



A Role for Judges in Assisted Dying

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Abstract

Medically provoked death, whether euthanasia or assisted suicide, is a common issue for discussion in various forums, participants coming from widely differing fields of knowledge, among who are, of course, doctors. Substantial legal differences exist in Europe on this issue and in an ever-wider Europe, it is essential, for practical reasons, that legislation be standardised. We would like to propose possible regulations that would provide effective safeguards in the application of euthanasia or assisted suicide.

Keywords

Euthanasia, Assisted suicide, End of life decisions, Law

Introduction

Medically provoked death, whether euthanasia or assisted suicide, is a common issue for discussion in various forums, participants coming from widely differing fields of knowledge, among who are, of course, doctors.

A study carried out in France among a lay population found that the express request of the patient was the most important factor in either accepting or rejecting assisted suicide or euthanasia (1). This request would have to be made repeatedly so that it could be taken as a serious request, rather than one forced on the person in question by external circumstances.

Later, another study carried out in 12 European countries showed that the trend towards accepting

euthanasia had grown over the last two decades by an average of 22%; the countries in which the increase in acceptance was greater were Belgium, Italy, Spain and Sweden. Only Germany presented results opposed to those of the rest of the countries studied (2).

One important finding from that study is that a higher level of educational training was associated with a greater acceptance of provoked death.

More recently, an excellent piece of work showed the substantial legal differences that exist in Europe on this issue and also the discrepancies that can be perceived between the professional groupings of the countries studied (3). The authors of this paper have added to that the information by describing the state of affairs in Spain (4).

In an ever-wider Europe, it is essential, for practical reasons, that legislation be standardised.

Moreover, the thoughts and feelings of those who find themselves in a situation of approaching death must be borne in mind when it comes to tackling the issue of regulations, and particularly of those who fear the application of non-voluntary euthanasia (5).

It is quite clear that a decision to request euthanasia or assisted suicide is- should be- a fully self-conscious act.

Obviously, this is not the case when euthanasia is administered in the intensive care unit to a person who has suffered a cerebral injury (6). This, however, is not the ideal situation for freely taking decisions.

Neither is there any independent will involved in the application of euthanasia administered to babies born with spina bifida (7), a practice employed almost systematically in the Netherlands.

There is also evidence to show that non-voluntary euthanasia (in non-competent patients) or involuntary euthanasia (when the patient is not consulted) does take place and that the authorities responsible for watching out for these cases are quite tolerant of these practices (8).

A regulation proposal

By making use of several fully effective legal situations –although in different territorial fields- we would like to propose possible regulations that would provide effective safeguards in the application of euthanasia or assisted suicide.

The first arises from a decision of the European Court of Human Rights (ECHR) that declares that the judges of the United Kingdom are the guarantors of an individual's rights when decisions have to be taken on the possible terminating of a child's life (9).

The second is based on the existence of an article in the Spanish Penal Code through which the sterilisation of incapacitated individuals is regulated (10). Article 156 states the following:

"However, the sterilisation of an incapacitated person who suffers a serious psychic deficiency shall not be punishable when that sterilisation, taking the greater interest of the incapacitated person as the guiding principle, has been authorised by the judge, either in the same incapacitation proceedings, or in proceedings of voluntary jurisdiction, following a request by the legal representative of the incapacitated person, and having heard the declaration of two specialists, the Public Prosecutors Office and prior exploration of the incapacity".

Taking this article as a basis, if we replace the concept of sterilisation with that of assisted suicide and the concept of incapacity with that of the petitioner, the text would read as follows:

"However, assistance to the petitioner's suicide shall not be punishable when that suicide, taking the greater interest of the petitioner as the guiding principle, has been authorised by the judge on the request of the interested party, having heard the declaration of two specialists, the Public Prosecutors Office and prior exploration of legal proceedings".

Hence, in our proposal and to ensure the greatest safeguards, it would be the judge who, having heard all the parties involved, would authorise that the person who wished to die could be assisted to do so.

Note that it is not only the judge who is responsible for making sure that legal proceedings are complied with, but that the Public Prosecutors Office must also be involved.

With regard to who is responsible for executing the order, another Spanish law (similar to others in other countries) could be made use of, namely the Law on Juries (11).

This regulation establishes that anyone may be named as a member of the jury (with certain legal exceptions) but that certain reasons can be cited for not participating in the very difficult task of judging the conduct of others.

Furthermore, given that there is between 60 and 70 percent of the population in favour of legalizing assisted suicide (12, 13), a list of voluntary assistants to suicide could be established who would be willing to fulfill the above mentioned legal authorisation. This list would be open and freely accessible to anyone, regardless of the profession.

Clearly, health personnel would be the most appropriate. However, just as first aid can be learnt with a certain amount of training, so could final aid.

For greater judicial control, the volunteers list would be under the control of a judge responsible for Civil Registry Offices.

Lastly, we still have to define who can apply for the application of assisted suicide.

For this, we could also make use of article 143.4 of the Spanish Penal Code (14), which considers extenuating circumstances for those who assist in the suicide of another and that demands that "the victim suffers a serious illness that would necessarily lead to his or her death, or that causes permanent and serious suffering difficult to sustain" in order to be applied.

As can be seen, our proposal provides a solution with ample legal cover, so as to prevent possible abuses, and responds to the problems arising out of performing assisted suicide or euthanasia:

Who authorises it?

Who performs it?

Who requests it?

A practical case

The procedure is really quite simple and safe. If someone wishes to die voluntarily, he or she must take the following steps:

1. Presentation of his or her application before the corresponding judge. The judge or magistrate, having examined the case and duly assessed it, authorises the practice of assisted suicide.

2. Communication to the judge responsible for the list of volunteers, who, in the way established in the Law on Assisted Suicide and Euthanasia, will indicate to the corresponding person that he or she must comply with legal proceedings. This participation is not compulsory, but would deal with the moral objections of individual citizens.

3. The citizen designated will then go to the petitioner's residence or to where he or she is living at that moment and proceed to undertake the necessary measures to directly or indirectly assist him or her in the exercise of his or her right to dispose of his or her own life.

Every one could recognize his own best interest much better than anyone else. But in some circumstances, i.e., when the patient is unconscious, we need an independent professional like a judge, to evaluate the best interest of patient, so that the procedure enjoys the greatest and most effective safeguards and legal protection, the figure of the Guarantor Judge could be created. His or her functions would be limited, in addition to checking that all legal requirements have been complied with in the prior procedure, to asking the petitioner if he or she wishes to persist with his or her death wish.

In the event of an affirmative answer, the judge would exhort the designated volunteer with a simple "Let the judicial authorisation be fulfilled".

Given that assisted suicide and euthanasia is a social problem, it should be society as a whole, i.e., all its members, who contribute to providing a solution.

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