

Euthanasia, Philosophy, and the Law: A Jurist's View from Madrid

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Spain and Its Contradictions: Euthanasia

In societies with an established system of rights, human dignity occupies the vertex of the moral statute. Freedom and equality are specific derivations of that higher value. Taking freedom and equality seriously necessarily means articulating a system of rights that places at its apex the value that unifies both: human dignity.

However, in liberal democratic societies, which aim to transform into positive law the values that give foundation to rights, it is not unusual for there to be a contradiction between the constitutional declarations and the regulation of euthanasia, frequently typified as cooperation or assisting in suicide. That is the case of the Spanish legal framework.

The Spanish constitution of 1978 determines that, "The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace" (Article 10.1).¹ But the constitutional recognition of personal autonomy coexists with a penal code that puts any assistance with suicide on close footing. Article 143.4 of the 1995 penal code establishes that "whoever provokes or actively cooperates with direct and necessary acts to produce a person's death, by express, serious and unequivocal petition of that person, in cases in which the victim suffers a grave disease that would necessarily cause his or her death, or that produces grave, permanent and difficult to tolerate suffering, will receive a penalty inferior in one or two degrees" to the penalties for direct cooperation with suicide. What the constitution gives, the criminal code takes away.

My intention in this article is to reflect as a Spanish jurist, from the point of view of philosophy of law, on the moral problem posed by euthanasia, as the matter to which the legal system will have to respond. This response will necessarily be conditioned by the values assumed by the legal system, which will be those that explicitly represent a shared minimal common ground, agreed upon through dialogue among the different maximalist moral positions. As Adela Cortina has pointed out in another article in this collection,² this is the laborious way morally pluralistic societies such as Spain work. In that context, I want to argue in favor of *individual autonomy* as the strongest candidate to be put forward by what Cortina calls "the laboratories of bioethics" as the shared common ground with respect to the morality of euthanasia.

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The principle of autonomy satisfies two basic requirements in this discourse. On the one hand, it is at the nucleus of a moral proposal centered on the individual, in the appreciation of its value and in the moral regard that deserves its definition of plans of life (that are also plans of death). On the other hand, vindicating autonomy has a central role in the structure of a determined model of social organization, typical of the best liberal proposals.

In this light, various questions arise: How does vindicating the free development of personality condition a determined response to the acceptability of euthanasia? Does the free development of personality imply the individual protagonistic role when deciding one's own destiny in determined circumstances? To what extent can the demands of dignity and free development of personality be taken seriously regarding euthanasia? Certainly, these questions let us appreciate that euthanasia is also a political issue.³

Life and Good

Even if the argument of autonomy, linked to individual protagonism when defining the value of life, is powerful, it also has its limitations and is easier to apply in some contexts than in others.⁴ Resorting to autonomy implies identifying the individual decision in which this autonomy is made manifest, which is not always easy. Such is the case of newborns or of those people who have lost consciousness or suffer a psychiatric illness, even if in the latter two cases advance directives can help identify individual wishes. For that reason, I refer to those cases in which the person clearly expresses or has expressed his or her will; these are the cases, incidentally, referred to in the penal code.

Faced with an idea of life as an absolute good—heir to the Judeo-Christian tradition, which is “the most powerful emotional basis for resisting euthanasia”⁵—it is possible to propose a different understanding of life, adopting a qualitative viewpoint that distinguishes between life as a biological reality and life as a biographical reality; between “being alive” and “having a life.” There are certain circumstances in which a person's life becomes a mere biological existence, lacking any chance to construct him or herself, to write his or her own vital biography. In this framework, the value of life is assigned by its owner. The problem is the value of life not from the standpoint of an observer, but from the point of view of those who suffer or enjoy that life. If we maintain that life is valuable, it is so because its permanence and continuity supposes an asset, something pleasant, and it is in an individual's interest to preserve it. That individual will be firmly interested in preventing someone from taking his or her life and will try to keep it at any cost. He or she knows, better than anyone, what that life is worth: “To say that something is of value to *someone* does not mean that it has a value because he or she *believes* it is valuable. It does not mean that it has value just because someone consciously cares. On the contrary, it means: something has value to a person if its loss would cause him or her *harm*.”⁶

We are evidently thinking in the context of modern-day Spain, which—like many other Western societies—highlights the value of individual autonomy and gives prominence to the decision of the individual in those cases in which he or she believes that life is no longer valuable. It is true that this approach may elicit the accusation of an excessive dose of subjectivism. One might object that each

individual could decide at any given moment, according to his or her own criteria, what is for him quality of life and what is a life worth living.

In fact, it is true that individuals assess vital situations in which they find themselves, but this is different from concluding that their options are exclusively subjective. It has been pointed out here that there are two possible approaches to the concept of quality of life: one objective and one subjective.⁷ The objective one is determined by the doctor's diagnosis. Subsequently the patient himself, using the data provided by his physician, transforms the objective quality of life into subjective quality of life, in the light of his preferences and ideas. In this sense, the quality of life we talk about when we raise the issue of euthanasia is indeed the subjective quality of life, in which the subject concerned has the last word. But even so, I do not think that we can say that we are moving into the realm of absolute subjectivity. The ultimate determination of the subject regarding the value of his own life is obviously the product of personal reflection, but that does not mean it is valid under any circumstances. Rather, it is valid only in those cases in which euthanasia may be considered an option.

In this sense, certain objective situations that undermine the quality of life have been characterized as *limited quality of life*, *minimal quality of life*, and *below-minimum quality of life*.⁸ The first consists of a deficit of the physical or mental capacity still permitting a proper human life and does not pose doubts with regard to euthanasia. The legitimacy of euthanasia is raised, rather, by situations of *minimal quality of life*, identified with irreversible conditions involving permanent and prolonged suffering, no ability to fulfill personal projects, frustrated vital expectations, and a significant decrease of consciousness and communication, and by *below-minimum quality of life*, identified with permanent vegetative states.

Discussion of the value of life is intimately tied to the notion of a *life* and a *good*, as the international philosophical debate has shown. According to Philippa Foot, being clear about what we mean when we maintain that life is a good is a basic premise that precedes a decision on the morality of euthanasia. What does it mean to maintain that a life is valuable for an individual? It is true that, if it is considered a good, the owner of that life may consider its prolongation beneficial. But it is no less true that sometimes prolonging life represents no benefit to the individual.⁹ On these occasions, death is "the liberation of a day after day more unbearable condition."¹⁰ When can it be maintained that life is something valuable or beneficial to an individual? As Foot points out, the individual's criteria can help answer that question. But the problem is to determine whether there is a conceptual connection between the notions of life and good.

To the question of when a life may be called a good, Foot answers that life is a good when it yields beneficial things. There may well be a connection, but the concept of life that is identified with something beneficial for the subject is not any kind of life, but a life where certain *normalcy standards* are present, which allows one to talk about *an ordinary life*. The presence of these standards can make a life attractive or odious. The idea of normalcy standards recognizes a number of basic goods, the absence of which precludes the connection between life and good.

The reference to these minimal goods is important to draw the blurry border around cases where the idea of euthanasia becomes plausible. The sphere of euthanasia would encompass not only terminal and close-to-death situations, but

also those cases in which death is not imminent but the person suffers a dreadful existence.

As mentioned above, Article 143.4 of the Spanish penal code makes reference to “grave, permanent and difficult to tolerate suffering.” This may or may not include situations that require permanent vital support. As Gracia puts it, “the ethical problem is limited to knowing if those persons who live a life they consider *worse than death* can put an end to their suffering (suicide) and, in case they are physically unable do that by themselves, if they can ask others, doctors in particular, to end their life (euthanasia).”¹¹

The assessment of each individual case may vary depending on the qualities that are looked at. There are objective and subjective qualities.¹² The former can be analyzed by using social indicators. Subjective qualities are the individual reactions toward the objective qualities. Objective qualities can be primary, that is, those that permit a human being to attend to his or her basic needs, or secondary, which would be the consequences of the primary ones. Among the primary objective qualities, Spanish philosopher and essayist José Ferrater points out adequate and sufficient food, protection from the elements, a reasonable certainty about one’s own safety, satisfactory relationships, and freedom from oppression.¹³ Objective qualities can have significant cultural and historical variations. Subjective qualities rely, to a large extent, on the person’s criteria.

Individual decisions regarding the benefit of continuing life depend on its objective and subjective qualities. Ferrater suggests considering the four situations listed in Table 1.¹⁴

Although this may be a very simplified sketch, it is useful for showing that the individual’s opinion and decision as defined by the subject’s convictions are in the end the ultimate criteria for justifying very different considerations to judge the value of life for that individual.¹⁵

Ferrater proposes a useful example. A soldier is seriously wounded in the battlefield and enemy troops who will torture him to death are about to arrive, but the soldier cannot be transported by his comrades. There are two possibilities: Give the soldier a painkiller that will help him cope with his suffering, but will also keep him alive when the enemy arrives; or shoot him to death or give him a dose of painkillers that will provoke a peaceful death, besides alleviating his pain, before the enemy catches him. The second option seems plausible, because the soldier’s situation has no objective qualities. But if the soldier *wants* to live, for whatever reason, demonstrating that for him his existence still has subjective qualities that let him value it positively, his decision has to be respected, even if it is deemed nonsensical. The soldier’s life has no objective quality, but he clings to a subjective quality. He can even provide reasons for that, such as the idea of

Table 1. Criteria for Continuing Life

Situation	Objective qualities	Subjective qualities	Worth continuing
1	Yes	No	No
2	No	Yes	Yes
3	No	No	No
4	Yes	Yes	Yes

having noble martyrdom for the love of his country. This is not an objective quality, but it is a subjective quality he has the right to prefer over an objective quality such as not suffering.¹⁶

Taking Individual Autonomy Seriously

Since the time of John Stuart Mill, autonomy has been a basic notion in any political conception that presents itself as liberal. For Mill, this “simple principle, [is] entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion.”¹⁷ And he adds

that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.¹⁸

The consequences of the liberal principle are ample and condition the whole legitimacy of authority in a society, beyond euthanasia. For Mill the only justification for limiting an individual’s freedom is self-protection, and only in the case that exercising freedom causes damage to third parties. Restricting a personal freedom that causes no damage to third parties, and is only aimed at that individual’s happiness, whatever the individual understands by this, lacks justification. If we analyze the moral validity of euthanasia according to this principle, we can conclude that no restriction on individual choice is justified in those cases where there is no damage to third parties. Restricting individual freedom to impose good is a violation of individual autonomy, because a particular concept of good cannot be imposed by others, but remains an individual option. This option *has* a moral value.

In those situations where the demand for euthanasia is not satisfied, we face the imposition of a particular concept of good. Denying euthanasia supposes a violation of individual autonomy, understood as the combination of three basic principles: the capacity to judge, individuality, and the capacity to make effective decisions. Accepting this denial can be a case of paternalism.¹⁹

Gerald Dworkin has defined paternalism as “the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.”²⁰ According to this definition, three elements must concur: (1) a restriction of a person’s freedom, (2) the intention to safeguard that person’s interests, and (3) the absence of consent from that person. In view of that, when the request for euthanasia is not fulfilled, this can be characterized as paternalism. There is a restrictive intervention by others on the individual’s decisions, with the intention to secure his or her interests.

In this framework, paternalism is a denial of individual autonomy. If what is pursued is favoring the subject’s interests, it seems more logical that, being the

one who knows best those interests, he or she should have the freedom to act according to them. Paternalism appears, thus, as difficult to justify here. But it is true that paternalism can find justifications that would rely on judgments about the individual's position to identify his or her best interests and to act according to them. In this point we would find two questions, one referred to the identification of individual interests, the other related to the subject's capacity to act in consequence (assuming, naturally, that individuals tend to act according to their preferences and interests).

When identifying what is beneficial for the subject, two strategies are possible to implement. One could choose to opt for identifying "objective" interests, situations that are beneficial per se, beyond the individual's personal preferences, in which case one must identify such objective interests and justify why they are superior to any personal preference. The other would be to think about the subject's protagonism when defining those interests, and let the subject decide, assuming all responsibility. This second strategy is easier to harmonize than the first one with the demands of individual autonomy.

We must make reference, nevertheless, to the possibility of a justified paternalism, and we must determine when the subject's free decision does not guarantee the identification and pursuit of his or her best interests. In this point we can resort to the notion of capacity, understood as "the capacity to confront rationally, with a high probability of success, the challenges or problems."²¹ According to this notion, the capacitated subject is in a position to choose and decide in a way that develops his or her preferences. Conversely, the absence of capacity denies a subject that possibility.

At this point we can propose a justified paternalism when the person lacks the capacity to decide what is best for him or her. Here, paternalistic intervention would respond to the moral duty to avoid risk or to make possible what the individual cannot achieve by him- or herself. Going back to those situations in which the moral legitimacy of euthanasia is considered, we can present them as a contradiction between autonomy and paternalism.

In one of the above-mentioned situations, denying euthanasia would be justified as long as the subject lacked capacity to choose his or her own conceptions of good. It would be immoral to hasten the death of a person who, in one of those circumstances, rejects all intervention conducive to that end, and the same can be said about dismissing a demand in the opposite direction. The moral duties to abstain and to act, respectively, emerge from the duty to respect individual autonomy.

It could be argued that it is difficult to accept an exercise of individual autonomy that would draw the subject into a situation where autonomy is no longer possible, which is what happens when the subject asks to be put to death. But if we take autonomy seriously, we have to accept the consequences of exercising it when we deal with people who want to stop suffering and claim a right to die with dignity.

Individual autonomy must not be interpreted in a unidirectional way. Accepting the right to die with dignity implies that the right to life is interpreted as a discretionary one in which its owner has the faculty to decide, and not an obligatory one, which could only be exercised in one direction.²² Characterizing this right as discretionary implies, thus, the possibility of considering it both a "negative right" and a "positive right,"²³ the former being the right to suffer no

unwanted interventions and the latter the right to choose one's own lifestyles and preferences, which include the end of life.

The contents of this right would be²⁴ (1) the right to reject any decision that leads to unwanted death; (2) the right to die in a peaceful way, according to one's own conscience; (3) the right to reject so-called therapeutic carnage; (4) the right to reject any medical treatment, even if that would result in death; (5) the right to express one's own will in advance regarding the process of dying, if certain circumstances are met; (6) the right to receive palliative care; and (7) the right to determine the moment of one's own death.

It could be said that all these points are part of the right to die with dignity, although not all points are accepted without discussion.²⁵ However, the position that society and the law take toward them will be nothing but an expression of the value attributed to individual autonomy.

Concluding Remarks

In this article I have proposed a reflection on some arguments a legislator should take into account in democratic societies when faced with formulating a legal response to a person's request to end his or her life in a situation in which death has begun its course and life no longer means a good for that person.

The legislator is confronted with the fundamental question of practical ethics: What to do? The legislative response must be articulated from a moral philosophical discourse based on values and principles. In these kinds of societies, the normative decision comes after the moral philosophical deliberation, and the legislator has to be consistent with the contents and demands of the common values and principles expressed in that deliberation. In democratic societies, such as in today's Spain, the principle of individual autonomy plays an irreplaceable, protagonist role in informing the deliberations and legislative responses to euthanasia.

At any rate, we have to pay attention to any contradictions between the constitutional proclamation of individual autonomy, that is, the "free development of personality" of Article 10.1 of the Spanish Constitution, and actual legislative initiatives that codify the necessary consequences of that proclamation. Legislation should not overlook the transcendental role of the pluralism of beliefs that characterizes our society, nor its constitutional expression, which demand that the consequences of autonomy be taken seriously.

Notes

1. The concept of dignity is, to a large extent, rather abstract. Identifying its concrete contents and dissecting its components is a complex task. It is simpler to point out determined situations as violations of human dignity. Nonetheless, human dignity presents an irreducible core, pervaded by the notions of autonomy and self-realization. See Peces-Barba G. *La dignidad de la persona desde la Filosofía del Derecho*. Madrid: Dykinson; 2003.
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13. See note 12, Ferrater, Cohn 1992:104.
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16. See note 12, Ferrater, Cohn, 1992:107.
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20. See note 19, Dworkin 1971:108.
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