicial authorities

The leading common law authority on point is the decision of the Canadian Supreme Court in *Rodriguez v A-G British Columbia* [1994] 85 CCC (3d) 15. After considering the legal situation in other jurisdictions, Sopinka J stated that a prohibition on assisted suicide 'is the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights'.⁶

Mrs Rodriguez, a 42-year-old woman with Lou Gehrig's disease (amyotrophic lateral sclerosis), wished for a doctor to set up technological means by which she might be able to end her life by her own hand at the time of her choosing. She applied for an order that s.241b of the *Criminal Code*, which prohibits the giving of assistance to commit suicide, be declared invalid on the basis that it violated her rights under the *Canadian Charter of Rights and Freedoms*, which includes the right to liberty and security of person. A 5:4 majority of the court held that personal liberty did not prevail over the proscription against assisted suicide, which protects the terminally ill who are particularly vulnerable. Due to the inability to provide adequate safeguards to protect the terminally ill, the majority considered that a complete prohibition of assisted suicide was necessary. In the Charter, the right to liberty is limited by principles of 'fundamental justice', and while the decision constituted an encroachment upon the liberty of Mrs Rodriguez, it was held not to be contrary to the fundamental interests of justice, which included the interests of the state in ensuring the protection of its vulnerable citizens. The encroachment upon the autonomy of Mrs Rodriguez reflected the policy that human life should not be depreciated by allowing life to be taken.

⁵ *Superintendent of Belchertown State School v Saikewicz* (370 NE 2d 417 (Mass. 1977)); *Cruzan v Director, Missouri Department of Health* (497 US 261 (1990)). The state's interest in the preservation of life is enshrined in the American Declaration of Independence and the Constitution of the United States.

⁶ *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519, 605.

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