Euthanasia and the right to life[1] – The Pretty case

by Christian Byk

How, conceptually, does the right to life (legal protection of one of humanity's fundamental values) connect with euthanasia (concern for a "good" death)?

The paradox is all the greater in that its legal implication seems to be that the effect of applying a recognised human right, the right to life, could be a desired death; unless the pro-euthanasia case is simply viewed as a social phenomenon with the force of the right to life ranged against it.

Some see the right to life as a safeguard against euthanasia, others as its Trojan horse. Considered in those terms, the euthanasia issue certainly poses questions about control of life and what meaning life has for us.

The medicalisation of death (Ariès, 1977; Morin, 1976) is a clear manifestation of this (new) way of seeing things: it shifts the place of death (into hospital), changes the people involved (or, at least, the family is no longer in the foreground), and splits the timeframe into stages, with increasing involvement of medical technology at each successive stage.

The fact is that the picture of death which this presents is one we find unbearable and inhuman, not so much because it breaks with time-honoured rites and customs our new ways of life have led us to abandon, but because medicine seems here to be breaking its promises. Having given us control of procreation and lengthened our lives, how can it now refuse us choice of our time of death?

As death approaches, are we to lose the personal autonomy which has been steadily extended as medicine and science have advanced and the conquest of which as a right is the symbol of our human rights society (Prieur, 1999)?

And yet human rights law seems loftily to ignore exercise of individual autonomy with respect to death.

1. I dedicate this paper to my friend, Ferdinando Albanese, a pioneer of bioethics in the Council of Europe, who died in November 2001 in the same circumstances as Mrs Pretty.

Until the Pretty decision (apart from a negative opinion given by the CDBI in the late 1980s in response to an application by the Dutch Government), the European Convention on Human Rights had not come up against the euthanasia issue. It is true that as early as 1976 the Parliamentary Assembly of the Council of Europe pronounced against prolonging life by technological means (Resolution 613 (1976) on the rights of the sick and dying, and Recommendation 779 (1976)) and Article 9 of the Convention on Human Rights and Biomedicine requires that account be taken of previously expressed wishes, including refusal of consent (though they are not binding), but it was only in the context preceding the Pretty judgment, with Recommendation 1418 (1999) (on protection of the human rights and dignity of the terminally ill and dying), that an explicitly restrictive position was stated, maintaining the absolute prohibition on intentionally ending the lives of the dying and terminally ill ("[their] wish to die never constitutes any legal claim to die at the hand of another person"). After this recommendation, the CDBI was instructed by the Committee of Ministers to draft a report on national legislation and practices. States' replies to the questionnaire on euthanasia were published on 20 January 2003.

True, this silence is as eloquent, in terms of human freedom, as criminal law's disengagement from matters of suicide. But there is more to this silence than affirmation of a freedom : it is also a refusal to discuss controlled death as part of life. When it was called upon to deliver judgment in the Pretty case, the European Court of Human Rights held that the right to life did not include the right to die (I), but conceded that the question of euthanasia involved exercise of personal autonomy (II), in our view opening the way to some degree of recognition of assisted suicide.