A Life Fulfilled

Should There Be Assisted Suicide for Those Who Are Done with Living?

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Abstract: The issue of assisted suicide for those with a "fulfilled life" is being hotly debated in the Netherlands. A large number of Dutch people feel that elderly people (i.e., people who have reached the age of 70) with a "fulfilled life" should have access to assisted suicide. Citizens have therefore requested Parliament to expand the existing legislation that governs euthanasia and physician-assisted suicide. The Dutch constitution does not permit national legislation to be incompatible with higher international (human rights) law. An analysis of the case law of the European Court of Human Rights shows that a person's right to decide on the time and manner of his or her death should be regarded as an aspect of the right to privacy. Although no positive obligation has been imposed on parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms to facilitate suicide, they may do so, provided that certain conditions are met.

Keywords: fulfilled life; suicide; assisted suicide; human rights; right to life; privacy

Introduction

The issue of "fulfilled life" has been publicly debated in the Netherlands since the early 1990s. A large number of people are in favor of giving elderly people (i.e., people who have reached the age of 70) who wish to end their lives the means to do so. In 2012, the Dutch Parliament was asked to expand the existing legislation in order to be able to provide suicide assistance to elderly people who consider their lives to be fulfilled. Is a state permitted to enact such legislation?

A Brief History

The public debate on the issue of "fulfilled life" was set in motion in 1991 by Huib Drion, a former Supreme Court judge and professor of civil law. In his high-profile article "The self-chosen death of elderly people," he wrote "It seems to me beyond any doubt that many elderly people would find great peace of mind in the reassurance that they have access to a way to part with life in an acceptable manner at the moment that this—in view of what life might have in store for them—seems appropriate to them."[1]

The issue of "self-chosen death" re-emerged in 2002 in the Supreme Court ruling in the *Brongersma* case. The 86-year-old former senator Edward Brongersma had persuaded his general practitioner to help him end his life, as he was "tired of life". On appeal, the physician was found guilty and convicted of assisting suicide. The Supreme Court upheld the ruling of the Court of Appeal and dismissed the physician's appeal. The highest Dutch court ruled that, in the absence of medically classifiable physical or psychiatric illnesses or disorders, physicians are not allowed to provide suicide assistance: they cannot plead force majeure in such

Cambridge Quarterly of Healthcare Ethics (2018), **27**, 366–375.

doi:10.1017/S0963180117000755

cases, in part because their specific expertise, in both diagnostic and treatment procedures, by its very nature does not extend to requests for assistance that (like requests based on tiredness of life) are not rooted in an illness or disorder.[2] Following this ruling, the Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst (KNMG, Royal Dutch Medical Association) set up a committee in 2014, which published a report on the role of physicians in cases of (perceived) "suffering from life."[3]

The debate on the issue of "fulfilled life" intensified in 2010 as a result of the launch of the Fulfilled Life Citizens' Initiative by the citizens' group Uit Vrije Wil (Of One's Own Free Will). In the Netherlands, citizens can place items on the parliamentary agenda. They can do so by means of a citizens' initiative: a request to the Lower House to discuss a detailed proposal (to improve, for example, the environment or the educational or healthcare systems) and to take a position. Anyone who has Dutch citizenship and is older than 18 can submit a citizens' initiative. Such an initiative must have at least 40,000 declarations of support from those who meet these criteria, stating their names, addresses and dates of birth.[4] The objective of the citizens' initiative of Uit Vrije Wil, which was supported by a number of Dutch celebrities and accompanied by no fewer than 116,871 declarations of support, was the legalization of the provision of suicide assistance to elderly people who consider their lives to be fulfilled.[5]

The citizens' initiative was debated in a plenary session on March 8, 2012.[6] The Lower House limited itself to a motion in which the government was requested to include the citizens' initiative in its response to the next survey of the functioning of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, commonly known as the "Euthanasia Act."[7] The government rejected the motion, arguing that the initiative would not fit in well with the principles of that act.[8] However, the government thought it was important to give further consideration to the points raised by the citizens' initiative. For this reason, in July 2014, the Minister of Health, Welfare, and Sport and the Minister of Security and Justice formed an expert commitee, which was asked to advise the ministers on the legal options and social dilemmas regarding the provision of assisted suicide to people who consider their lives to be fulfilled.[9] The committee published its recommendations in February 2016.[10]

The Citizens' Initiative

The aim of the initiative of Uit Vrije Wil is to legalize the provision of suicide assistance to elderly people who consider their lives to be fulfilled, at their express request, and subject to conditions of due care and verifiability. According to the group, the Dutch Constitution guarantees all citizens the ability to live their lives according to their own views and preferences, and to make decisions accordingly, a freedom that extends to the final stage of life and to life and death decisions. It therefore considers self-determination to be the basis of the initiative: free persons who consider their lives to be fulfilled should have the right to choose the time and manner of their own death.[11]

The group argued that we are all living longer than in the past, usually to our satisfaction; but that, for a variety of reasons, we may at some point come to the conclusion that the value and meaning of our lives have diminished to

such an extent that we begin to prefer death to life. In such circumstances, sometimes we no longer see a way to continue living in a manner that we find meaningful, and feel that we are merely existing. Everything of value is behind us, and all that remains is emptiness. If we become completely dependent on the assistance of others, and lose control over every aspect of our own life, we can be also confronted with an irreversible loss of dignity. According to Uit Vrije Wil, choosing between death and a life that we feel to be unbearable is a difficult one. However, when it becomes clear that our circumstances cannot be improved in any way, we may come to the conclusion that our life is fulfilled; and in those circumstances, choose to die in peace and with dignity, preferably in the presence of loved ones. This action often requires assistance if it is to be performed effectively and without horrible consequences for the person concerned or for others.[12]

The citizens' group claims that the personal freedom to decide on one's own death is hardly controversial from a moral point of view, and observes that although suicide is not prohibited by law in the Netherlands, assisting suicide is. Uit Vrije Wil therefore believes that it should no longer be punishable to assist suicide, and that elderly Dutch people who wish to die with dignity should be given this opportunity by law. The group maintains that this implies professional, responsible, and legally regulated suicide assistance.[13]

Citizens' initiatives should be concrete proposals. Therefore, Uit Vrije Wil proposed a law that was clearly based on the Dutch Euthanasia Act. According to the proposal, requested suicide assistance should be provided by a suicide assistant: a registered care provider—who need not be a healthcare professional—who holds a certificate showing that he or she has satisfied certain training requirements. This suicide assistant should be associated with a foundation for suicide assistance to elderly people that: (1) selects, trains, and certifies suicide assistants; (2) supports them; (3) develops professional standards for suicide assistance; (4) supervises writing prescriptions for euthanasia medications; and (5) periodically assesses the practice of suicide assistance and reports to the responsible members of government.[14]

According to the proposal, elderly people (i.e., people who have reached the age of 70) should direct their request to these qualified suicide assistants. Like physicians who act in accordance with the Euthanasia Act, they will not be prosecuted if they comply with the due care requirements and properly report cases where they have provided suicide assistance.[15]

Suicide assistants must, according to the proposal, satisfy the following requirements when dealing with a request: they must (1) be convinced that the request for suicide assistance is voluntary, well-considered, and persistent; (2) have established that the request was made by a Dutch citizen or by a citizen of a Member State of the European Union who has been a resident for at least 2 years and that the person who made the request has reached the age of 70; (3) have informed the person about the substantive and procedural aspects of the requested suicide assistance; (4) have received a written statement from the person documenting the request for suicide assistance; (5) have consulted at least one other independent suicide assistant who has spoken to the person making the request and given a written opinion on the due care requirements, as referred to under (1) to (4); and (6) ensure that the suicide assistance is provided in a professional manner.[16]

According to the citizens' group's proposal, a suicide assistant must file a report with the municipal forensic pathologist, just as a physician is required to do under the Dutch Euthanasia Act. When reporting a case of suicide assistance, suicide assistants must explain how, in their opinion, the due care requirements have been satisfied. The forensic pathologist then performs an autopsy to establish how and by what means the patient ended his or her life. The pathologist also checks whether the report of the suicide assistant has been completely filled in. In turn, the forensic pathologist issues a report on the suicide assistance to one of the five regional euthanasia review committees (set up under the Euthanasia Act), enclosing the relevant documents (the reasoned report of the suicide assistant, the written opinion of the consulted independent suicide assistant) with his or her own report.[17]

The regional euthanasia review committees, which for these types of cases would be composed of a suicide assistant (rather than, as in other cases, a physician), an ethicist, and a lawyer-chairperson for the assessment of suicide assistance cases, examines the received reports and issues an opinion as to whether the suicide assistant acted in accordance with the due care requirements. If the committee determines that the assistant has satisfied all the requirements, this conclusion is shared with the suicide assistant and the case is closed. If the committee concludes otherwise, the findings, and file, are also shared with the Board of Attorneys General and the Healthcare Inspectorate.[18] The Board considers whether to initiate criminal proceedings; the Healthcare Inspectorate decides whether other measures should be taken.

The proposal of the citizens' initiative largely mirrors the existing Euthanasia Act. For example, it envisions statutory due care requirements and a reporting procedure, and suicide assistants will not have acted unlawfully if they properly filed their reports and, in the opinion of a regional euthanasia review committee, satisfied the requirements. What distinguishes the proposal from the Euthanasia Act is that a request can only be submitted by someone who has reached the age of 70. Unlike the Euthanasia Act, the proposal requires that the request is persistent and in writing. Moreover, the suicide assistant need not be a physician and, when a case of suicide assistance is reported, a suicide assistant, instead of a physician, will sit on the regional euthanasia review committee. Finally, the due care requirements are slightly different. Hopeless and unbearable suffering as a result of a medically classifiable disorder is not a requirement. The suicide assistant also does not have to inform the elderly person making the request about his or her situation or prospects, or reach the conclusion (together with the person concerned) that there was no other reasonable solution to that person's situation.[19]

The Ministers' advisory committee was not specifically asked to consider the proposal of the citizens' group. Its brief was to examine "how the wish can be fulfilled of an increasing number of Dutch citizens to be invested with a greater right of self-determination in the form of assistance when they consider their lives to be fulfilled."[20] It was considered to be "of essential importance that misuse be prevented and people feel secure."[21]

Because various terms are used in the public and political debates on the issue, such as "fulfilled life," "done with living," "suffering from life," "tired of life," "voluntary euthanasia," and "self-chosen death," the committee first identified a number of characteristic aspects of a "fulfilled life." The issue concerns

people "who *are usually elderly* who, in their opinion, no longer have a *life perspective* and have developed a *persistent, active death wish* as a result."[22]

As part of its assignment, the advisory committee commissioned four research assignments. The first one, which was given separately to two professors of health law (including the author),[23] concerned the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Right to Respect for Private Life…

Dutch policymakers often seem to think that, as a sovereign state, the Netherlands inhabits some kind of normative vacuum. However, the scope for national policy is prestructured to an extent that should not be underestimated. For example, the Netherlands is bound by numerous human rights conventions, with which national policies outlined in legislation, government policy, or case law must not conflict. It is therefore of essential importance to know when a state is considering legislation in the area of "fulfilled life," if such policies are permitted or forbidden by international human rights law, or whether the legal position is unclear.

The ECHR is by far the most important human rights convention to which the Netherlands is a party.[24] The European Court of Human Rights (ECtHR) supervises compliance with this convention. The ECHR was concluded in 1950 in response to the numerous human rights violations that had taken place during World War II. The text of the convention says nothing about suicide assistance to elderly people who consider their lives to be fulfilled. However, because the European Court of Human Rights regards the convention as a "living instrument" of human rights protection, which must be applied in "present-day conditions,"[25] this court has already examined termination of life on request and assisted suicide cases. Two rulings are particularly important here.

First there is *Pretty v. United Kingdom* (2002).[26] In this case, an almost completely paralysed amyotrophic lateral sclerosis (ALS) patient sought to obtain a ruling from the European Court of Human Rights that her husband would be immune from prosecution if he helped her commit suicide, an assurance that the Director of Public Prosecutions (DPP) had refused to give. Diane Pretty was afraid that her life would end harrowingly and without dignity. She claimed that the decision of the DPP constituted a violation of inter alia her right to life and her right to respect for private life.

The right to life is laid down in Article 2 of the ECHR:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
    a. in defence of any person from unlawful violence;
    b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    c. in action lawfully taken for the purpose of quelling a riot or insurrection.

The right to privacy is protected by Article 8 of the ECHR:

1. Everyone has the right to respect for his private and family life and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety of the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

With regard to the right to life, Pretty argued that this right could not imply a duty to live. The Court did not concur and concluded that the right to life does not imply a right to die.[27]

However, the real importance of the ruling lies in the Court's observations concerning the right to privacy. According to the Court, the criminal law of the United Kingdom (with its blanket ban on assisted suicide) *did* stand in the way of Pretty's decision to avoid what she regarded as an undignified and distressing end to her life. The Court then declared that it was "not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 § 1 of the Convention."[28]

The Court was more specific about the meaning of privacy in the context of a person's death in the *Haas v. Switzerland* ruling (2011).[29] The applicant in this case had asked the Swiss authorities several times for permission to obtain over-the-counter euthanatics. Ernst Haas had had a serious bipolar disorder for 20 years. He made two suicide attempts during this time and was frequently admitted to psychiatric hospitals. Because he thought that his disorder, which is difficult to treat, made a life with dignity impossible for him, he asked several psychiatrists to give him a prescription for euthanatics, which are only available on prescription in Switzerland. This was without success. Haas eventually applied to the European Court of Human Rights complaining that his right to respect for private life had been interfered with, because he could never satisfy the conditions for obtaining the means, namely a prescription written by a physician based on a thorough psychiatric assessment.

Although the Court did not assume a positive obligation for the state to take the necessary steps that facilitate (in the eyes of the person who made the request) suicide with dignity,[30] it did state that "an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention."[31] With regard to this aspect of the right to privacy, the European Court of Human Rights also stated that it should not be "merely theoretical or illusory."[32]

… and the Right to Life

In both cases, the Court concluded that the right to respect for private life had not been violated. In the *Pretty* case, the European Court of Human Rights ruled that the interference could be justified because it was provided for by law and served

to protect the rights of others, more specifically, their right to life. Moreover, in the eyes of the Court, a general prohibition on assisted suicide was not disproportionate, because this prohibition is enforced with some flexibility, as the DPP has a discretion to prosecute and not all cases of assisting suicide are prosecuted.[33] If that had not been the case, the Court might have arrived at a different decision.

Although when it weighed the relevant interests, the European Court of Human Rights was sympathetic toward the wish of Haas to take his own life in a safe, painless, and dignified manner, it was nevertheless of the opinion that the arrangements that Switzerland had made served a legitimate purpose: to protect everyone from rash decisions and prevent abuse, and, more specifically, to prevent access to the relevant drugs by people who are not able to weigh their interests in the matter. According to the Court, the right to life obliges states to set up procedures that guarantee that persons' decisions to end their own lives actually correspond with their free will.[34] If Switzerland had not had such a procedure in place, the Court's ruling would have been different.

The right to respect for private life does not imply that a state has a positive obligation to facilitate dignified suicide; the case law shows that the right to life is subject to a positive state obligation: states that are party to the ECHR are obliged to protect the lives of people who are not able to make decisions of their own free will and with full understanding of the implications and to act accordingly. According to the Court, states are obliged to prevent suicide if the decision to die was not made of a person's free will and with full understanding of the implications. The lives of vulnerable people must be protected, even from their own acts.

"Fulfilled Lives" and Human Rights

The *Pretty* and *Haas* cases were not about fulfilled lives. In *Gross v. Switzerland* (2013), the applicant was an elderly woman who for many years had expressed a wish to end her life.[35] Although Alda Gross (born in 1931) did not have a medical condition, she indicated that she was becoming more feeble with the years and that she was not prepared to suffer any longer from the deterioration of her physical and mental faculties. After she had unsuccessfully tried to obtain euthanatics with a physician's prescription, she submitted an application to the Health Council of the Swiss Canton of Zurich. The consulted physicians refused because Gross did not have a medical condition. Their professional standards prevented them from writing out prescriptions for euthanatics in such cases. They also indicated that they were afraid to be dragged into prolonged legal procedures. The Health Council rejected the request, and this decision was upheld by the various subsequent courts. In 2010, the Federal Supreme Court of Switzerland ruled that the state is not obliged to guarantee access to euthanatics. This court also argued that, because she was not terminally ill, Gross did not satisfy the requirements laid down in the medicoethical guidelines regarding end-of-life care for patients.[36]

However, in 2013, the European Court of Human Rights ruled, by a majority, that the right to respect for private life had been violated. The Court found that it is first and foremost up to national authorities to issue clear and comprehensive guidelines regarding the circumstances in which someone like the applicant (i.e., someone who does not have a terminal illness) should be able to receive permission to obtain a lethal dose of medication to take his or her own life. In the opinion

of the Court, the violation of the right of the applicant consisted of the absence of such guidelines in Switzerland.[37]

This was a very interesting ruling, but it was, unfortunately, one without any legal significance. After the case was referred to the Grand Chamber of the Court at the request of the Swiss government, it came to light that, when the case had been heard by the Chamber, the applicant was already dead. In 2014, the Grand Chamber disallowed the application because of abuse of the right to submit an application.[38]

Because no significance may be attached to the *Gross* ruling, only the rulings in the cases of *Pretty* and *Haas* continue to serve as guidance. According to the European Court of Human Rights, states that are party to the European Convention think differently about people's right to decide on the time and manner of their own death. The Court believes that most states attach more weight to the protection of the life of a person than to that person's right to end it. However, according to the Court in the *Haas* ruling, some states have decriminalized assisting suicide to a great extent. Because, in the opinion of the Court, there is no moral consensus, states have a significant "margin of appreciation": it is primarily up to states to weigh the interests (protection of life vs. freedom of choice regarding one's own death) at stake.[39]

However, not all legal regimes are acceptable. Parties advocating the protection of life would do well to realize that people have the right to decide on the time and manner of their own death: a right that is not restricted to (seriously) ill people and that, like all human rights, must be practical and effective. On the other hand, the parties that give greater emphasis to freedom of choice regarding one's death should also realize that this comes with a responsibility to safeguard the lives of vulnerable people. Although states may permit assistance in suicide, they are not obliged to do so. If a state chooses to do so, it has to provide a regime that guarantees the protection of the lives of people who are not able to make free and informed decisions regarding their own death and to act accordingly.

Concluding Remarks

The Dutch advisory committee advised against expanding the existing legislation. It identified four different "fulfilled life" situations: (1) situations that already fall within the scope of the Euthanasia Act; that is, that involve suffering with a predominantly medical basis; (2) situations that are regarded as "borderline cases," because it is less clear whether the suffering is predominantly medical; (3) situations that do not involve any suffering with a medical basis; and (4) situations that do not involve any suffering.[40]

In the opinion of the committee, the scope of the Euthanasia Act as it stands is wide enough for most people whose suffering is linked to their perception of their life as being "fulfilled" and who can be classified under the "fulfilled life" situation referred to under 2. The regional euthanasia review committee can take advantage of this scope that, in its opinion, the "fulfilled life" situations referred to under 3 and 4 do not have. On the basis of the empirical research that it commissioned, the committee stated that it did "not have the impression that many requests for assisted suicide were submitted in these situations."[41] In the end, the committee saw no reason to expand the existing legislation.

In October 2016, the Dutch government sent Parliament a position paper. It ignored the recommendations of the committee and set out plans to introduce

legislation similar to the law proposed by the citizens' group in 2010.[42] These were abandoned by the new cabinet, which took office in October 2017.[43]

Notes

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3. KNMG. *Op zoek naar normen voor het handelen van artsen bij vragen om hulp bij levensbeëindiging in geval van lijden aan het leven* [*In search of rules for physicians faced with requests for assisted suicide by those who suffer from life*]. Utrecht; Royal Dutch Medical Association, 2004.
4. See the website of the Dutch Parliament. n.d. https://www.tweedekamer.nl/kamerleden/commissies/verz/burgerinitiatieven/ (last accessed 22 Aug 2016).
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7. *Kamerstukken II*, 2011–2, 33 026, no. 5.
8. *Kamerstukken II*, 2012–3, 31 036, no. 7.
9. *Kamerstukken II*, 2013–4, 32 647, no. 26.
10. Adviescommissie voltooid leven [Advisory Committee Fulfilled Life]. *Voltooid leven. Over hulp bij zelfdoding aan mensen die hun leven voltooid achten* [*Fulfilled Life. On assisted suicide for those who consider their lives fulfilled*]. Den Haag: Adviescommissie voltooid leven. 2016.
11. See note 5, Uit Vrije Wil 2017.
12. See note 5, Uit Vrije Wil 2017.
13. See note 5, Uit Vrije Wil 2017.
14. Uit Vrije Wil. Burgerinitiatief voltooid leven, Sections 3, 4 and 13. 2017; available at http://www.uitvrijewil.nu/index.php?id=1006/ (last accessed 22 Aug 2016).
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19. Euthanasia Act, Section 2, para 1.
20. See note 9, *Kamerstukken II*, 2013–4.
21. See note 9, *Kamerstukken II*, 2013–4.
22. See note 10, Adviescommissie voltooid leven 2016, at 34.
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26. ECtHR April 29, 2002, appl. no. 2346/02 (*Pretty v. United Kingdom*).
27. See note 26, ECtHR 2002, at § 39.
28. See note 26, ECtHR 2002, at § 67.
29. ECtHR January 20, 2011, appl. no. 31322/07 (*Haas v. Switzerland*).
30. See note 29, ECtHR 2011, at § 53.
31. See note 29, ECtHR 2011, at § 51.
32. See note 29, ECtHR 2011, at § 60.

33. See note 26, ECtHR 2002, at § 76.
34. See note 29, ECtHR 2011, at § 58.
35. ECtHR May 14, 2013, appl. no. 67810/10 (*Gross v. Switzerland*).
36. See note 35, ECtHR 2013, at § 6–21.
37. See note 35, ECtHR 2013, at § 69.
38. ECtHR September 30, 2014, appl. no. 67810/10 (*Gross v. Switzerland*).
39. See note 29, ECtHR 2011, at § 55.
40. See note 10, Adviescommissie voltooid leven 2016, at 36.
41. See note 10, Adviescommissie voltooid leven 2016, at 231.
42. *Kamerstukken II*, 2016–7, 32 647, no. 55.
43. See Regeerakkoord 2017 [Coalition agreement 2017]. *Vertrouwen in de toekomst* [*Confidence in the future*]. p. 20.2017; available at: https://www.rijksoverheid.nl/documenten/publicaties/2017/10/10/regeerakkoord-2017vertrouwen-in-de-toekomst (last accessed 15 Jan 2018).