

Euthanasia Legislation in the European Union: is a Universal Law Possible?

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Introduction

The European Union is the culmination of a long effort to create a unified, borderless Europe. Although it evolved from what were primarily a series of economic agreements, the competency of the European Union is ever expanding into new areas of policy. The European Union is gaining recognition as a single entity, espousing European views, on the world stage. For example, the European Union as a single political entity now calls for the abolition of capital punishment and torture.

However, the original economic purpose of the European Union still dominates much of the policy it creates. Member states guard their sovereignty in culturally sensitive policy areas as there remains a multitude of discordant voices within this larger administrative body. Thus there is little actual political unity within the European Union as most policy is still created at the national level. The Maastricht Treaty divided policy concerns under European Union jurisdiction into the “three pillars,” however the enumerated policies are anything but comprehensive.¹ Yet even with these gaps in competency, there is still room for the intrusion of the policies of the European Union into areas of law that were perhaps unforeseen by the member states.

One such area is the area of healthcare. Healthcare policy is complex. It meshes economic policy, human rights, criminal law, professional licensing and many other areas into one concept. Furthermore, the cultural expectations are incredibly diverse. Even the role of the patient and the physician varies from nation to nation. Therefore, any part of the European superstructure that has the potential to significantly alter the functioning of any part of a member state's healthcare system will be highly controversial.

It is due to this discordance amongst the states that the European Union will likely remain subordinate to the member states in areas of potential cultural conflict. To illustrate the reluctance of the European Union to take a proactive role in areas such as these, this essay will focus on the issue of euthanasia and its development within Europe. This issue is highly divisive and will likely never see resolution within the European Union structure. This disunity should not be surprising, as many states are divided internally on whether or not such procedures should be legalized. Euthanasia is an appropriate focal point for exploring further unification of Europe, as the debates surrounding it illustrate many of the abstract principles guiding individual nations. This in turn helps to demonstrate how truly diverse and incompatible many of these views are.

Each state has its own unique history and views, however, it would be beyond the scope of

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¹ Leonard, Richard L., *The Economist Guide to the European Union 8th Ed.* (Profile Books Ltd., London, 2002), 40. First Pillar The European Community: Institutions and legislative procedures, agricultural policy, the internal market, environment, citizen's rights, economic and monetary union, regional policy etc.; Pillar Two: Common Foreign and Security Policy; Pillar Three Justice and Home Affairs: asylum policy, immigration, the fight against drugs, police cooperation etc.

this essay to compare them all and the number of comparisons would be so large that they would cease to be meaningful. However, in order to conduct a cross-cultural comparison of euthanasia laws, those nations picked must be sufficiently different and representative of the broad array of opinions within Europe. I chose the United Kingdom because it is the only common-law state in the EU, and has a history of both Protestant and Catholic rule. Greece was chosen to balance out the western European perspective and exemplify a view less influenced by enlightenment liberal ideals. Finally, the Netherlands was chosen as the representative state in which euthanasia has been legalized and regulated. The Netherlands have a unique history of secularization and tolerance amongst the European states, which surprisingly accounts for the uneasiness of its citizens in merging with a larger extra-state body.

After the comparison of Greece, the United Kingdom and the Netherlands, I will compare how euthanasia fits into the larger picture of European policy. Since health policy is extremely broad, I have chosen to focus this essay on matters concerning only human rights. Economic policy will likely affect the delivery or the access to healthcare; however, this falls within an area in which the European Union already has competence. Therefore, changes might be expected to occur within the European Union and filter down to the member states.

Through the comparative analysis of the legislative history of euthanasia across three of the member states of the European Union, it is evident that legislation can be made through democratic pressure, court reform or legislative change influenced by external factors. With respect to euthanasia, the European Convention on Human Rights serves as a useful predictor for the development of legislation either universally prohibiting or universally legalizing the practice across the European Union. Ultimately, this issue will likely remain regionalized and beyond the legislative scope of any pan-European body due to the potential for conflict and alienation of any number of member states.

Definitions

The euthanasia debate is easily confused due to the many conflicting interpretations of the word itself. For the purpose of this essay, euthanasia is assumed to mean *voluntary active euthanasia*: an act that causes the death of the patient through administering life-shortening treatment at the expressed will of the patient.² So-called passive euthanasia through withdrawal of life-sustaining treatment will not be an issue discussed in this paper.

Physician-assisted suicide is another term that arises in this debate and occurs where the physician supplies information or the means of committing suicide; however the patient actually terminates his or her own life.³

Autonomy is one of the overarching principles guiding healthcare ethics and legislation and is linked with the inviolability of the person. Here, autonomy will refer to the ethical principal of respecting an individual's capacity and freedom to make his or her own

² Gordijn, Bert, Ben Crul and Zbigniew Zylicz 'Euthanasia and physician-assisted suicide', in Ten Have, H. and Clark, D (eds.), *The Ethics of Palliative Care: European perspectives* (Buckingham, Open University Press, 2002), 182.

³ *Ibid.*

choices.⁴

Greece

Greece is considered by many to be the birthplace of European society. In fact, it is from the Greek language that we acquired the roots of many of our words, including euthanasia.⁵ In ancient Greece, suicide was generally viewed in a positive light, from Epicure and the pursuit of the avoidance of pain, to Socrates, who chose death by hemlock over a life in exile.⁶ Much has changed since the ancient era, however. Although not entirely forgotten, the ways of the Pagan ancients has been replaced by the views of Orthodox Christianity. Today, approximately 98% of Greeks belong to the Orthodox Church.⁷ The Orthodox Church forbids euthanasia as life is a holy gift from God; therefore it has an intrinsic dignity that protects it from unjust attack.⁸ The Orthodox view of death is also rooted in a type of mysticism more commonly associated with the East than the more rationalistic views held by people of Western Europe. Death is seen as a mystery, which is by definition indefinable and not a scientific moment identified with biological states such as cessation of brain function.⁹ Due to the sacredness of death, as the moment when a person comes nearest to God, Orthodox Christians consider it unethical to either hasten death or excessively prolong life.¹⁰

This Christian attitude heavily impacts the Greek legal system. Euthanasia is regulated within the Penal Code and is thus a criminal offence. However, it is not dealt with in any comprehensive, singular fashion. Article 299 of the Greek penal code proscribes involuntary homicide with a mandatory sentence of life imprisonment.¹¹ However, there is a qualified sanctity of life, in that under certain circumstances the law will reflect the motive of the person who kills.¹² Article 300 of the Penal code allows for voluntary euthanasia, though it is not called such. It punishes anyone who decides and executes homicide after an intense and persistent suffering from an incurable and unbearable disease with a sentence of 10 days to 5 years.¹³ These laws' foundations are that homicide and euthanasia are an insult to human life and should not go unpunished.¹⁴

Despite differential punishment, the attitude towards euthanasia in Greece is likely not to change much, unless the Greeks become more secular and move away from the Orthodox

⁴ Woods, Simon 'Respect for autonomy and palliative care', in Ten Have, H. and Clark, D (eds.), *The Ethics of Palliative Care: European perspectives* (Buckingham, Open University Press, 2002), 153, 154.

⁵ Gordijn, 182 *Eu* = good *Thanatos* = death

⁶ Mystakidou, Kyriaki, 'The Evolution of Euthanasia and its Perceptions in Greek Culture and Civilization', [2005] 48(1) *Perspect. Biol. Med.* 95, 97, 98.

⁷ Mavroforou, Anna, 'Euthanasia in Greece, Hippocrates' birthplace.', [2001] 8(2) *Eur. J. Health Law* 157, 161.

⁸ *Ibid.*

⁹ Hatzinikolaou, Father Nikolaos, 'Prolonging Life or Hindering Death? An Orthodox Perspective on Death, Dying and Euthanasia.', [2003] 9 (2/3) *Christ. Bioeth.* 187, 189.

¹⁰ Hatzinikolaou, 196.

¹¹ Mystakidou, 100.

¹² Mavroforou, 159.

¹³ Mystakidou, 100; Mavroforou, 159, 160 *Provisions: 1. Explicit and persistent demand of the victim declared repeatedly in written, verbally or by gestures. 2. The patient should be conscious and be able to fully understand what he demands. Mentally handicapped patients or minors are not legally eligible to decide of their own. 3. The patient should suffer from incurable disease or and unbearable physical handicap such as blindness or amputation. 4. The perpetrator must have expressed mercy for the victim.*

¹⁴ Mavroforou, 158, Mystakidou, 100.

Church. As discussed above, the Orthodox Church is not open to euthanasia in anyway. This is further evidenced by a newspaper article released shortly after the Netherlands began to change its laws on euthanasia; the Orthodox Church released a statement of disapproval for "assisted suicide," confirming that only God can decide on life and death.¹⁵ The origins of Greek law and social ethics are different from other European countries in some ways. Greece was isolated from the rest of Europe during the renaissance because of the control of the Ottoman Empire.¹⁶ Therefore, Greek society evolved independently of the individualistic, liberal perspective that is dominant in many other nations. However, despite their separation from the enlightenment era, Greece was one of the first nations in Europe to adopt an all-inclusive, comprehensive code protecting the rights of person.¹⁷ One unique feature of Greek law is the apparent discord between the rights-based language of their laws and Constitution and the attitudes of the Greek people towards autonomy in healthcare. Greece led the way in codifying patient's rights. The legislation is comprehensive and contains requirements for rights to information and a requirement for informed consent.¹⁸ Thus, on the surface, Greece appears to be oriented toward a liberal perspective just as strongly as any other European country. However, Greek society is slow in adapting to the increased focus on the individual. This is particularly true when considering the patient-physician relationship. Paternalism and a reliance on physicians to do what is in the best interest for their patients is not a common sentiment in the European nations of today. However, the Greeks still follow a traditional pattern of "medical authority" and are very slow in changing towards a system of patient driven healthcare.¹⁹ The lack of change within Greek society is worrying for those who advocate the rights-based perspective of legalization of euthanasia. If the nation were to become more tolerant of the idea and a law passed allowing physicians to conduct such activities, serious questions would arise as to the voluntary nature of undertaking. It is reasonably foreseeable that a physician could decide euthanasia was in the patient's best interest and proceed with killing the patient. Even if involuntary euthanasia remained illegal, social models of behaviour change slowly and haphazardly and people might tolerate a physician taking on his traditional role as the source of medical decisions on behalf of the patient. This would most certainly run afoul of human rights legislation agreed upon by European countries but it would potentially be difficult to stop. The Greek legal and social contrast illustrates a problem that is sure to plague any further unification attempts in terms of euthanasia or any other rights-based legislation. Not all nations think the same way. Regarding black letter law, Greece appears very similar to any other Western country in terms of the predominant importance of individual autonomy in healthcare decision-making. However, in practice, the physician is given great power by the people to make decisions on their behalf. It is difficult to predict these types of differences. It also helps illustrate how policies put in place might not have the desired effect on the people within national borders. This conflict also raises some of the problems of unification in a strongly religious society.

¹⁵ Anonymous (2000) 'Church of Greece: Euthanasia is Assisted Suicide', *Macedonian Press Agency*, 1.

¹⁶ Mystakidou, 99.

¹⁷ Dacoronia, Eugenia, 'The Development of the Greek Civil Law: From its Roman--Byzantine Origins to its Contemporary European Orientation.', [2003] 11(5) *Europ. Rev. Pr. L.* 661, 665.

¹⁸ Merakou, Koula, 'Development of Patients' Rights Legislation', [1999] 6 (1) *Eur. J. Health Law* 71, 73, 74.

¹⁹ Ploumbidis, D., 'Ethical issues of deinstitutionalisation in Greece.', [2001] *Ethical Aspects of Deinstitutionalization in Mental Health Care Final Report*, 68.

Certainly euthanasia legislation could be imposed by an extra-state body such as the European Union, but if it did not meld well with tradition the laws might end up being ignored by the people. Or, more likely and more devastating, Greek people would end up feeling alienated by the laws imposed upon them and feel resentment towards the institutions that implemented them. It does not take much to imagine the destabilizing effect this could have on the European Union or any other structure of its type. Secularization seems to be gaining ground, particularly as a driving force in the creation of a unified Europe.²⁰ Since the secular view is put forth in rights-based language in terms of European Union policy, if large nations become increasingly secular and begin to view issues of euthanasia as a question of balancing rights, the roots for conflict with nations of differing traditions becomes evident. As long as rights-based policies and law-making works to the same teleological conclusion as Christian beliefs, Greeks are unlikely to have objections; however, if this shifts, nations such as this will likely become alienated, barring increased secularization within their borders.

Great Britain

The origins of active euthanasia in British thought are found in the works of Thomas More and Francis Bacon.²¹ In the early 17th century, Bacon discussed euthanasia as a fair, easy passage.²² Beginning in the late 19th century, euthanasia again appeared on the philosophical stage of Great Britain. The discussion was heavily influenced by the spirit of the time, that is, by individualism, rationalism and laissez-faire economics. Indeed, the debate today is very much grounded in traditional liberal thought.

In Great Britain, euthanasia is illegal and punishable under criminal law.²³ There are no exceptions in English law to 'mercy killings', although a relative of a suffering person may bring up a defence to reduce the charge from murder to manslaughter.²⁴ This uncompromising attitude towards deliberate homicide reflects the fact that traditionally in Great Britain's laws maintaining social order supersedes individual autonomy.²⁵

The origin of this strict attitude to the inviolability of life can be found in the distant past of the evolution of common law. Heavily influenced by ecclesiastical teachings, the life is regarded as sacred and therefore protection is extended, even to the dying.²⁶ Life is regarded as inalienable; one cannot consent to it being ended, just as one cannot license another to commit a crime.²⁷ But that does not put an end to the euthanasia debate.

The problem arises in common law England because two rights are competing for predominance. All rational patients have the right to make their own decisions over

20 Anonymous 'God Missing from EU constitution', [2003] BBC News World Edition found at <http://news.bbc.co.uk/2/hi/europe/2734345.stm>.

21 Emanuel, Ezekial, 'The History of Euthanasia Debates in the United States and Britain.', [1994] 121(10) Ann. Intern. Med. 793, 795.

22 Bacon, Francis *The Proficiency and Advancement of Learning*, (London, 1605) found at <http://www1.uni-bremen.de/~kr538/baconadv.html>, para. 7.

23 Grubb, Andrew 'Euthanasia in England — A Law Lacking Compassion?', [2001] 8(2) Eur. J. Health Law 89, 89; Otlowski, Margaret, *Voluntary Euthanasia and the Common Law*, (Clarendon Press, Oxford, 1997), 59 .

24 Grubb, 89, 90 *It is possible for a charge of murder to be reduced to manslaughter if a relative who kills can show "abnormality of the mind" that has "substantially impaired his mental responsibility"*.

25 Otlowski, 21.

26 Otlowski, 19.

27 Otlowski, 20.

treatment.²⁸ In fact the right to self-determination gives rise to the common law doctrine of consent.²⁹ However, as discussed above, one cannot give consent to another to end one's own life. This has caused a sort of stalemate within the British legal system. Euthanasia laws are dependent on a shift in perspective. Once public opinion sways the lawmaking bodies to consider autonomy dominant to the sanctity of life, then the laws will likely begin to shift.

It might seem presumptuous to assume that the law in Great Britain will eventually allow euthanasia, however, when the history of increasing autonomy is taken into consideration, legalized euthanasia is likely to be the outcome. Patient autonomy in medical issues was introduced into British legislation in approximately 1914.³⁰ Certainly, this is in keeping with the common law traditions of the inviolability of the person. What is left is the balance between the right to autonomy and order in society. Order in society is important, however, it may be undemocratic to enforce a ban on euthanasia when 81% of Britons responded in favour of a bill to legalize it.³¹ If paternalism is unacceptable in the delivery of healthcare it most likely is unacceptable in the legislature.

However, construction of legislation is a slow process. Currently, the *Assisted Dying for the Terminally Ill Bill* is under debate in Great Britain.³² It is just a question of whether or not the bill will make it through the complex parliamentary procedures or if it will stall partway.

One of the unique features of Common Law states is the use of precedent in legal proceedings. Great Britain and other common law states look at the precedents set by previous legal rulings to determine what the law is and how it ought to be applied. This can effectively speed up the legislative process if judges undertake an activist role by broadening definitions of protected rights, for example, to encompass a previously controversial issue. Proponents of euthanasia law suggested the courts take an active role in determining the predominance of autonomy; however, they have so far declined to do so in the United Kingdom.³³

What makes this extremely peculiar is the discord between the institutions of justice and legislature and the way euthanasia is prosecuted. There is a general unwillingness of juries to convict family members or physicians accused of murder in cases of mercy killings out of sympathy of both the accused and the victim.³⁴ This makes prosecution rather difficult. In fact, prosecutors are finding it necessary to change the charges to crimes such as attempted murder or manslaughter in order to avoid having the jury acquit.³⁵ This led to a prevailing opinion that if one were to be found out after performing euthanasia then despite breaking substantive law, no charges would follow. This changed after the conviction of

²⁸ Blaser, Art, 'Euthanasia and Human Rights Law: Compatible or Contradictory?' [2000] *International Studies Association*, <http://www.ciaonet.org/isa/bla01/>.

²⁹ Otlowski, 35.

³⁰ Biggs, Hazel, 'The Assisted Dying for the Terminally Ill Bill 2004: Will English Law Soon Allow Patients the Choice to Die?', [2005] 12(1) *Eur. J. Health Law* 43, 46.

³¹ Biggs, 47.

³² Biggs, 53.

³³ Grubb, 90.

³⁴ Lynn, Robert, 'Ending Life' in Grubb, A. and Laing, Y. (eds.) *Principles of Medical Law*, 2nd ed. (Oxford University Press, New York, 2004), 1107.

³⁵ Lynn, 1108 *The jury acquitted three physicians, Adams, Carr and Lodwig because the killings were committed on compassionate grounds.*

Dr. Cox on attempted murder.³⁶ However, euthanasia undoubtedly continues to be performed quietly.

For now the debate continues between those for and against assisted suicide. Those against it usually speak of the slippery slope towards justifying all killings and the chilling effect that would have on the rights of the individual.³⁷ They argue that there would be no voluntary decisions because people would feel pressured into making such decisions and that patient trust in physicians would be eroded as they would become involved in taking away life as much as they are involved in healing.³⁸ On the opposite end, supporters argue that the continued ban threatens the interests and rights of patients by limiting their options. Since it attracts criminal liability, some doctors may be willing to accede to the requests and some may not be, leading to inconsistency in treatment and furthermore, the unregulated practice threatens self-determination because of the practice of involuntary euthanasia practised without regulatory scrutiny.³⁹

Since Britain signed onto the European Convention of Human Rights, much of the legislation in this area has been updated to harmonize with European policy. However, the United Kingdom Human Rights Act 1998 still contains a conflict between the right to self-determination and the right to life.⁴⁰ Early in its adoption, some hoped that the European Court would bring this argument to a close in favour of patient self-determination. However, the Diane Pretty case established that this will not be the case. Exercising its discretion the European Court of Human Rights was unwilling to interpret the right to self-determination broadly enough to encompass control over death, as there is no uniform European conception of this issue.⁴¹

Thus the outcome will depend on the legislative process. Perhaps eventually a bill will pass that decriminalizes euthanasia. However, until that happens, Great Britain will continue to have one of the strictest and most unforgiving legal systems in regards to euthanasia, despite the opinions of the citizenry.

The Netherlands

In the Netherlands, euthanasia began the path to decriminalization in 1973. The development of euthanasia legislation follows the opinion polls showing marked increase of approval, from 40% in 1966 to more than 70% support continuously since 1990.⁴² The Court of Leeuwarden found that a doctor could be shielded from criminal liability when substantive and procedural requirements had been met.⁴³ The Supreme Court made the most important court decision on this issue in 1984 when it accepted the termination of life

³⁶ Biggs, 45.

³⁷ Emanuel, 7.

³⁸ Nedwick, Christopher 'The Organisation of Health Care', in Grubb (ed.) *Principles of Medical Law*, 2nd ed. (Oxford University Press, New York, 2004), 8.

³⁹ Otlowski, 151.

⁴⁰ Lynn, 1110.

⁴¹ Wada, Emily, 'A Pretty Picture: the Margin of Appreciation and the Right to Assisted Suicide', [2005] 27(249) *Loy. L.A. Int'l & Comp. L. Rev.* 275, 275.

⁴² Pakes, Francis, 'Under Siege: The Global Fate of Euthanasia and Assisted-Suicide Legislation.', [2005] 13(2) *Eur.J.Crime Cr.L.Cr.J.* 199.

⁴³ Leenen, Henk, 'The Development of Euthanasia in the Netherlands.', [2001] 8(20) *Eur. J. Health Law* 125.

upon explicit request providing certain criteria were met.⁴⁴ Thus the path was paved for the practice of euthanasia in the European country most famed for its tolerance and social progressiveness.

Prior to the legislative amendments, an agreement was forged between the Minister of Justice and the Royal Dutch Medical Association to not prosecute physicians as long as they complied with the agreed notification procedures.⁴⁵ The courts would allow euthanasia as long as the requirements were fulfilled. There were several potential areas to allow doctors protection, but the Supreme Court opted to fit euthanasia under the defence of necessity.⁴⁶ In The Netherlands, necessity (also called duress) allows the transgression of law in cases of emergency, severe distress or conflicting duties; euthanasia was framed in terms of conflicting duties for a physician between a duty to maintain and preserve life and a duty to end unbearable, hopeless suffering.⁴⁷ This laid the groundwork for the introduction of legislation to formally decriminalize euthanasia.

The change finally came in 2001. There are many theories to explain how the government finally enacted this legislation. First, the political climate changed from 1994 to 2002. Two liberal parties and the labour party formed the majority of the seats in the government without much mainstream Christian party representation.⁴⁸ They pushed a myriad of liberalizing social reforms through, including the decriminalization of euthanasia. Perhaps part of the motivation to change the law was the lack of adherence by the public, thus its authority was undermined.⁴⁹

The main characteristic of the political attitude towards legislation in support of euthanasia in the Netherlands is the relative lack of controversy from within the country at the time of enactment. In other nations, there was a certain amount of discomfort. However, the Royal Dutch Medical Organization did not offer a message of strong opposition and neither did the majority of Dutch people.⁵⁰ This is likely due in part to the fact that euthanasia has been practiced in The Netherlands relatively openly since the decision in 1973. It is also in part because of the lack of a strong religious voice of opposition. These ingredients are crucial in explaining how the euthanasia bill came to be and why it does not face continual attacks. The changes that were made are different from those in England and Greece and perhaps reflect a uniquely Dutch urge to regulate and systematize euthanasia. While the English common law contains a defence for the relatives and family of the profoundly ill and the Greek law provides a lesser punishment for those who commit euthanasia upon request, Dutch law only allows physicians to execute euthanasia providing they follow strict regulations. For anyone falling outside this exception, euthanasia is still a crime as per the Dutch penal code

The Dutch law integrates patient autonomy into medical care by creating an unambiguous standard of care for physicians. Amongst the many requirements, the procedure must be

⁴⁴ Leenen, 126, 127 *Criteria: 1. a free explicit and well-considered request by the patient himself; 2. unbearable suffering and a hopeless situation without prospect of improvement; 3. no reasonable alternative available to alleviate the suffering; 4. the euthanasia is administered by a doctor; 5. the doctor has consulted another competent and independent doctor.*

⁴⁵ Lynn, 1131.

⁴⁶ Leenen, 126.

⁴⁷ *Ibid.*

⁴⁸ Pakes, 130.

⁴⁹ Leenen, 129.

⁵⁰ Pakes, 131.

voluntary and the patient must have been informed of and rejected all possible medical alternatives.⁵¹

Another interesting feature of the amendment of Dutch legislation is its conception as a community matter. The decision makers recognized that it is a matter of society and required democratic decision-making, yet it is practised on an individual, self-determined basis.⁵² This is very much in line with the defence of necessity that was implemented by the courts before the legislation passed. The defence was applied to physicians by framing euthanasia in terms of conflicting duties. On the one hand the Doctor had a duty to maintain the life of his or her patient, while on the other hand he or she has a duty to end unbearable, hopeless suffering.⁵³ The defence of necessity is constructed to allow for conflicting duties in The Netherlands and is thus unlike the Common Law defence of the same name.

The Netherlands has set up a sort of test case for euthanasia legalization. While the practice is still widely accepted within the country, the functional characteristics may serve to confirm some of the fears of those who object to the implementation of such programs elsewhere. In 1994, the Supreme Court extended the definition of suffering to non-terminal patients, including those in extreme psychological distress.⁵⁴ This concerns some people as they see it as a slippery slope. However, the voluntary limitation is still in place and it is not necessarily leading to anything that violates autonomy, as feared by opponents of euthanasia. Furthermore, in 2002, a Doctor Surturios was convicted because the man he euthanized had stated he was 'tired of life' and the court held that this was insufficient to justify euthanasia.⁵⁵

Yet, in a survey conducted in the Netherlands, some physicians stated they would be willing to perform euthanasia without explicit request on the premise that they must balance beneficence with autonomy.⁵⁶ This seems surprising considering the strict guidelines put in place. However, despite the non-voluntary administration of euthanasia at times, there does not appear to be any controversy amongst the Dutch people.

One final point on the Netherlands is the structure of the society itself. While euthanasia is frequently viewed as an expression of self-determination and thus a manifestation of libertarian principles, in The Netherlands the society itself has strong community values. These are reflected in their comprehensive national health insurance scheme.⁵⁷ Therefore, it helps demonstrate why euthanasia is acceptable to the Dutch people. In a society where healthcare is provided at no cost to the patient and without a private care provider, citizens will likely be less fearful of euthanasia being used against them rather than at their request.

Comparison of Selected Nations

The purpose of comparing the attitudes and policies regarding euthanasia in Greece, Great Britain and the Netherlands is to illustrate some of the differing fundamental principles at

⁵¹ Grubb, 1132.

⁵² Leenen, 128.

⁵³ Leenen, 126.

⁵⁴ Lynn, 1131.

⁵⁵ *Ibid.*

⁵⁶ Cohen-Almagor, Ricardo, 'Non-voluntary and Involuntary Euthanasia in the Netherlands: Dutch Perspectives', [2003] 18 Issues Law Med. 239, 244.

⁵⁷ Otlowski, 452.

work in various nations of the European Union. Three common themes emerge from the examination of these nations. First, there is the relationship between the people and their legal and legislative institutions. Next is the influence of social and religious values on decision-making. Then comes the implementation of Criminal Law to euthanasia and finally there are the competing conceptions of fundamental ethical and legal principles.

Greece is unique amongst these nations as the legislation preceded the opinion of the citizenry in terms of human rights. While Greek legislation has included protection of rights longer than most other European countries, the realization of these rights in society has not progressed rapidly.

In Great Britain, public support for euthanasia has existed for some time yet little or no progress has been made in formally liberalizing euthanasia laws. The legislative process is simply a slow one and may eventually be successful; however, it is not surprising that it has yet to conform with national opinion as elected governments are frequently hesitant to embrace controversial issues such as euthanasia. The courts would have the power to interpret case law to conform with public opinion (this is how Dutch euthanasia law came into being), but have declined to do so. From its conception in the seventies, the decriminalization of euthanasia has gained increasing support from the Dutch people. Upon the enactment of the legislation that finally regulated it, support was already very high and has remained so.

Generally, governments are reactive to politically sensitive legislative changes and thus tend to trail popular opinion. The process may be expedited by judicial intervention, depending on the willingness of the courts to undertake such action.

The influence of religion on legislation is likely most strongly felt in Greece, where the Orthodox Church maintains a strong presence. As long as people are retaining ties to a Christian faith, it is less likely that there will be mass support for legalizing euthanasia. In Great Britain and the Netherlands, religion is becoming less of a political force and we thus see the liberalization of social policy. However, religion is still a very real force at work.

The criminal law is an interesting reflection of societal values in that it can illustrate a nation's underlying values yet it cannot show how closely these laws are adhered to. In the Netherlands euthanasia remained under the prohibition of homicide long after these crimes ceased to be prosecuted. The same is true in Great Britain, though this is due to the attitudes of the jury rather than any legal precedent.

Furthermore, there are discordances in the wording of the laws and those who can be held criminally liable. In Great Britain only relatives of the victim have a defence for committing a homicide out of compassion, whereas in the Netherlands, the exclusion is only for a physician. Greek law provides a lesser offence for anyone who kills out of mercy at the request of the victim. This is an interesting reflection of the attitude towards physicians in that regulation, whether supportive or prohibitive seems to be the key in determining who can conduct euthanasia. Greece again seems anomalous compared with the two western states but this might be explained by the continued subscription to beneficence and paternalism in medical care.

Furthermore, the defences available in England are the narrowest, with only 'mental abnormality',⁵⁸ being allowed. It is then up to prosecutorial discretion to bring a lesser charge or for the jury to acquit. The Dutch exemption is entirely procedural and the Greek exemption examines motive, something that is not done in The Netherlands or Great

⁵⁸ Grubb, 89, 90.

Britain.

In Greece, the fundamental principles at work in healthcare have been legislated yet the physician still is held to be the primary agent in determining appropriate care. Due to the private nature of the implementation of healthcare, introducing patient autonomy into the Greek healthcare model is likely just a question of social evolution. It can be exercised with some discretion of the physician without raising the alarm in any way. From an autonomy perspective, legalizing euthanasia in this environment would be an ethical disaster.

Thus in Greece, the situation is somewhat different from that of Great Britain or the Netherlands. Both of these countries determined the validity of their respective euthanasia laws through balancing rights and duties. In Great Britain, the competing principles are largely public order based on the sanctity of life versus patient autonomy and the right to choose the method of one's death. The Netherlands saw the debate arise on similar grounds. However, due to the invocation of the defence of necessity, the competing duties of the doctor were introduced. This idea of competing duties persists in euthanasia decision-making processes today creating what might be described as a modified paternalist healthcare delivery system.

Where any controversial topic comes to the attention of the legislature, there will frequently be a disagreement on two or more fundamental principles. Where this occurs, it is difficult to alter the status quo and introduce legislature to effect change, as evidenced by both Great Britain and the Netherlands. However, the change will come in response to the shift in public opinion if it is legislative and it will likely develop concurrently in the case of judicial reasoning.

Thus in examining the implementation of any change to euthanasia law, or any other transnational law, within the context of the European Union or any larger body with judicial supremacy, the following factors must be considered:

Is there a general consensus on this issue? How will implementation affect society at large?

What religious factors could be relevant to implementation of this policy?

Who are the relevant agents affected by this law? Does this adhere to existing national laws?

What are the fundamental principles underlying this law? Are there any conflicts? Can these fundamental principles be interpreted in more than one way?

With these principles in mind, I will now examine the role of human rights legislation and criminal law from a European perspective.

Human Rights Legislation in Europe

In order to understand the potential for human rights development within the European Union, it is first necessary to examine the functioning of the European Convention of Human Rights and how the court affiliated with this body rules on difficult issues such as euthanasia.

This body is not actually part of the institutional structure of the European Union itself and not all European Unions are signatories to the Convention, though most are. However, the Charter of Rights and Freedoms proposed with the Draft Constitution Treaty borrows heavily from the European Convention of Human rights and should the European Union implement a codified bill of rights, it would take a very similar form.

European Convention on Human Rights

The European Convention on Human Rights (ECHR) is an institution of the Council of Europe and has been in place since 1950.⁵⁹ There are 46 members of the Council of Europe, who participate in this international body.⁶⁰ Individuals or groups can bring cases against their own states if their rights are being violated.⁶¹ However, this court falls short of the aims of the European Union, not due to its jurisdiction but due to the nature of its judgements. The European Convention on Human Rights is supreme to state law and attracts penalties and can negate national laws, although there is no mechanism in place for enforcement of the decisions it hands down.⁶² However, the decisions are meant to be complied with and signatories have committed themselves to securing human rights through this channel.⁶³ Thus, examining how the decisions of the European Court of Human Rights as the judiciary arm of the European Convention of Human Rights are implemented illustrates both the potential for intervention into the matters of sovereign states and the drawbacks associated with intervention. Furthermore, examining the case of euthanasia within the context of the European Court of Human Rights demonstrates the conservatism inherent in judicial activities and the hesitancy any pan-European body will have towards interfering with state policy in highly controversial areas.

A case addressing euthanasia came before the European Court of Human Rights in 2002. A woman, Diane Pretty, brought a case against the United Kingdom seeking to have their laws prohibiting euthanasia declared an infringement of her human rights. She suffered from a degenerative disease with no hope of improvement and sought to have immunity from prosecution for her husband if he assisted her in committing suicide, which the British courts had denied her.⁶⁴ Specifically she sought an order to quash the decision of the prosecutor not to grant immunity to her husband and to have section 2 of the Suicide Act 1961 declared incompatible with Articles 2, 3, 8, 9 and 14 of the convention.⁶⁵

However, the Court ruled against Ms. Pretty. They determined the right to life guaranteed in Article 2 refers to a positive right to have life protected and not to have the right to have someone terminate your own at life at your request.⁶⁶ No positive right could be found with respect to Article 3 and protection from torture as this provision requires only that the government or other relevant party refrain from doing something.⁶⁷ The court declared that there was no violation of Article 14 as it did not come into play.⁶⁸

What is of the greatest interest is the manner in which the court interpreted the violations of Articles 8 and 9. With respect to the violations of privacy and freedom of thought, the court found these actually did exist. However, they did not go as far as to say that the manner in which these rights were violated constituted a human rights abuse. They avoided this by injecting a measure of proportionality into the rulings and finding that the

⁵⁹ <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/>.

⁶⁰ http://www.coe.int/T/e/Com/about_coe/.

⁶¹ <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Execution/How+the+execution+of+judgments+works/>.

⁶² Corstens, Geert, *European Criminal Law*, (Kluwer Law International, The Hague, 2002), 308.

⁶³ <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Execution/How+the+execution+of+judgments+works/>

⁶⁴ *Pretty v. the United Kingdom*, 2002-III Eur. Ct. H.R. 155, para. 3.

⁶⁵ *Pretty*, para 12.

⁶⁶ *Pretty*, paras. 37-40.

⁶⁷ *Pretty*, paras 55-56.

⁶⁸ *Pretty*, para. 90.

prohibitions placed on suicide by the Suicide Act 1961 and the refusal of the Prosecutor to grant immunity to Ms. Pretty's husband was not disproportionate and could be justified as "necessary in a democratic society."⁶⁹

The European Court of Human Rights has declined to interpret the European Convention on Human Rights in a broad scope and it remains the prerogative of the court to do so. The court has a built-in judicial restraint in that it can determine the margin of appreciation to allow room for regional decision-making.⁷⁰

The contrast of only three nations shows the widely disparate views of member states. Certainly there is an underlying respect for human life, but what that precisely entails varies state by state. Since there is no consensus, the European Court of Human Rights may cast the margin very wide in order to encompass competing views.

Now that the Court has rendered this decision it is unlikely to hear such cases again due to the doctrine of *res judicata*. The matter has been settled and it is an area of flexibility for signatory states. It is clear that euthanasia is not going to be legalized in a pan-European fashion through the Court, however, it is not clear that a challenge against it would necessarily be unsuccessful. If evidence can show that the euthanasia laws in nations such as the Netherlands lead to abuses of the vulnerable, the Court may be able to tip the balance back the other way.

In fact, the Council of Europe rejected a euthanasia resolution 138-26 in April, 2005.⁷¹ While this elicited much praise from the various Christian churches within Europe, the basis for the refusal is based more on a fear of the slippery slope towards involuntary euthanasia than it is on the definition of the right to life.⁷² This confirms that the members of this particular body are in no rush to see a right to euthanasia become enshrined as a guaranteed right for all Europeans.

However, this rejection does little to alter the current legislation of member states. While the bill, had it been accepted, would have required Convention states to add a right to choose termination of life, amongst other things, its dismissal does not alter the current fluidity of the definition of rights that allows states to enact euthanasia legislation.

It seems that the ECHR will therefore be reactive rather than proactive in terms of European policy. While there is no doubt it may remain a functional body in terms of addressing human rights abuses, it will remain conservative with a view to deference to state sovereignty when defining what a right actually entails.

European Union

As of yet, the area of human rights is largely beyond the competence of the European Union. A universal bill of rights was included in the Draft Constitution Treaty but since this failed to pass the referenda in both the Netherlands and France, the potential for

⁶⁹ *Pretty*, paras. 76, 78, 82, 83.

⁷⁰ *Wada*, 278.

⁷¹ Or, E. K. Y. 'Pro-Lifers Hail Decision of Council of Europe to Reject Euthanasia', [2005] *Christian Today* found at <http://www.christiantoday.com/news/europe/prolifers.hail.decision.of.council.of.europe.to.reject.euthanasia./482.htm>; Sliva, J. 'European human rights body speaks against euthanasia', [2005] *News from Russia* found at <http://newsfromrussia.com/world/2005/04/27/59458.html>.

⁷² *Ibid.*

development of human rights legislation within the construct of the European Union may be stymied for the foreseeable future. However, it is not likely that the issue of universal human rights will never be brought up again in the European Union; thus it is worth an examination of what was proposed in the draft Constitution and a prediction of the direction future legislation may take.

Since 2000, the Charter of Fundamental Rights has existed as a political declaration but due to the failure of the Constitutional Treaty to be acceded to by all member states it has no legally binding effect.⁷³ The Charter itself contains wording very similar to the European Convention on Human Rights. Provisions include a right to life, human dignity and a prohibition on torture.⁷⁴ Due to this similar wording, the same types of conflicts will likely arise out of this legislation that occur under the European Convention on Human Rights. These rights may be interpreted differently by various member states. There is no indication of whether or not the European Court of Human Rights' interpretations would stand but likely the issues would need to be relitigated. The European Women Lawyers Association addressed these concerns in June of 2001 and pointed out many instances where the rights were defined in an overly broad fashion. Certainly this would not bode well for the future legitimacy of this document if these matters were not addressed. One further point of importance is the proposed limitation to the application of the Charter. Article 52 limits the jurisdiction of the Charter to actions taken by the European Union and its institutions, leaving all other areas to the national legislatures of the member states.⁷⁵ Unless the European Convention is maintained, Europeans will end up with less protection than they originally had under the Convention. However, it is unclear as to the role of the Convention within a European Charter of Rights system. Furthermore, as European Union law is supreme under this structure, if conflicts were to arise between the two regarding definitions of rights, the Convention definition would cede to the European Union definition.

Another concern raised in regards to human rights is the addition of Article I-52 to the draft Constitution Treaty, because there is concern that it biases the European Union institutes towards religious entities. The precise wording is as follows:

ARTICLE I-52 - Status of churches and non-confessional organisations

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organisations
3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.⁷⁶

On the surface, this addition appears only to guarantee the preservation of the status quo in so far as religious groups go. However, many secular groups are strongly against this Article whilst many religious groups are strongly in support. Groups such as the European Women's Lobby argue that this Article presents a threat to the guaranteed separation of

⁷³ Anonymous, 'Convention on the Future of Europe' [2003] *World Federation of Right to Die Societies* found at , <http://www.worldrtd.net/news/world/?id=583>.

⁷⁴ Charter of Fundamental Rights of the European Union', [2000] *Official Journal of the European Communities*, C (364), 1-22.

⁷⁵ Garcia, Ricardo, 'The General Provisions of the Charter of Fundamental Rights of the European Union', [2002] 8(4) *Eur. L.J.* 492, 496, 497.

⁷⁶ Treaty Establishing a Constitution for Europe 2004, CIG 87/1/04 Article I-52.

church and state.⁷⁷ Other groups argue that it shelters relationships between church and state within the European Union, potentially at the expense of protecting human rights.⁷⁸ Churches, on the other hand, see this Article as a guarantee to their continued participation in policy talks and see the inclusion of this provision as a reflection of the pluralism found in European democracies.⁷⁹ What is clear is that if and when this Constitution or one that resembles it is enacted, the role of religious groups will be preserved in terms of policy creation. In turn, this means human rights definitions will need to be interpreted with deference to these groups.

In terms of the legislative institutions of the European Union, there has been no success in securing a definitive view on euthanasia, though there will likely be significant developments in this area in the years to come. In 2005, a written declaration to ban euthanasia on human rights grounds in the European Union failed to reach its required 367 signatures, which would have meant its adoption by the European Parliament and entailed an appeal from this body to the United Nations.⁸⁰ From a legislative perspective, the issue is far from over and it will remain a question of both pro- and anti-euthanasia groups lobbying the issue and proposing legislative reform to either allow or prevent the European Union from condoning euthanasia.

Human Rights, Euthanasia and Europe

The development of human rights legislation in the pan-European context shows the same pattern of development as the United Kingdom and the Netherlands. The people begin to conceptualize rights in a certain way and begin to pressure the institutions to legislate change. However, this change lags significantly behind popular opinion. Considering the division in support for euthanasia amongst the member states of the European Union, it is highly unlikely that this issue will be legislated on in the near future.

Although it might be possible to introduce the legislation and wait for the population to catch up conceptually, as is the case in Greece, this does not seem likely due to the other factors weighing in on the issue of euthanasia. Furthermore, due to the limitation of jurisdiction of the European Union's Charter of Rights, it is unlikely that this issue would reach the European Court of Justice at all. Instead euthanasia will be an issue to be put before the European Parliament, as is being done already. Then it just becomes a question of waiting for the outcome, much like the situation in Great Britain.

The issue of foremost importance to the European Union and the ability to effect change in euthanasia policy is the area of religion. Clearly, Europe has a strong Christian tradition, which is still very much alive despite increasing secularization. If the European Union is to respect the religious institutions as suggested by Article I-52 of the Constitution Treaty, it is difficult to imagine how the institutions could push through legislation legalizing euthanasia across Europe, as it would be met by staunch opposition by many if not most

⁷⁷ la Rivière-Zijdel, Lydia, 'EWL Statement to the Intergovernmental Conference 2003' European Women's Lobby' [2003] found on <http://www.act4europe.org/code/en/back.asp?Page=168>.

⁷⁸ 'Note Concerning Article 37 of the Draft Treaty, p. 2' [2003] *European Humanist Federation* found at <http://www.humanism.be/new/documents/const02-en-note37.pdf>.

⁷⁹ Martin, A. 'Archbishop Martin on 75 years of diplomatic relations with Holy See', [2004] *Catholic Ireland*, Newsroom found at <http://www.cinews.ie/article.php?artid=475>.

⁸⁰ 'The written declaration to ban abortion and euthanasia fails to pass', [2005] *Eurp-Fam* found at <http://www.euro-fam.org/scripts/spop/articleINT.php?LG=EN&LJ=FR&XMLCODE=2005-06-20-1436>.

religious groups. The European Court of Human Rights is better insulated from this type of political pressure as its primary mandate is to examine human rights and guarantees no preference to the religious perspective. As long as the religious groups are given an active role in policy-making, or even if their current interactions within certain European state governments are protected by new European Union provisions, legalizing euthanasia across Europe will not be possible.

Despite these limitations, giving the European Union jurisdiction over the area of human rights worries anti-unification groups as they fear it strikes at the very heart of state sovereignty.⁸¹ If a broad mandate were bestowed upon the European Union through a charter of rights, then the European Court of Justice would have the power to find state laws *ultra vires* if they conflicted with these charter rights. However, judging from the limitations placed upon the European Union's jurisdiction, it seems unlikely that this type of state conflict would ever occur.

Even if it gained jurisdiction, taking the decisions of the European Court of Human Rights as precedent, there would be little narrowing of the extremely broad definitions of various rights. As the comparisons of the three nations showed, comprehension and implementation of rights varies tremendously state by state. This problem of understanding rights has been raised by those critical of the unification process.⁸² It is most likely that these rights would remain vague enough to allow for all dominant views of member states.

Conclusion

For difficult issues such as euthanasia, it is unlikely that a top-down approach will ever be successful in Europe. To avoid alienating member states, the courts will continue allowing national discretion in these types of policy areas. Forcing legalization would be too difficult for many states to accept considering the differing views on rights and religion. Mass prohibition would alienate socially liberal states and does not account for the complexities of criminal law as a reflection of state characteristics. Thus where there is no clear answer, institutions of a pan-European nature will continue to avoid bringing these issues within their scope and decline to provide clear answers.

⁸¹ Coughlan, Anthony p. 18-19 Coughlan, A. (2003) 'A critical analysis of the EU draft Constitution', [2003] TEAM Working Paper No. 10 1-38 found at <http://www.teameurope.info/wp-analysisconstitution.nr10.pdf>, 18, 19.

⁸² Coughlan, 20.