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https://doi.org/10.5007/1677-2954.2024.e100011

CUR HOMO DEUS? SOME CONSIDERATIONS REGARDING THE RIGHT TO LIFE

CUR HOMO DEUS? ALGUMAS CONSIDERAÇÕES SOBRE O DIREITO À VIDA

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ABSTRACT
One of the most important rights humans have is the right to life. But its status is far from self-evident. This paper raises a few questions regarding this right: what does it mean conceptually, and what does it imply; what is its status within a catalogue of fundamental rights; who is the owner of the right to life, and does it include the right to die? In connection with present legal developments, it is asked whether the right to self-determination should be given priority over the right to life, as was suggested by a recent decision by the German constitutional court.
Keywords: Right to life; Right to self-determination; European Convention on Human Rights; German Constitution; Euthanasia; Self-ownership.

RESUMO
Um dos direitos mais importantes que os humanos têm é o direito à vida. Mas o seu estatuto está longe de ser evidente. Este artigo levanta algumas questões relativas a este direito: o que significa conceitualmente e o que implica; qual é o seu estatuto num catálogo de direitos fundamentais; quem é o dono do direito à vida e isso inclui o direito de morrer? Em ligação com a atual evolução jurídica, questiona-se se o direito à autodeterminação deveria ter prioridade sobre o direito à vida, como foi sugerido por uma decisão recente do Tribunal Constitucional alemão.
Palavras-chave: Direito à vida; Direito à autodeterminação; Convenção Europeia dos Direitos Humanos; Constituição Alemã; Eutanásia; Propriedade de si.

Introduction: *testimonium paupertatis*

Whoever wants to write on the right to life probably has some understanding of what that right refers to: life. Yet, who can say what life really is or how it should be lived? Perhaps that question was the focus of Socrates' brief conversation with the old man Kephalos at the beginning of

Plato's Politeia. After all, Kephalos has already come a long way and death is in sight. But the conversation doesn't really get going. Kephalos does not really give an answer and soon retreats to his home altar.[2] Of course, this failed conversation has not put an end to the human conversation about life and the right to life. That conversation contains and continues to contain many dimensions, a number of which are outlined here.

On the concept of 'right to life'

It appears that there is quite a bit of uncertainty about the right to life. First, there are conceptual problems. How can one actually have a 'right' to life? You either live or you don't live, so it seems. In the first case you are (already) 'alive' and in the second case you are not living, and it is impossible for 'you' to claim life. This is true both for those who are dead and for those who are not yet born. In short: does 'life' not coincide with the 'right to life'? Doesn't everyone who is 'here' have the right to be 'here',[3] even though that may sound a bit silly? In contrast, for example, the right to property or to freedom of expression do not seem at all conceptually difficult to understand, even though these rights obviously entail difficulties in determining their scope and application. When I live, I need property and from a certain age onwards I have my own views. Most people find it better to own property than not and to be allowed rather than prohibited to express their opinions. However, ownership and opinions are, how should one put it, outside or separate from the bearer of those rights, that is, from the person who is entitled to them. Those are legal (or moral) goods that may or may not belong to a living legal (or moral) subject. However, with regard to the right to life, subject and object seem to coincide.[4] Unless I accept the existence of the immortal soul with a pre-natal or post-mortal existence, I cannot conceive of a (legal or moral) subject[5] without the object (or good) 'life'. It is indeed a basic 'good'. The person who is not yet or no longer alive cannot possibly claim the right to life, while a person whose property or freedom of expression has been violated can still claim the right to it (at least in a moral sense). Of course, my life can be taken from me, but if that is understood as a violation of my right to life, then I am no longer there to claim my life.[6] And once I'm there, it's conceptually quite complicated to say that I would rather not have had that right.[7] This explains why legal claims such as 'wrongful life' claims pose major conceptual problems: how can someone who exists believe that his or her life is a form of harm, and would rather not have been there?[8]

Probably because of such considerations, the right to life is often considered to be at the top of the hierarchy of rights.[9] But this image of ranking suggests a mere difference of degree between the right to life and other (fundamental) rights, while conceptually there is more to it. Is the right to life merely 'higher' than that to property or freedom of expression (and thus more worthy of protection) or is this right different in nature?[10] After all, the right to life (or better: life?) seems to be the *conditio sine qua non* of the possibility of all other rights. If that is the case, then the right to life (or better: life?)[11] must indeed be of a different category than all other rights like the right to property and freedom of expression.

Thus, a proper understanding of the right to life is not possible by understanding it (merely) analogously to other rights, namely as the right not to be killed and as the (mere) duty of others, in particular the state, to protect life. This is true even when the right to life, like most other rights,[12] is not considered absolute. We will see that indeed the right to life is not absolute and the protection of life not unconditional, but this does not alter the fact that without life there are no rights and certainly no legal community.

The fundamental character of 'life' explains the importance of the question as to when life is worthy of protection. This question regards the relationship between the biological phenomenon of human life, especially at its beginning and its end, on the one hand and its being worthy of protection as a legal phenomenon on the other.[13] Should life be protected when its biological 'carrier' is not yet, as in a zygote, or no longer, as in deep dementia or coma, aware of such life, whatever awareness or consciousness may mean? By making abortus provocatus and euthanasia legally possible, many legal systems acknowledge the distinction between human life that is and that is not (fully) protected by law. Only when 'life' has been recognized by and adopted within a legal sense, other rights can emerge. This explains why such great social and political disagreements surround abortion and euthanasia: some believe that the distinction between biological and legal human life is not legitimate, while others strongly defend that distinction.

A reflection on the concept of 'right to life' may also lead to what are sometimes called the great questions of life: what is the meaning of my life or of human life in general?[14] It isn't a great overestimation of humans to think that everyone, even the greatest optimist, is sometimes confronted with the question: 'what does it all mean?'.[15] And that question may lead to related questions: I may have the right to own property and express my opinions, but what 'good' - if at all - does property serve and what is the point of voicing my opinion? Here too, the difference between the right to life and all other (human) rights manifests itself. Until recent, it was not

prohibited to give up one's property or freedom of expression, but actively 'doing away' with one's own life was not allowed. Nowadays the legal and perhaps even the moral prohibitions on suicide are no longer considered valid. But even though the act of killing oneself is no longer prohibited, assisting someone else to commit suicide remains a criminal offence in most legal systems.[16]

On the substance of the right to life: two views

Connected to these conceptual problems is the difficulty of determining what the right to life substantively implies. What does the worthiness of life mean? The well-known 'universal historian' Yuval Harari knows the answer. Whether the title of his well-read book 'Homo Deus' consciously refers to the not (anymore) well-known work of Anselm of Canterbury, is not clear. Yet, this 11th century monk was not only the first to come up with the so-called ontological proof of God's existence, which is now considered incorrect by many; but he also gave an answer to the question why God had to become man in the person of Jesus Christ - 'Cur Deus Homo'- an answer, by the way, equally rejected by most in modern days. Thus, a greater contrast between Harari (Homo Deus) and Anselm (Deus Homo) is hardly imaginable. According to Anselm, God had to become man and thus mortal in order to free us, humans, from the fate that we, in the person of Adam, had brought upon ourselves by the original sin. Obtaining knowledge of good and evil, prohibited by Divine law, put not only an end to man's carefree existence in Paradise ('in the sweat of thy face shalt thou eat bread'), but also to his natural immortality ('for dust thou art, and unto dust shalt thou return', Genesis 3, 19). Unbelievers like to ridicule us Christians, writes Anselm, because of the doctrine that God had to manifest Himself in the miserable and finite condition of man in order to reconcile us with him. Why would 'God' 'accept the smallness and weakness of human nature' was the objection Anselm wanted to answer.[17]

Harari tells a completely different story: God does not have to become man, but man is on his way to becoming (a) god. After all, at the beginning of the 21st century, humanity has emerged from the plagues it suffered in the past: infectious diseases, famine, and war. From a historical perspective, those curses, Harari optimistically states, now belong to the past and that is not the result of Divine intervention but of human ingenuity. If in the near future tragedies will occur as a result of disease, hunger, and violence, they will no longer be understood as things that simply happen to humans, but as problems that can and must be overcome. In principle, the present world is healthy, prosperous, and peaceful. Therefore, a new

question arises. What is now on humanity's agenda? Harari's answer is that humans now aim to overcome mortality, to establish a situation of well-being and to attain the status of divinity. These goals are interconnected: the ambition to overcome death requires a definition of the concept of well-being and an upgrade of man to the status of god. The question is not why God had to become human, but how humans accomplish this transition from homo sapiens to homo deus.

By striving for immortality, says Harari, humanity is fulfilling a promise made in the mid-20th century. Immediately after the Second World War, the Universal Declaration of Human Rights (and subsequent treaties and constitutions) clearly established 'human life' as an ultimate value. According to Harari, death is a clear violation of the right to life and therefore a 'crime against humanity'.[18] Until establishing the 'right to life', homo sapiens had never attributed ultimate value to human life. It was always assumed that there was something that transcended human life. Therefore, people attributed a certain metaphysical meaning to death: it showed the relative value of human life. Today, however, humans know that death is nothing more than a technical failure that some humans, especially engineers, can and should fix. When someone dies, this is indeed due to a technical problem.[19] Nowadays a lot of money and time is invested in research into cancer, germs, genetics, and nanotechnology. In Harari's view, the Universal Declaration implies not merely that humans have the right to live until a certain age, but to a life without an expiry date. Based on the sanctity of human life, the dynamics of science and the needs of a capitalist economy, the 'war on death' is the great project of the coming century.

Opposed to this interpretation of the right to life as a claim to overcome death, we find a very different interpretation: the right to life does not exclude death, but rather includes death and even the right to self-chosen death. This interpretation is the object of an extensive moral, political and legal battle as the right to euthanasia and the right to assisted suicide have only been acknowledged in a minority of states worldwide. Socially, Harari's interpretation carries perhaps most weight, since medical science focuses mainly on preserving human life, not on guiding people to a decent death.[20]

The starting point of the interpretation of the right to life as including the right to die[21] can perhaps best be located in situations in which relatives of comatose patients asked their medical doctors to no longer keep their loved ones alive artificially because there was no longer any chance of healing or recovery. One important case involved Nancy Cruzan. The question of whether she could be allowed to die, was ultimately (negatively)

decided by the Supreme Court of the United States in 1990. Cruzan had been in a vegetative state for seven years after a car accident and those close to her (family members and friends) believed that it would have been her wish to die. The Supreme Court ruled however that Cruzan's presumed wish was insufficiently clear and that the state's duty to protect life should therefore be decisive. The objective interest of the state in life would, in the words of Griffin,[22] lay in safeguarding life as a value in itself and would thus prevail over the subjective value of Cruzan's life for this person and her environment.

The next episode in this interpretation would be the request to be allowed to die, not asked in the name of someone else (as in Cruzan), but by the person in question. A famous legal example is that of Diane Pretty. She asked for a decision by the Public Prosecution Service of the United Kingdom not to prosecute her husband if, at her express request, he would help her to die when she was no longer able to die at her own hand during a very advanced stage of her muscular disease. In the UK, as in most jurisdictions, assisted suicide is a criminal offense.[23] The Public Prosecutor rejected her request, which Pretty considered a violation of her right to life, which would, she held, include a right to die. This legal dispute ultimately ended in Strasbourg, where the European Court of Human Rights ruled that the decision of the Public Prosecutor was not in violation of the right to life as enshrined in the European Human Rights Convention. Within that legal context, the right to life stipulates that no one may be deliberately deprived of life.

A final step in this trajectory lies (for the time being) in the recognition of the right to assistance with dying, not only when the request to die is based on a medical emergency, as in the cases of both Cruzan or Pretty, but also when a person considers his or her life not worth living any longer. Would the right to self-determination not include the right to die at one's own decision or with the help of another person?[24]

In sum: according to this second interpretation human life indeed has an expiration date. The right to life cannot include a claim to immortality, not only because life itself is finite but also because, according to some at least, the prospect of the end of life is constitutive for the meaning of human life.[25] Indeed, since the 'natural' end of life may sometimes appear to be postponed quite endlessly due to all sorts of medical interventions, one should perhaps be able to decide for oneself the moment of one's death. To be sure, this does not answer the question of the value of human life. It is merely a fact of life that some humans of a certain age consider their life as completed or so ridden with pain and misery that it is no longer considered worth living. Which moral or legal consequences and conditions

should be attached to the claiming the right to die, is the subject of much debate and controversy. It could be asked whether it is possible for any person to consider his or her life as 'completed'. Is it possible to choose between life and (one's own) death, which is a 'situation' totally unknown? Within the philosophical tradition, the right to die was generally rejected and the prohibition of suicide and assisted suicide was generally supported,[26] even though there were dissonant voices, such as Seneca's and Hume's.

On the law regarding the right to life

Given these two radically different interpretations of the relationship between the right to life and death, it is important to consider what the law has to say here. Three main types of legislation could be considered: national, international, and regional, the last of which has the most to offer.[27] In Dutch law, the right to life does not appear,[28] thereby eliminating the conceptual difficulties mentioned earlier. The Dutch constitution simply states that everyone has the right to the inviolability of the body. Its meaning is clear – a human being is a physical being and as such vulnerable. In that 'physicality' he or she can be harmed by self and by others. Such harm or infringement by others is not permitted without a legal basis, as when e.g. a person consents to being examined or treated by a medical doctor. If suicide is not criminally prohibited, the law does not stand in the way of humans harming themselves (unless there is undue pressure from others).

This 'inviolability' of the body can also be found within the international context, but here it carries less weight. Article 3 of the Universal Declaration first stipulates everyone's right to life and liberty and only thereafter the inviolability of the person (not the body) is mentioned. The Declaration does not comment on or explain the relationship between (right to) life and freedom on the one hand and inviolability of the person on the other, nor the relationship between person and (everyone's physical) body. In the International Covenant on Civil and Political Rights, 'life' stands on itself, separated from freedom; 'inviolability' appears to be replaced by security. Freedom and security find their meaning in the context of arrest and imprisonment, in Article 9. Article 6, solely dedicated to the right to life calls this right 'inherent' to be protected by law, even though the imposition of the death penalty is not ruled out.[29]

At the European regional level - in the European Convention on Human Rights (ECHR) - the right to life stands (also) on itself and is at the top (Article 2) of all the rights mentioned therein; Here too, freedom and

security are related to situations involving arrest and imprisonment. The right to life is formulated as follows: 'the right to life shall be protected by law and no one shall be deprived of life intentionally'. The wording of the article leaves it unclear how both elements (the duty to protect (the right to) life and the prohibition against intentionally taking someone's life) are related.

Four exceptions apply to the right to life, one of which is included in the first paragraph and three in the second paragraph. The first concerns the death penalty, which of course is a form of 'intentionally taking someone's life'.[30] The other three exceptions concern cases in which someone's life is taken in a 'non-intentional' manner without violating their right to life. This concerns the following three situations: someone dies while an (other) person or several (other) persons are defended against unlawful violence; someone is killed in an attempt to arrest him[31] or in an attempt to escape detention; someone dies when an uprising or a riot is put down or suppressed. If the use of lethal force in these last three situations is necessary and proportionate, someone is killed without violating their right to life.

A number of things stand out in the wording of Article 2. Firstly, the meaning of the element 'right to' remains unclear: Article 2 concerns the protection of human life, and the exceptions revolve (solely) around situations in which the state (but not the person whose life it is) may take a life without violating this right. This also explains why the death penalty is included in the first paragraph and the other three exceptions in the second paragraph. Bringing about the death of the person who is criminally sentenced to death, is clearly intended (and thus an exception to 'nobody shall be deprived of life intentionally'). Intent is supposed to be absent in the other three situations. The ending of (certain) lives is supposed to be merely the unintentional and therefore secondary consequence of actions that primarily aim for the good, namely defending endangered and threatened lives of others, making arrests, and suppressing uprisings. Unfortunately - so the reasoning seems to be - certain societal goods are sometimes accompanied by the unavoidable evil of taking (the criminal's) life.

However, and secondly, this classification is not self-evident: the punishment of death can only be considered intentional from the perspective of retribution as the main justification of criminal law. From a utilitarian criminal law perspective, the death penalty is just as much a (regrettable but unfortunately necessary) means to the end of social welfare as the killing of, for example, a terrorist in defence of innocent lives. The Convention thus clearly relies here on the classic doctrine of double effect,

which distinguishes between what is explicitly intended by a human act and the side effects, costs, or 'collateral damage' of this act. Death penalty is clearly intended, the other takings of life are not. According to Thomas Aquinas, to whom this doctrine is often attributed, an action should be morally judged by its intention and not by its side effects.[32] This doctrine with its distinction between what is intended and its foreseeable side-effect, is well-known for its use in the law of war and in medical ethics, both of which, not coincidentally, relate to the question of life and death. However, this doctrine has repeatedly been criticised. The distinction between what is intended and what is foreseeable is sometimes wafer-thin. With the help of this doctrine, all kinds of negative effects can be justified as long as there is a good intention (and a good effect) behind it.[33] The three exceptions in the second paragraph of article 2 indeed presuppose that defending someone against unlawful violence, being able to arrest someone (and preventing his escape) and suppressing an uprising are, in the extreme case, of greater importance than the lives of those involved in these situations.

Thirdly, and most importantly perhaps, this article leads us to questions of ownership of human life. The right to life is considered to be limited by situations in which the interest of the state is at stake. It could be argued that all four exceptions concern situations in which the state aims to maintain itself and its monopoly on violence.[34] In this reading of Article 2, the decision on the scope of the right to life lies ultimately with the state(s), even though it can be called to account by the Court that has been granted the authority to oversee compliance with the Convention.[35] In principle, however, states reserve the right to take the life of anyone sentenced to death, of anyone who lethally threatens the lives of others, of anyone who resists arrest or wants to escape from prison, and of those who revolt against the state.[36]

On the ownership of the right to life.

We have seen that the end of (human) life in the context of Article 2 of the ECHR is only discussed insofar as it may be caused by the state. Traditionally, this could be understood within the frame of natural law reading of human rights: these are rights that accrue to humans in force of their nature, but that can only be effectively guaranteed if an enforcement agency, read: the state, is established (through some social contract mechanism). A treaty or convention on human rights is the solemn recognition of these (pre-existing) rights by several states and their promise to respect and promote the lives of their residents, provided a limited

number of well-defined exceptions. The text of the treaty or convention is therefore declaratory and not constitutive (since it does not establish these rights).

This 'idealistic' reading has not remained unchallenged. A well-known difficulty of such natural law reading is the lack of clarity regarding the origin, basis, and scope of those rights. Those who, like Bentham, are not prepared to accept a state of nature, whether fictitious or not, therefore regard these natural rights as 'nonsense upon stilts'. Bentham presents us with an alternative, 'realistic' reading of human rights. Every subjective right, including the right to life, must be viewed as a child of objective law.[37] Subjective rights do not exist prior to a society with a legal order.[38] Therefore, national, international, and regional human rights conventions of declarations should not be seen as merely declaratory, but primarily as constitutive.

The right to life in the ECHR thus expresses nothing more and nothing less than the mutual recognition by states of this privilege (of life) and other privileges they grant to their citizens.[39] Consequently, states are not the final addition to an argument that starts with individual rights and then moves its way up. Rather, states stand at the origin of subjective rights because they are the masters of the treaty and of the legal order it establishes.[40]

This reading sheds a completely different, and in my view a more adequate light on the right to life. Instead of conceiving of the right to life as something 'natural' to man, this right is the result of a convention. In a sense one could say that the right to life does not belong to the person who lives that life, but to the state. In principle, the state will respect life, but it can (and will) also take life when its self-preservation is at stake (as e.g. in a situation of war). And even if that is not the case, it is able to transform the right to life into a duty to live, as in the cases of Nancy Cruzan and Dianne Pretty.[41]

On the struggle for the right to life

So far, we have seen two competing views on the substance of the right to life: the right either excludes or includes death; and two competing interpretations of the ownership of that right: life does or does not belong to the bearer of that right. Of course, these opposing views and interpretations are to a large extent artificial constructions. Firstly, immortality is far from within reach and the literary sketches of an endless life give us a far-from-attractive picture.[42] Until now, every person's life simply comes to an end despite the medicalization of death, which often

pushes the processes of aging and dying to unattractive and undignified limits.[43] Second, many states (but certainly not all and not always, not even within the Council of Europe) consider the right to life as a legitimate limitation of state power.

Still, this artificiality does not detract from the fact that there is indeed a struggle for the right to life and this struggle concerns indeed the question of who has the final say when it comes to 'life'.[44] This applies at the moment in particular in Germany. In its judgment of February 20, 2020, the German Federal Constitutional Court struck down paragraph 217 of the German Criminal Code (as introduced in 2015). It thus paved the way to perhaps the most liberal euthanasia legislation in the world. This is not the place to discuss that judgment in detail.[45] A brief overview of what was going on will suffice.

The mentioned paragraph made it a criminal offense to promote suicide in a business-like manner. The lawgiver probably had organisations like 'Dignitas' in Switzerland and 'Sterbehilfe Deutschland' in mind[46] and wanted to prevent the establishment of such 'businesses'. In principle, this paragraph did not make assisted suicide by ordinary medical doctors into a criminal offence and thus almost impossible. A 2017 ruling by the Federal Court of Justice had even clearly stated that the making available of certain lethal drugs to terminally ill people under very strict conditions would not conflict with paragraph 217. However, since the concept of 'business-like' ('geschäftsmäβig') was not clearly defined, the paragraph led in practice to great reluctance among medical doctors regarding assisted dying. One could even say that it is common practice for doctors to (also) be involved in the process of dying. It is simply the business ('Geschäft') of doctors. So, in practice helping persons to die became almost non-existent.

In 2020, The Federal Constitutional Court declared that the legal rule that led to a situation in which doctors hardly dared to provide assistance to dying persons was in contradiction with the German Constitution. It would in particular contradict the right to personality. Based on this right, every person has the right to the free development of his personality. According to the Court, this right – in conjunction with the provision on human dignity also prominently present in the German constitution - leads to a right to self-determination that also includes the right to give up one's life and to receive assistance from others in ending one's life. The German constitutional order is based on an image of the human being, the Court states, who is determined by human dignity and entitled to the free development of the personality through self-determination and personal responsibility. The decision of an individual human being to end his or her life on the basis of his or her understanding of the meaning of his or her

own existence ('seinem Verständnis von der Sinnhaftigkeit der eigenen Existenz') must be acknowledged as an act of autonomous self-determination.[47] In other words, the right to life does not imply the obligation to live (until its natural end) but includes the right to end one's life. The German Court presents us a very broad interpretation of the right to self-determination: everyone has the right to end his or her own life and to request and obtain assistance from others.[48]

As already mentioned, the aim of Paragraph 217 was to prevent a kind of normalization of assisted suicide (by organizations as mentioned earlier). It thus aimed - in line with the Germany's own constitution and with Article 2 ECHR - to protect (the right to) life. By now acknowledging the right to suicide and to be assisted with ending one's life, irrespectively of whether or not there is an incurable or terminal illness, the German highest court makes a clear choice: the owner of life is the one who lives that life, and not the state; death belongs to the decision-making repertoire of (German) citizens. The legislator 'only' has to ensure that any choice for ending one's life is well-considered and voluntary and that the right to self-determination is not thwarted by others.

For classical authors such as Locke and Kant, such statement would have been anathema, even if they did not believe that ultimately the state has sovereign power over human life. According to Locke, man was created by God and therefore His property. No one is allowed to leave his 'post' on this earth on his own initiative. Also today, some authors – without relying on theological arguments - raise their eyebrows at the idea of leaving the decision on the expiry date of their lives to those who live the life.[49]

In a recent essay,[50] Wils challenged the wisdom of the radical decision of the German Constitutional Court. His objections seem to me to be twofold: first, this decision would fit within a general cultural and social, but – according to Wils - regrettable trend that places the human being at the centre of the universe. Human life is increasingly concerned with planning and control, overlooking the contingency of life. Secondly and related, the decision of the court neglects the often-tragic character of suicide and may instead lead to a sort of normalization of suicide, adding to what perhaps might be called an ideology of death. In Wils' view, the Court wrongly seems to consider the choice to end one's life as an ordinary choice among other choices that shape one's life.

On the right to self-determination (Coda)

It is not easy (for me) to arrive at a final view on the relationship between the right to life and the right to self-determination. Should the

latter indeed now take priority over the former? Does the classic idea that I am not the proprietor of my life, no longer carry much moral weight? Perhaps Kant's philosophy offers some guidance here. Kant defended the view that humans are, regarding their own life and body, '*sui iuris*' but that they are not '*sui dominus*'.[51] Human beings are indeed self-determining beings, in the sense that they ought - and by implication are capable - to lead a moral life, but they are not the proprietors of themselves. Kant seems to present us with two arguments: being the proprietor of oneself would be contradictory, for as a person he or she would be a subject that can hold property, but as something that is owned, he or she should be considered an object. It is, however, impossible to be proprietor and property, a person as well as a thing, at the same time. Although this argument draws on Kant's well-known, but perhaps not fully rigid, distinction between persons and things, it resonates with the view that nobody's existence is his or her own creation. In that sense everybody's 'self' is a 'given', or - perhaps in a better formulation - a 'Geworfenheit' to use Heidegger's idiom. That's why it seems not plausible to give the idea of self-determination a predominant, let alone an exclusive, place in discussions on life and death. At least compassion or mercy, an element that unfortunately cannot easily be couched into the modern discourse that is dominated by rights, should play an important role.[52]

Kant's second argument is related but slightly different. If something is one's property, Kant writes, one can *in principle* do with it whatever one likes (unless the rights of others are at stake which is – pace Kant - the case most of the time). Humans, however, cannot treat themselves in whatever way they want since they have obligations towards themselves. They are accountable to humanity in their own person, says Kant. Nowadays, the idea that humans have duties to themselves is not a popular one and the right to self-determination is rarely considered as a source of obligations that one owes oneself.

According to Kant, these (two) arguments against self-ownership led to a categorical prohibition of suicide, and thus - by implication - to an equally strict prohibition of assisting suicide as well. We need not follow him here, certainly not since Kant did acknowledge cases of what one could perhaps interpret as altruistic suicide. These are forms of sacrificing one's life in order to promote morality or to safeguard one's moral integrity. Perhaps the most famous example[53] is that of a citizen who is threatened (by his prince) with the loss of life if he refuses to give false testimony against an honorable fellow citizen. It is clear what one should do: refuse to make such a false declaration. Morality trumps (biological) life. Life is clearly not the highest value for Kant. It would be far-fetched to interpret

this and other examples as cases of (risking) suicide, but they make at least clear that not being 'sui dominus' does not rule out situations in which choices against one's life are morally 'the right thing to do'. Such choices are then the expression of self-determination in the sense that the self is dedicated to moral ends that transcend the 'self'.[54] Perhaps this has some plausibility, for the choice between continuing to live and ending one's life indeed appears to be of a different status than, for example, choosing a career, adopting a political viewpoint, or marrying a life partner. Life includes all these choices. The only alternative to life is death and nobody knows what death is.

Notes

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[2] Plato, *Politeia*, 331 d.

[3] Perhaps this is just another way of expressing Hannah Arendt's statement that there is only one human right, namely the right to have rights.

[4] This is, however, not entirely true. I can indeed give up all my property and still remain a potential property holder, but I cannot give up my life and still be the holder of the right to life. Yet, the reverse is possible: I can give up my right to life, i.e. the right not to be killed, while I am alive. See: e.g. Feinberg's example of the 'annual spring rite', in: FEINBERG 1978. According to libertarians, I can do with my body whatever I want, and this would also suggest a separation of object and subject of this right. Yet, again, I can only do whatever I like with my body, as long as I am living being.

[5] Perhaps it is even better not to speak of 'subject' here, because such an imagined soul is no longer or not yet a member of a legal community (although he may be citizen of the – Kantian - 'Kingdom of Ends').

[6] According to Schabas, the European Court of Human Rights accepts that there may be a violation of the right to life even though the victim has not died, see SCHABAS 2015, 125-6.

[7] Of course, there is a philosophical tradition that holds that it is better not to be born than to be born. The best-known current representative of such anti-natalism is BENATAR 2006 ('each one of us was harmed by being brought into existence', BENATAR 2006, vii).

[8] In comparison to which 'situation' can life as such be considered harmful? Harm presupposes a comparison. See for KORTMANN; HAMEL 2004.

[9] See e.g. SMITH 2005, 205.

[10] Often the right to life is seen as unwaivable or especially urgent and non-political, see RAWLS 1999, 79.

[11] It is possible to imagine a world in which living humans have given up or, more likely, have been forced to give up their right to life, but not a world without human life where the right to life would still be valid.

[12] The only possible exception is the right not to be tortured. Article 2 of the Convention against Torture (https://www.unhcr.org/media/convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-1984) states: No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'.

[13] In this context, R. Dworkin (e.g. in DWORKIN 1993) makes the distinction between life as a biological and as a biographical phenomenon.

[14] Think of the famous opening of A. Camus, *The Myth of Sisyphus*.

[15] See for example the classic NAGEL 1987, but also: PINKER 2018, 433-435.

[16] Some consider this a legal anomaly: how can the providing of assistance to an act which is legal be prohibited. Yet, in the Netherlands the escaping from a prison is not a criminal offense, whereas providing such assistance is. See: DEN HARTOGH 2020, 714 n. In Germany 'Beihilfe zur Selbsttötung' is (indeed) not a criminal offense because suicide itself is not punishable, see WILS 2021, 80.

[17] See e.g., ANSELM 2005.

[18] HARARI 2015, 24-34.

[19] Against the idea that (biological) life can be controlled, and that death is the result of a process of wear and tear that can be repaired, see EHRENREICH 2018, especially 171-180; see also GAWANDE 2014, Chapter 2.

[20] GAWANDE 2014 opens as follows: 'I learned about a lot of things in medical school, but mortality wasn't one of them.'

[21] The expression 'right to die' is obviously ambiguous too. Humans are mortal and the 'right to die' means 'solely' the right to determine the moment of one's death. More extensive on this: Chapter 6 on the right to life, in MERTENS 2020.

[22] GRIFFIN 2008, 218-219.

[23] Note that Pretty's request can also be read differently namely not to prevent her husband from helping her when she is in dire need. So understood there is a real conflict of duties: the moral duty to help someone in need (which Kant considers

a categorical imperative) on the one hand and the legal duty to obey the law on the other.

[24] In Germany, the right to assisted suicide (now) seems to be part of the right to self-determination, following the German Constitutional Court's decision (see below); In the Netherlands a law enabling old people to make such a request and to have it granted is under consideration, see: Parliamentary Papers II 2019/2020, 33534 no. 2, 3.

[25] See, for example, STARK 2016.

[26] See, for example, MERTENS 2017.

[27] I will focus on constitutional formulations only. Examining the right to life in case-law does not fit within the limited confines of this paper.

[28] That fits well with the time in which the Dutch constitution was established (1848). Before the Second World War, constitutions hardly mention the right to life, but emphasize that human life is to be protected. See: SCHABAS 2015, 118.

[29] The International Covenant imposes on the death penalty strict conditions. It may only be imposed for the most serious crimes; there must be a right to appeal and finally a plea for pardon must be available; Furthermore, the death penalty may not be imposed on persons who committed these serious crimes before the age of 18, nor on pregnant women.

[30] As is well-known, this exception has now become obsolete due to developments that led to the adoption of Protocol 6 (to ECHR) in 1983, on the basis of which the death penalty can no longer be imposed.

[31] This exception in particular is curious: arrest takes place with a view to bring to person justice. If, in extreme cases, someone can be justifiably killed in the attempt to arrest him, would this not amount to a violation of the presumption of innocence?

[32] Thomas Aquinas, *Summa Theologica*, Secunda Secundae, Questio 64, Art. 7 (I answer): 'Now moral acts take their species according to what is intended, and not according to what is beside the intention'. The intention must thus be morally good and the bad side effects not intended (even if they are foreseen) and the morally good outcome of the act must outweigh the morally bad side effects.

[33] See e.g. FROWE 2016, 146-153.

[34] The pursuit of self-preservation is not limited to living beings: 'Every thing, insofar as it depends on it, tries to persevere in its existence' (Spinoza, *Ethics*, Bk 3, propositio 6).

[35] The first time a case was decided by the Court regarding Article 2 was the McCann case in 1995.

[36] I do not know whether the killing of own citizens abroad (such as done by the UK in 2015) has ever been justified by invoking this provision. At the time, then Prime Minister Cameron invoked the right to self-defence. At issue is whether a state can invoke Art. 51 of the UN Charter when it concerns a threat posed by our own citizens.
See: https://www.theguardian.com/world/2015/sep/07/drone-british-citizens-syria-uk-david-cameron

[37] In Bentham's words: 'Right, the substantive right, is the child of law', see: J. BENTHAM 2001, 123.

[38] A similar idea can be found in Kelsen, whose pure legal theory argues against the dualism between subjective law and objective law, see e.g. KELSEN 1992 (originally 1934), 37-8.

[39] In Hohfeld's language, the 'right' to life should therefore not be a claim-right, but rather a privilege. See HOHFELD 1919.

[40] Why these states were prepared to establish such a set of rights at the time can historically be explained but this is a matter that cannot be discussed further here. It is however worth mentioning that the then Dutch government (probably like other states) believed that it already met all the requirements of the treaty. It believed the Convention would not 'bite'.

[41] Or consider an act of ultimate helpfulness as a crime, as in the Dutch Heringa case, in which an ordinary citizen provided the means with which his elderly mother could execute her well-considered wish to die.

[42] Think, for example, of Simone de Beauvoir's *All men are mortal* (orig. 1946), whose main protagonist is cursed by immortality; or José Saramago's *Death with interruptions*, New York, Boston 2009 (orig. 2005), which fictionalises a state which is threatened by the absence of death: 'if we do not die again, we have no future'.

[43] GAWANDE 2014, chapter 2.

[44] And what life means. This medicalization implies that 'life' is not a static fact.

[45] This was done in an excellent manner in DEN HARTOGH 2020. I follow Den Hartogh. The entire ruling: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/02/rs20200226_2bvr234715.html

[46] On the tortuous (and moving) road to Switzerland, see e.g., BLOOM 2022.

[47] Federal Constitutional Court 26 February 2020, 2BvR 2347/15, e.g. para 208, 277.

[48] This decision is in line with recent case law of the European Court of Human Rights which (since Haas v. Switzerland, ECtHR 20 January 2011, No. 31322/07) decides questions with regard to the end of life on the basis of Article 8 of the Convention (on the Right to Private and Family Life) and no longer on Article 2 (on the right to life). See: Federal Constitutional Court 26 February 2020, 2BvR 2347/15, para 302-305. For a fine overview of this case, see DEN HARTOGH 2020, esp. 717.

[49] E.g. VELLEMAN 1999.

[50] WILS 2021.

[51] KANT 1968, 270.

[52] Within the context of the Dutch legislation concerning euthanasia, the element of mercy plays an important role. In order to prevent misunderstandings: within the Netherlands nobody has the right to euthanasia, but merely the right to request a doctor for assistance with dying. Doctors do not have the duty to honour this request.

[53] KANT 1968b, 30 and 56..

[54] With regard to the life of the self we could with Ronald Dworkin (DWORKIN 1993) distinguish between life as a biological and life as a biographical phenomenon, as well as two forms of self.

References

ANSELM of Aosta, *Cur Deus Homo*. Transl. Sydney Norton Deane. Fort Worth (TX): RDMc Publishing, 2005.

BENATAR, David. *Better Never to Have Been. The Harm of Coming into Existence*, Oxford: Oxford University Press, 2006.

BENTHAM, Jeremy. Anarchical Fallacies: A Critical Examination of the Declaration of Rights. In: HAYDEN, P. (ed.), *The Philosophy of Human Rights*. St Paul: Paragon, 2001.

BLOOM, Amy. *In love (A memoir of love and loss)*. New York: Random House, 2022

DEN HARTOGH, Govert. Decriminalizing Assisted Suicide Services (Bundesverfassungsgericht 26 February 2020, 2BvR 2347/15), *European Constitutional Law Review*, 16. 2020, 713-732.

DWORKIN, Ronald. *Life's Dominion*. New York: Vintage, 1993.

EHRENREICH, Barbara, *Natural Causes. Life, Death and the Illusion of Control*. London: Granta, 2018.

FEINBERG, Joel. Voluntary Euthanasia and the Inalienable Right to Life, *Philosophy & Public Affairs*, 7, 1978, 93-123.

FROWE, Helen. *The Ethics of War and Peace*. 2nd edition. London: Routledge, 2016.

GAWANDE, Atul. *Being Mortal. Medicine and What Matters in the End*. New York: Metropolitan Books, 2014.

GRIFFIN, James. *On Human Rights*. Oxford: Oxford University Press, 2008.

HARARI, Yuval N. *Homo Deus. A Brief History of Tomorrow*. London: Penguin, 2015.

HOHFELD, Wesley N. *Fundamental Legal Concepts as Applied in Legal Reasoning.* New Haven (CT): Yale University Press, 1919.

KANT, Immanuel. *Kritik der praktischen Vernunft*, Akademie Ausgabe Band V. Berlin: de Gruyter, 1968 (1968b).

KANT, Immanuel. *Die Metaphysik der Sitten*. Akademie Ausgabe, Band VI. Berlin: de Gruyter, 1968 (1968a).

KELSEN, Hans. *Introduction to the Problems of Legal Theory*. Transl. B. Paulson and S. Paulson. Oxford: Oxford University Press, 1992.

KORTMANN, Sebastianus C. J. J.; HAMEL B. J. C. (eds.), *Wrongful Birth and Wrongful Life*. Deventer: Kluwer, 2004.

MERTENS, Thomas. Kant over zelfmoord, *Filosofie en Praktijk* (38) 2017, 5-21.

MERTENS, Thomas. *A philosophical Introduction to Human Rights*. Cambridge: Cambridge University Press, 2020.

NAGEL, Thomas. *What does it all mean?* Oxford: Oxford University Press, 1987.

PINKER, Steve. *Enlightenment Now. The Case for Reason, Science, Humanism and Progress*. New York: Viking, 2018.

RAWLS, John. *The Law of Peoples*, Cambridge (MA): Harvard University Press, 1999.

SCHABAS, William A. *The European Convention on Human Rights: A Commentary*, Oxford: Oxford University Press, 2015.

SMITH, Rhona K. M. *Textbook on International Human Rights* (2nd edition). Oxford: Oxford University Press, 2005.

STARK, Andrew. *The Consolations of Mortality*. New Haven (CT): Yale University Press, 2016.

VELLEMAN, J. David. A Right to Self-Termination, *Ethics* (109) 1999, 606-628.

WILS, Jean-Pierre. *Sich den Tod geben. Suizid als letzte Emanzipation*. Stuttgart: Hirzel, 2021.