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ABSTRACT

The phrase 'sanctity-of-life' signifies the idea of life being a pious gift from the almighty, which must be preserved no matter what. To the proponents of this idea, the practice of physician-assisted dying is not only unethical and dangerous, but also blasphemous. Regardless, the practice has gained recognition in several countries in the modern times. Some jurisdictions have also codified laws to allow medical assistance in dying for the patients suffering from mental disorders. This practice however is still only prevalent in the countries following civil law system. This paper is an attempt to study 'physician-assisted dying for psychiatric patients' (psychiatric euthanasia) in the context of common law. After a brief discussion of general issues around the concept of physician-assisted dying, the authors have keenly analyzed the general challenges that psychiatric euthanasia would encounter under common law, with respect to established principles and judicial precedents. The authors have also highlighted the need for a robust framework of guidelines around the issue. In the end, the authors conclude the discussion by giving certain suggestions with respect to the approach of different common law jurisdictions.

Keywords - *Psychiatric Euthanasia, Terminal illness, Autonomy, Suicide, and Mental health.*

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Introduction

Right to life is recognized as the most significant human right for the very existence of human beings.[1] Dignity in human life is the underlying principle that endows meaning to this right.[2] The concept of human dignity has occupied the center stage in the academic discussions of late. Even so, there is little consensus on what this concept entails for the law makers and judges around the world.[3] Hence, the extent of its scope and meaning is largely undetermined.

A major debate with regard to right to life and human dignity is – whether it encompasses right to die as well?[4] In this context, the notion of 'physician-assisted death' (hereinafter referred to as 'PAD') is often discussed on the grounds of human rights as well as medical ethics.[5] PAD can be understood as a process where a physician assists in terminating the life of a patient, who is under unbearable suffering due to an incurable disease, upon his request.[6] The concept of PAD includes two forms:[7]

- when a physician administers a lethal medication to the patient (also known as 'active euthanasia').[8]
- when a physician prescribes a life-ending medication which is later administered by the patient himself (also known as 'physician assisted suicide').[9]

These forms of PAD serve as exceptions to the existing criminal laws in some countries across the world.[10] While active euthanasia is considered an exception to homicide laws, physician assisted

[1] Amitai Etzioni, *Life: The Most Basic Right*, 9 JHR 100 (2010).
[2] Elizabeth Wicks, *The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties*, 12 HRLR 199 (2012).
[3] Conor O'Mahony, *There is no such thing as right to dignity*, 10(2) INT'L J. CONST. L. 551 (2012).
[4] Madison Frank, *Dignity in Death: Why the Fundamental Right of the Individual to Choose Their Final Moments Outweighs the Government's Societal Interests to Preserve Life*, 49(2) U. BALT. L. REV. 137 (2020).
[5] Franklin G. Miller & Howard Brody, *Professional Integrity and Physician-Assisted Death*, 25(3) HASTINGS CENTER REPORT 8 (1995).
[6] Mary A. Wickline, *Physician-Assisted Death: What Everyone Needs to Know,* 106 JMLA 397 (2018).
[7] Nicola Davis, *Euthanasia and assisted dying rates are soaring. But where are they legal?*, THE GUARDIAN (Jul. 15, 2019), https://www.theguardian.com/news/2019/jul/15/euthanasia-and-assisted-dying-rates-are-soaring-but-where-are-they-legal.
[8] Yvette Brazier, *What are Euthanasia and Assisted Suicide?*, MEDICAL NEWS TODAY (Dec. 17, 2018) https://www.medicalnewstoday.com/articles/182951#euthanasia-and-assisted-suicide-.
[9] *Id*.
[10] J. Pereira, *Legalizing euthanasia or assisted suicide: The Illusion of Safeguards and Controls*, 18(2) CURR. ONCOL. 38 (2011).

suicide stands as an exception to the laws against abetment of suicide.[11] Despite the different methods of implementation, active euthanasia and physician assisted death incur similar ethical challenges, which is why they are studied together as PAD. These challenges range from justifiability of terminating a human life to safeguards necessary for the process.[12]

As general practice around the world, only physical illness has been deemed as a valid ground for PAD.[13] However, more recently in some countries, an irremediable suffering caused by mental disorders is also considered as a valid ground for PAD.[14] This practice is referred to by various terms around the world but, the authors have used the term 'psychiatric euthanasia'[15] to signify both active euthanasia and assisted suicide for psychiatric patients, throughout the paper for the sake of consistency.

Psychiatric euthanasia is legal only in a handful of European countries, namely Belgium, the Netherlands, Luxembourg and Switzerland.[16] These countries have legalized psychiatric euthanasia through either an express provision of law or an omission in law regarding the same. For instance, under sec. 293(2) of Dutch Penal Code, if a doctor terminates the life of a person on the request of such person, then it is not an offence, provided that the doctor has complied with the provisions of Termination of Life on Request and Assisted Suicide (Review Procedure) Act, 2002.[17] On the other hand, under Swiss law, assisted suicide is prevalent because of an omission in the Swiss Penal Code. Sec. 114 of the Swiss Penal Code prohibits 'causing the death' for "commendable motives" and sec. 115 expressly prohibits assisted suicide for "self-serving reasons".[18] Both the provisions in consonance allow for assisted suicide for psychiatric patients in

[11] Božidar Banović & Veljko Turanjanin, *Euthanasia: Murder or Not: A Comparative Approach,* 43(10) IRANIAN J. PUB. HEALTH 1316 (2014).
[12] A. Narbekovas & K. Meilius, *Why is the Ethics of Euthanasia Wrong?*, 11 MED. ETIKA. BIOET. 2 (2004).
[13] Bonnie Steinbock, *Physician-Assisted Death and Severe, Treatment Resistant Depression*, 47(5) THE HASTINGS CENTER REPORT 30 (2017).
[14] *Id.*
[15] Jorge Lopez-Castroman, *About the Practice of Psychiatric Euthanasia: A Commentary*, 15 BMC MED. 125 (2017).
[16] Monica Verhofstadt & Others, *Psychiatric Patients Requesting Euthanasia: Guidelines for Sound Clinical and Ethical Decision Making*, 64 INT. J. OF LAW AND PSYCHIATRY 150 (2019).
[17] *The Dutch Termination of Life on Request and Assisted Suicide (Review Procedure) Act, 2002*, 9 ETHICAL PERSPECTIVE 176 (2002).
[18] PEN. CODE, § 114, § 115 (Switzerland).

practice.[19] The same has been declared and reiterated by the Supreme Court of Switzerland numerous times.[20]

Similarly, Belgium has also made an express law to regulate euthanasia and assisted suicide on the grounds of physical as well as mental illness. In 2002, the Belgian Act on Euthanasia was passed that lays down the conditions and procedure to perform euthanasia.[21] Even in Luxembourg, the recent 2009 law on euthanasia and assisted suicide has legalized assisted deaths in the country for psychiatric patients.[22]

It is further important to note that all of the above-mentioned countries are following the civil law system. The authors believe that the practice of psychiatric euthanasia would encounter a separate set of issues and challenges in common law countries, which give paramount importance to judicial precedents. Bearing the same in mind, a keen analysis of such challenges is presented herein, with specific focus on the legal scenario of five common law countries – Canada, the United States of America (USA), the United Kingdom (UK), India, and Australia.

Ethical and legal position of PAD

Having to assist someone in dying, even upon their request is sure to present an ethical dilemma to medical professionals. Sulmasy and Mueller (2017) argue that PAD is strictly proscribed in the Hippocratic writings[23] and its practice raises multiple ethical and clinical issues.[24] Not only can the physicians influence patients' choices depending on their own fears of death/disablement, participating in PAD incurs adverse impacts on such physicians as well.[25] Sumner (2012) also asserts that the Hippocratic oath unequivocally forbids assisted dying as it states, "*I will not give a deadly drug to anyone if I am asked, nor will I make a suggestion to that effect*".[26] Although this view is supported by many physicians all over the world, Merino et al. (2017) point out that there

[19] George Mills, *What you Need to Know about Assisted Suicide in Switzerland*, THE LOCAL CH. (May 3, 2018) https://www.thelocal.ch/20180503/what-you-need-to-know-about-assisted-death-in-switzerland.
[20] *id; Schweizerisches Bundesgericht. Entscheide* 2A.48/2006 und 2A.66/2006.
[21] The Belgian Act on Euthanasia of May, 28th 2002 (Belgium).
[22] Law of 16 March 2009 on Euthanasia and Assisted Suicide 2009 (Luxembourg).
[23] W. H. S. JONES & OTHERS, HIPPOCRATES (Harvard University Press, 1923).
[24] Lois Snyder Sulmasy & Paul S. Mueller, *Ethics and the Legalization of Physician-Assisted Suicide: An American College of Physicians Position Paper,* 167(8) ANN INTERN MED. 1 (2017).
[25] *Id.*
[26] L. W. Sumner, Helping Certain Patients End their Lives, 184(18) CMAJ 983 (2012).

could be multiple interpretations of this statement in the oath.[27] Some scholars have even interpreted the sentence to be referring to murder instead of euthanasia or assisted suicide, as the physicians skilled in healing, were also skilled in killing during Greco-Roman times.[28]

At any rate, the world of medicine has changed drastically from when Hippocrates came up with the historic oath. The modern medicine has changed the context of people's death and end-of-life care; strict adherence to the oath in this context will breed complications.[29] Even the oath has been modified quite a few times, and several versions are available in today's time.[30] In fact, one of the available modern versions reads as: "*If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty.*"[31] This clearly signifies the recognition of assisted deaths as a permissible practice in the field of medicine. As far as ethical challenges are concerned, they may be overcome by mutual trust between the physician and his patient. According to Beauchamp (1996), PAD must stem from a close physician-patient relationship constructed by the parties.[32] They both must discuss the patient's best interests and determine the logically correct course of action, even if that is death.[33]

In any case, ethical position on the matter varies from one person to another. While a physician may feel it is immoral to participate in PAD, another may feel morally obligated to help his dying patients die in the most humane manner possible. In that context, legal position in a jurisdiction regarding PAD can sway their attitudes either way. A growing number of countries are recognizing PAD as valid, but the practice still remains outlawed in most of the countries around the world.[34] Lawmakers as well as scholars in common law countries have been debating over legal validity of

[27] Sabrina Merino & Others, *"The prohibition of Euthanasia" and Medical Oaths of Hippocratic Stemma*, 23(1) ACTA BIOETHICA 171 (2017).
[28] PAUL CARRICK, MEDICAL ETHICS IN ANTIQUITY PHILOSOPHICAL PERSPECTIVE ON ABORTION AND EUTHANASIA, (Springer, 1995).
[29] Thomas A Preston, *Physician Involvement in Life-ending Practices*, 18 SEATTLE UNI. L. REV. 531 (1995).
[30] Yvette Brazier, *What are euthanasia and assisted suicide?*, MEDICAL NEWS TODAY (Dec. 17, 2018), https://www.medicalnewstoday.com/articles/182951
[31] Peter Tyson, *The Hippocratic Oath Today*, PBS NOVA (March 27, 2001), https://www.pbs.org/wgbh/nova/article/hippocratic-oath-today/
[32] Tom L. Beauchamp, *The Justification of Physician-Assisted Deaths*, 29(4) INDIANA LAW REVIEW 1173 (1996).
[33] *Id.*
[34] Nicola Davis, *Euthanasia and assisted dying rates are soaring. But where are they legal?*, THE GUARDIAN (15 July 2019), https://www.theguardian.com/news/2019/jul/15/euthanasia-and-assisted-dying-rates-are-soaring-but-where-are-they-legal

euthanasia and suicide for a long time now. Although, passive euthanasia (withdrawal of life support from terminally ill patients) has been allowed by the courts in UK[35] and India,[36] active euthanasia and physician assisted suicide are still prohibited in these countries. Moreover, only ten states of the USA have legalized physician-assisted suicide.[37]

Not so long ago in 2015, PAD was legalized in Canada by the Supreme Court.[38] The Court held that the provisions criminalizing aiding/abetting suicide are of no force or effect to the extent that: "*they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.*"

The judgment was followed by Canada government codifying the legalization.[39] This led to an opening of floodgates of applications, as the numbers were multiple times than anticipated.[40] A similar trend was observed in Victoria, Australia, where voluntary assisted dying was legalized by a legislation in 2017.[41] Within a year of the same, close to 400 people registered for voluntary assisted death.[42] However, the requirements as to make someone eligible for PAD vary to some extent in different jurisdictions. There are some common prerequisites for PAD, which are:[43]

- the medical condition must indicate unbearable pain
- there is no possibility of improvement
- the person is competent to make decision about ending his/her life
- the person must be terminally ill.

[35] St George's NHS Trust v. S, (1998) 3 All (ER) 673.
[36] Common Cause v. Union of India, (2018) 5 SCC 1.
[37] *States with Legal Physician Assisted Suicide*, PROCON.ORG (Jul. 25, 2019), https://euthanasia.procon.org/states-with-legal-physician-assisted-suicide/.
[38] Carter v. Canada (Attorney General), 1 SCR 331, 2015.
[39] An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying) 2016, S.C. 2016, c. 3.
[40] Kathleen Harris, *Number of Canadians choosing medically assisted death jumps 30%*, CBC (June 21, 2018), https://www.cbc.ca/news/politics/maid-assisted-death-increase-1.4715944.
[41] Voluntary Assisted Dying Act 2017, No. 61, Acts of Parliament, 2017 (Victoria).
[42] Paul Komesaroff & Others, *One Year of Voluntary Assisted Dying in Victoria: 400 have Registered, despite Obstacles,* THE CONVERSATION (June 30, 2020), https://theconversation.com/one-year-of-voluntary-assisted-dying-in-victoria-400-have-registered-despite-obstacles-141054.
[43] Jorge Lopez-Castroman, *About the Practice of Psychiatric Euthanasia: A Commentary*, 15(1) BMC MED. 125 (2017).

In the case of psychiatric euthanasia, some of these requirements become problematic. There are various issues associated with the practice including the competence of the patient to make a conscious choice, mental disorders being non-terminal illness, and the unpredictable nature of such disorders.[44]

Challenges for Common Law Countries

As previously discussed, the concept of PAD is still finding ground in common law. For most of the common law jurisdictions, recognition of psychiatric euthanasia appears to be a distant possibility. Even in the countries which have started to recognize PAD, psychiatric euthanasia is sure to pose more challenges. The authors have sought to examine these challenges in this section and provide a way around them.

The "terminal illness" requirement

Time and again, the association of PAD with an impending death has been discarded.[45] Euthanasia means to allow a painless death to someone, who is suffering from an incurable illness and is under insufferable pain.[46] However, some lawmakers around the world continue to relate the practice with a reasonable foreseeability of death.[47] This requirement often leads to the exclusion of psychiatric euthanasia as a valid practice.

Prime example of this may be observed in Canada. As discussed above, a progressive decision in the case of *Carter v. Canada*[48] decriminalized PAD in the country. Recognizing the need for a set of regulations, the court also directed the government to formulate a legislation around the issue.[49] This move was celebrated by the advocates of voluntary euthanasia all over the world.[50] The decision also allowed room for physician assisted death in cases of suffering due to mental

[44] Monica Verhofstadt & Others, *Psychiatric Patients Requesting Euthanasia: Guidelines for Sound Clinical and Ethical Decision Making*, 64 INT. J. OF LAW AND PSYCHIATRY 150 (2019).
[45] Madeline Kennedy, *Euthanasia rising in Belgium, including more who are not terminally ill*, REUTERS (Sept. 15, 2016), https://www.reuters.com/article/us-health-euthanasia-belgium-idUSKCN11M03D.
[46] BRIAN A. GARNER, BLACK'S LAW DICTIONARY (Thomson Reuters, 2014).
[47] An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying) 2016, S.C. 2016, c. 3; Voluntary Assisted Dying Act 2017, No. 61, Acts of Parliament, 2017 (Victoria).
[48] Carter v. Canada (Attorney General), 1 SCR 331, 2015 (Supreme Court).
[49] *Id.*
[50] Jocelyn Downie, *A Watershed Month for Medical Assistance in Dying*, POLICY OPINION (Sept. 20, 2019), https://policyoptions.irpp.org/magazines/september-2019/a-watershed-month-for-medical-assistance-in-dying/.

disorders.[51] Almost a year and a half after *Carter* judgment, the government enacted a new law on physician assisted deaths.[52] Albeit the judgment focused on consent and irremediable suffering, the act introduced additional requirements for "medical assistance in dying (MAiD)". Most notable of these requirements was that the patient's "*natural death has become reasonably foreseeable*",[53] which effectively excluded its application to all psychiatric patients.

This requirement has been challenged in the Supreme Court on the grounds of being violative of Canadian Charter of Rights and Freedoms in *Lamb v. Canada*.[54] In the latest development in the case, the attorney general of Canada has submitted that the term 'reasonably foreseeable' has to be construed widely.[55] It was submitted that if a patient was to refuse a treatment which is necessary for subsistence of his life, his death may be considered reasonably foreseeable.[56] However, such a definition raises even more ethical questions in so far as it requires a patient to refuse treatment and thereby essentially deteriorate his condition. Such a requirement would never stand the test of constitutionality.

Similar requirements are to be found in Australia where voluntary assisted dying (VAD) is legal in Victoria.[57] It is stipulated that for person to be eligible for VAD, he must be suffering from a disease or mental condition which is expected to cause his death within six months.[58] It is also categorically stated that a person who is only suffering from a mental illness is not eligible for VAD.[59] In the USA as well, all the states which allow for PAD have mandated that the concerned patient must be suffering from a terminal disease.[60]

[51] Canada (Attorney General) v. EF, (2016) ABCA 155 (Court of Appeals).
[52] An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying) 2016, S.C. 2016, c. 3; Voluntary Assisted Dying Act 2017, No. 61, Acts of Parliament, 2017 (Victoria).
[53] Paul S. Appelbaum, *Should Mental Disorders Be a Basis for Physician-Assisted Death?,* 68(4) PSYCHIATRIC SERVICES 315 (2014).
[54] Lamb v. Canada, (2018) BCCA 266 (Court of Appeals).
[55] *id*.
[56] Jocelyn Downie, *A Watershed Month for Medical Assistance in Dying*, POLICY OPINION (Sept. 20, 2019), https://policyoptions.irpp.org/magazines/september-2019/a-watershed-month-for-medical-assistance-in-dying/.
[57] Voluntary Assisted Dying Act 2017, No. 61, Acts of Parliament, 2017 (Victoria).
[58] *id*, § 9(1)(d)(iii).
[59] *id*, § 9(2),
[60] *States with Legal Physician Assisted Suicide*, PROCON.ORG (Jul. 25, 2019), https://euthanasia.procon.org/states-with-legal-physician-assisted-suicide/.

Terminal illness is often associated with reasonable foreseeability of the patient's death.[61] Although the term 'terminal' has been interpreted in several ways,[62] the most commonly used interpretation is "*an ailment which is, to a reasonable degree of certainty, incurable and would lead to an inevitable death in the absence of appropriate treatment.*"[63] Based on this definition, several psychiatric disorders can also be considered as terminal illnesses.[64] It is no news that a significant percentage of worldwide deaths are attributed to chronic mental disorders.[65] Moreover, suicidal tendencies are a common symptom of several psychiatric disorders;[66] in fact, the risk of suicides in psychiatric patients is 3-12 times higher than in others.[67] Let's suppose for instance: A patient is suffering from therapy-resistant schizophrenia and experiences psychotic episodes with delusions and acoustic hallucinations. These hallucinations are loud, recurring, and unbearably painful. To remedy his suffering, he has attempted suicide multiple times. Would this example meet the requirement of reasonable foreseeability of death, considering the fact that he is sure to attempt suicide again?

Many doctors around the world believe that such patients can indeed be classified as terminally ill.[68] There have been cases where people after being denied assisted death, refused food and nutrition, ultimately leading to their deaths.[69] Evidently, the root cause of such deaths is mental disorders and to that extent, they must be considered as terminal illness. Many scholars have also

[61] Maytal Guy & Theodore A. Stern, *The Desire for Death in the Setting of Terminal Illness: A Case Discussion*, 8(5) PRIM. CARE COMPANION J CLIN. PSYCHIATRY 299 (2006).
[62] J. Pereira, *Legalizing euthanasia or assisted suicide: The Illusion of Safeguards and Controls*, 18(2) CURR. ONCOL. 38 (2011).
[63] James J. McCartney & Jane Mary Trau, *Cessation of the artificial delivery of food and fluids: Defining terminal illness and care*, 14(5) DEATH STUDIES 435 (2007).
[64] Constance E. George, *When Is Depression a Terminal Illness? Deliberative Suicide in Chronic Medical Illness*, 18 AMA J. ETHICS 594 (2016).
[65] Elizabeth Reisinger Walker & Others, *Mortality in Mental Disorders and Global Disease Burden Implications*, 72(4) JAMA PSYCHIATRY 334 (2016).
[66] Gloria Reeves, *Terminal Mental Illness: Resident Experience of Patient Suicide*, 31(3) JOURNAL OF THE AMERICAN ACADEMY OF PSYCHOANALYSIS AND DYNAMIC PSYCHIATRY 429 (2003).
[67] H. I. KAPLAN & B. J. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (WILLIAM & WILKENS, 1995).
[68] Linda Pressly, *The troubled 29-year-old helped to die by Dutch doctors*, BBC NEWS (Aug. 8, 2018), https://www.bbc.com/news/stories-45117163.
[69] Scott Kim, *How Dutch Law Got a Little Too Comfortable with Euthanasia*, THE ATLANTIC (June 8, 2019), https://www.theatlantic.com/ideas/archive/2019/06/noa-pothoven-and-dutch-euthanasia-system/591262/.

argued that anyone who is suicidal feels that his suffering is unbearable and the law must recognize the plight of such persons.[70]

Regardless, the terminal illness requirement is an asterisk on the right to die with dignity and it is erroneously interpreted to exclude psychiatric patients from PAD. The authors strongly believe that every person is entitled to live with a minimum dignity and if and when the standards of his living go below that minimum and his suffering becomes incurable, he should be allowed to die in peace. In such cases, terminal illness should not be a pre-requisite.[71]

Making an informed choice

One of the most essential pre-requisites for euthanasia is that the person must be competent to make a reasonable and conscious choice.[72] This could be difficult for someone who is suffering from a mental disorder.[73] Over the years, the law has devised ways to assess if a person suffering from a mental illness is capable of rational decision making but it gets trickier when termination of one's own life is concerned.[74] In such conditions what may seem like a well deliberated choice is often an outcome of failure to contemplate the options in a reasonable manner.[75] But even in cases of mental disorders, not all brain functions are impaired similarly and the person may still be able to think clearly. Okai et al. (2007) found in their study that majority of psychiatric in-patients were competent to make decisions relating to their treatment and care.[76] In the case of psychiatric euthanasia, it becomes crucial to make sure if the patient is actually in a position to make an informed decision regarding termination of his life. This would make the role of consulting psychiatrists and physicians all the more relevant.

[70] Wesley J. Smith, *Canada Push To Allow Mentally Ill Euthanasia,* NATIONAL REVIEW (April 18, 2017), https://www.nationalreview.com/corner/canada-push-allow-mentally-ill-euthanasia/.
[71] J. Pereira, *Legalizing euthanasia or assisted suicide: The Illusion of Safeguards and Controls*, 18(2) CURR. ONCOL. 38 (2011).
[72] Jorge Lopez-Castroman, *About the Practice of Psychiatric Euthanasia: A Commentary*, 15 BMC MED. 125 (2017).
[73] David Okai & Others, *Mental capacity in psychiatric patients: Systematic review*, 191 BR. J. PSYCHIATRY 291 (2007).
[74] Mathew Ratcliffe, *Psychiatric Euthanasia, Mental Capacity, and a Sense of the Possible*, 27(3) PHILOSOPHY, PSYCHIATRY, AND PSYCHOLOGY 1 (2020).
[75] *id*.
[76] David Okai & Others, *Mental capacity in psychiatric patients: Systematic review*, 191 BR. J. PSYCHIATRY 291 (2007).

This discussion prompts the question: what of those patients who are not capable of making a conscious choice? Materstvedt (2003) argue that medicalized killing of a patient without their consent, whether non-voluntary (where the patient is not capable of consenting) or involuntary (against the patient's choice), is not euthanasia but murder.[77] However, there is precedent in common law wherein the Court allowed euthanasia for a patient who was in a vegetative state and thus, unable to consent.[78] This judgment has been referred to in many common law jurisdictions since then.[79] Although the case related to passive euthanasia only, a similar approach may be implemented in the case of psychiatric euthanasia for the patients who are unable to consent.

Decisional Autonomy debate

Most of the common law countries guarantee right to liberty and autonomy to their citizens to a certain degree.[80] This right often extends to right to autonomy of medical treatment. In the historic judgment of *Montgomery v. Lanarkshire Health Board*,[81] the UK Supreme Court held that "*a competent adult person is entitled to decide which, if any, of the available forms of treatment to undergo*". Patients' autonomy is one of the strongest arguments used to back assisted deaths. Professionals in bio-ethics are also starting to recognize that the law should allow the patients a set of options regarding their treatment, including the option to die a merciful death.[82] In the light of the same, it is the need of the hour that common law countries recognize PAD as a valid and ethically permissible practice.

On that note, suicide is now also construed in terms of individual autonomy.[83] Over the years, we have seen many common law countries decriminalizing suicide. Most recently in India, Mental Healthcare Act, 2017 effectively decriminalized suicide;[84] assisting or abetting a suicide however, is still prohibited.[85] It is stipulated under the Mental Healthcare Act that any person who attempts

[77] Lars Johan Materstvedt & Others, *'Euthanasia and Physician-Assisted Suicide: A View from an EAPC Ethics Task Force*, 17 PALLIATIVE MED. 97 (2003).
[78] Airedale National Health Service Trust v. Bland, (1993) 1 All (ER) 821.
[79] Aruna Shanbaug v. Union of India, (2011) 4 SCC 454.
[80] Ronald J. Krotoszynski Jr., *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 40 DUKE L. J. 1398 (1990).
[81] Montgomery v. Lanarkshire Health Board, (2015) UKSC 11.
[82] Tom L. Beauchamp, *The Right to Die as the Triumph of Autonomy*, 31(6) JOURNAL OF MEDICINE AND PHILOSOPHY 643 (2006).
[83] David M. Clarke, *Autonomy, Rationality and the Wish to Die*, 25 JOURNAL OF MEDICAL ETHICS 457 (1999).
[84] Mental Healthcare Act 2017, § 115, No. 10, Acts of Parliament, 2017.
[85] PEN. CODE, § 306 (India).

to commit suicide shall be presumed to be under severe stress and hence, shall not be tried and punished under law.[86] It is pertinent to note that the law herein recognizes the fact that a person may tend to terminate his own life due to severe stress and depression. The authors vehemently argue that the exact same rationale must be followed by the common law countries for psychiatric euthanasia as well. This would go a long way, not only in terms of establishing autonomy as a paramount right, but also in eliminating the difference of legal stances with respect to physical and psychological ailments.

Role of Doctors

With the advent of psychiatric euthanasia, the clinicians in certain countries have been able to end the unbearable and incurable suffering of psychiatric patients by giving them a merciful death.[87] However, the process must be accompanied with appropriate 'safeguards' to ensure that the patients who are assisted to death are choosing death voluntarily and consciously.[88] To address this issue, the law often prescribes a set of regulations which mandates an active role for doctors in the whole procedure. The role of doctors, especially psychiatrists is crucial at each and every stage of the procedure in psychiatric euthanasia.

A recent case study of 36-year-old man who requested for assisted death because of his psychiatric disorder is quite relevant in this context.[89] As per the past medical reports, the patient was suffering from chronic psychosis and therapy-resistant schizophrenia, leading to hallucinations. He heard voices speaking and singing which drove him to the extent of requesting death. After he made his request, his case was referred to another doctor for a mandatory second opinion according to the new regulations by the Dutch Medical Association. During this process, the consulting doctor analyzed the symptoms and the case was concluded to be of 'intrusive thoughts'. After the diagnosis, a new course of treatment was prescribed to him and within 3 weeks, a drastic decrease

[86] Mental Healthcare Act 2017, § 115, No. 10, Acts of Parliament, 2017.
[87] Ron Berghmans & Others, *Physician-assisted suicide in psychiatry and loss of hope*, 36 INT'L J. LAW AND PSYCHIATRY 436 (2013).
[88] Mark D. Sullivan & Others, *Should Psychiatrists Serve as Gatekeepers for Physician-Assisted Suicide?,* 28 THE HASTING CENTER REPORT 24 (1998).
[89] S. M. P. Van Veen & A. Batalla, *Last-Minute Recovery of a Psychiatric Patient Requesting Physician-Assisted Death*, 71(6) PSYCHIATRIC SERVICES 621 (2020).

in the symptoms was recorded. Soon thereafter, the patient recovered from the disease and has never shown any symptoms afterwards.

This incident shows the need of mandating the active role of doctors in the process of psychiatric assisted death. Psychiatrists' keen understanding of human behavior and psychosocial element which dominates one's approach, decision-making, reactions and self-worth is essential not only in assessing the extent of the disease but also in assessing whether the patient himself is competent to make such a decision.[90] The above case illustrates that psychiatric euthanasia if approached systemically and carefully, would help not only the incurable patients die with dignity, but also help those who are misdiagnosed as incurable.

That is why the expert discussion over the safeguards in the administration of assisted death includes the mandatory inclusion of psychiatric consultation.[91] Academic discussions and widespread support for compulsory consultation of psychiatrists has forced the nations to bring detailed frameworks around the issue, which make such consultations mandatory.[92] These regulations have defined the obligatory role of the psychiatrists during the whole process.

Most notable among such guidelines is to be found in Netherlands.[93] The Dutch Psychiatric Association in 2018 couched the guidelines concerning psychiatric assisted deaths with the aim of providing "*a contemporary, detailed procedural framework having applicability on everyday practice as well as compliance with ethical standards*".[94] The said guidelines which are specifically molded for psychiatric patients provide comprehensive procedures that must be followed during the entire process. The procedure is systemically divided into four phases and requires involvement of at least three physicians; these phases are:[95]

- Request phase

[90] Ruaidhrí McCormack & Rémy Fléchais, *The Role of Psychiatrists and Mental Disorder in Assisted Dying Practices Around the World: A Review of the Legislation and Official Reports,* 53(4) PSYCHOSOMATICS 319 (2012).
[91] W. F. Baile & Others, *The Request for Assistance in Dying: The Need for Psychiatric Consultation,* 72 CANCER 2786 (1993).
[92] Hane Htut Maung, *Psychiatric Euthanasia and the Ontology of Mental Disorder*, 38(1) JOUR. OF APPLIED PHILOSOPHY 136 (2020).
[93] Kasey Joyce, *The Legal and Practical Fraework for Psychiatric Diagnoses As Bases for Requests for Euthanasia and Physician-Assisted Suicide in the Netherlands*, 31(2) FLORIDA JOUR. OF INT'L LAW 239 (2020).
[94] Guideline: Physician-Assisted Death in Patients with a Psychiatric Disorder (Netherlands), Dutch Psychiatric Association (2018).
[95] *id*.

- Assessment phase
- Consultation phase
- Executive phase

This procedure involves three physicians, out of which two must be psychiatrists. In the second phase, a thorough investigation is done to check all medical as well as legal prerequisites like whether the request is voluntary and the person requesting for assisted death is competent.[96] The guidelines also mandate a second opinion by an independent psychiatrist having specialization in the concerned disorder.[97]

Other countries which have allowed psychiatric euthanasia also have rules and regulations in place specifying the role of doctors, however not as detailed as in the Netherlands. According to sec. 3 of the Belgian Act on Euthanasia, if the patient is not expected to die in the near future', the initial doctor must "*consult a second physician, who is a psychiatrist or a specialist in the disorder in question*".[98] Similarly, in Luxembourg, a consultation with the second doctor is compulsory and he must be "*competent as to the pathology concerned*".[99] After the consultation, he is required furnish the report based upon his/her examination.[100]

In the light of the above discussion, it is apparent that psychiatric euthanasia requires several checks and safeguards in place to become a beneficial policy. Sullivan et al. (1998) argue that the involvement of the psychiatrists with patients requesting assisted death must be in the role of 'healer' not as a 'gatekeeper' as the primary intention of the evaluation is to help such patients.[101] Hence, a simple decriminalization of psychiatric euthanasia (as done in *Carter v. Canada*)[102] would not be successful, if a robust set of guidelines prescribing medical and psychiatric consultations is absent.

[96] Hans Pols & Stephanie Oak, *Physician-assisted dying and psychiatry: Recent developments in the Netherlands*, 36(5-6) INT'L JOUR. OF LAW & PSYCHIATRY 506 (2013).
[97] *id*.
[98] The Belgian Act on Euthanasia of May, 28th 2002 (Belgium).
[99] Law of 16 March 2009 on Euthanasia and Assisted Suicide 2009 (Luxembourg).
[100] *id*.
[101] Mark D. Sullivan & Others, *Should Psychiatrists Serve as Gatekeepers for Physician-Assisted Suicide?,* 28 THE HASTING CENTER REPORT 24 (1998).
[102] Carter v. Canada (Attorney General), 1 SCR 331, 2015 (Supreme Court).

Conclusion

Psychiatric euthanasia is a complex issue which poses several ethical challenges to the lawmakers around the world. As evident from the discussion under above heads, most of the common law countries may find the concept difficult to acknowledge. Especially in the countries like the UK and India, where PAD is not allowed even for physical ailments, it is highly unlikely that psychiatric euthanasia will find validation anytime soon. As for jurisdictions like Canada, Australia (Victoria), and the USA (ten states), the authors argue that the legal stance on physical and mental illness should be identical and thereby, these states must allow psychiatric euthanasia.

With that being said, the authors also acknowledge that assessing the situation of psychiatric patients is much more complex than those with physical ailments.[103] Due to unclear biological foundation and lack of understanding of the issue, assessment of such patients is fairly uncertain. Hence, the practice cannot be allowed anywhere without comprehensive safeguards in place. This is an extremely sensitive matter and it is imperative that the lawmakers prepare a strong framework of regulations and guidelines so as to ensure accurate diagnosis and care of such patients. As previously discussed, the framework issued by the Dutch Psychiatric Association in 2018 appears to be the most accurate among the regulations prevalent in different countries which allow for psychiatric euthanasia,.[104] The guidelines provide for objective assessment of the patients and their examination by multiple experts. They may also try alternative methods of treatment to ascertain if the disease is actually remediable.[105] The authors believe that the acceptance of this concept in common law countries must be accompanied with strict rules on the lines of above-discussed framework.

Regard must also be had to the eligibility for euthanasia under Dutch law. The law in the Netherlands allows even minors above the age of 12 years to undergo assisted death (consent of the parents is taken for children aged 12-16 years.[106] In any case, a person who has not yet attained

[103] S. M. P. Van Veen & Others, *Last-Minute Recovery of a Psychiatric Patient Requesting Physician-Assisted Death*, 71(6) PSYCHIATRIC SERVICES 621 (2020).
[104] Guideline: Physician-Assisted Death in Patients with a Psychiatric Disorder (Netherlands), Dutch Psychiatric Association (2018).
[105] S. M. P. Van Veen & Others, *Last-Minute Recovery of a Psychiatric Patient Requesting Physician-Assisted Death*, 71(6) PSYCHIATRIC SERVICES 621 (2020).
[106] BBC News, *Netherlands backs Euthanasia for terminally ill children Under 12*, BBC NEWS (Oct. 14, 2020) https://www.bbc.com/news/world-europe-54538288.

the age of majority cannot be expected of making a conscious and informed choice with regard to termination of his own life, and to that extent the Dutch law is highly problematic.

Most of the common law countries are still in the way of figuring out, where exactly they stand on the concept of right to die. There has been a slow and steady transition towards the idea of recognizing the liberty and autonomy of patients, with some countries accepting the change more readily than others. The ethical debate of 'individual's life *versus* individual's autonomy' may continue for a long time, but the states should not have different policies for physical and mental diseases/ailments with respect to assisted deaths. The modern law of health and medicine does not allow states to discriminate between physically and mentally disabled persons.[107] While on one hand, states as well as international organizations are trying to spread awareness around the importance of mental health,[108] having such distinctions depicts a regressive school of thought. To that effect, the authors argue that the jurisdictions which have legalized PAD for physical terminal illness, should also recognize and accept psychiatric euthanasia.

[107] Matthé Scholten & Others, *Equality in the Informed Consent Process: Competence to Consent, Substitute DecisionMaking, and Discrimination of Persons with Mental Disorders*, 46 THE J. MED. PHIL. 108 (2021).
[108] E. C. Fistein & Others, *A comparison of mental health legislation from diverse Commonwealth jurisdictions*, 32(3) INT'L J. LAW PSYCHIATRY 147 (2009).