

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND EUTHANASIA *

GEORGE ZDENKOWSKI**

Editorial Note: A shorter version of this article was published in Forum, in 1996 3(1) *University of New South Wales Law Journal Newsletter* 1. In order to canvass all the issues in adequate detail, the author has expanded upon his remarks in Forum to produce this article. Just as this issue was going to the press the Federal Parliament passed the *Euthanasia Laws Act* 1996 (Cth), with effect from 27 March 1997. This legislation is specifically designed to override existing and future Territorial laws authorising voluntary euthanasia, including the *Rights of the Terminally Ill Act* 1995 (NT). The heated public debate surrounding the passage of the Federal Law, the stated resolve of the protagonists of voluntary euthanasia to pursue other options (including State legislation) and the pioneering nature of the Northern Territory initiative convince the Editors that this article still makes an important contribution to continuing debate. Now that the *Euthanasia Laws Act* 1996 (Cth) has come into force, it is unlikely that the High Court challenge to the *Rights of the Terminally Ill Act* 1995 (NT) will proceed.

I. INTRODUCTION

Issues relating to the practice of euthanasia have assumed prominence in Australia as a result of a number of recent developments. The *Rights of the Terminally Ill Act* 1995 (NT) ("ROTTIA") came into effect on 1 July 1996, and was subsequently challenged in the Northern Territory Supreme Court. The

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** BA LLB Syd, Associate Professor of Law and Director of the Australian Human Rights Information Centre of the University of New South Wales.

legislation was upheld by a majority of two to one.¹ An application for special leave to appeal against this decision to the High Court of Australia has been made.

On the legislative front there has been the introduction of legislation in the Northern Territory Legislative Assembly attempting to repeal the ROTTIA² and, at the Federal level, the introduction of the Euthanasia Laws Bill 1996.³ This is a private member's Bill, introduced by Kevin Andrews, MHR, which attempts to override the ROTTIA.⁴

In relation to other States and Territories, Mr Michael Moore, Independent ACT MLA, has proposed to reintroduce his voluntary euthanasia law in the ACT in 1997.⁵ In New South Wales, there has been a proposal to hold a referendum in relation to euthanasia⁶ and an extensive open debate on euthanasia took place in the NSW Legislative Assembly on 16 October 1996.⁷

The debate about ROTTIA is no longer academic. On 22 September 1996, the first death authorised by this law took place.⁸ This has contributed to further passionate debate about the legitimacy of the ROTTIA and the legislative attempt to override it.⁹

The ROTTIA, and attempts to introduce similar legislation, or legislation which would override it, raise ethical, moral, religious, philosophical, legal, constitutional and human rights issues. This article will discuss the application of international human rights law to euthanasia and, in particular, the

- 1 Christopher John Wake and Djiniyinni Gondarra v Northern Territory of Australia and The Honourable Keith John Austin Asche AC, *The Administrator of the Northern Territory of Australia* (unreported, Supreme Court of the Northern Territory, Martin CJ, Angel and Mildren JJ, 24 July 1996).
- 2 The Respect for Human Life Bill, introduced by Labor MP Mr Neil Bell, was debated on 21 August 1996. G Alcorn, "Euthanasia Law May be Repealed", *Sydney Morning Herald*, 22 August 1996, p 2. This Bill, directed at repealing the ROTTIA was defeated in a 14 to 11 vote.
- 3 Sherrill Nixon, "Bill May Overturn NT Euthanasia Law", *The Sydney Morning Herald*, 9 September 1996, p 5; Editorial, "Euthanasia Overruled", *The Sydney Morning Herald*, 10 September 1996, p 12.
- 4 This Bill seeks to amend the provisions of the *Northern Territory (Self-Government) Act 1878* (Cth), the *Australian Capital Territory (Self-Government) Act 1888* (Cth) and the *Norfolk Island Act 1979* (Cth) to withdraw from each of the respective Legislative Assemblies the power to make laws which permit euthanasia. The Federal Parliament is authorised to enact such a law pursuant to s 122 of the Constitution. The Bill will be subject to a 'conscience vote'. The Prime Minister and Opposition Leader have each expressed support for the Bill (Editorial, "Euthanasia Leadership is Welcome", *The Australian*, 16 September 1996, p 8). Some parliamentarians have expressed public dissatisfaction in relation to the Bill because of their pro-euthanasia views (see Margo Kingston, "Drive to Stop Vote on Mercy Killing", *The Sydney Morning Herald*, 10 October 1996, p 6); others have expressed opposition to the Bill because it is perceived as an erosion of the powers of the Territories to govern themselves (see Editorial, "Irresponsible", *The Sydney Morning Herald*, 9 October 1996, p 18).
- 5 B Lane, "Anti-Euthanasia Bill May Cover ACT Laws", *The Australian*, 26 July 1996, p 8.
- 6 D Nason, "Advocates of Euthanasia May Push Freedom", *The Australian*, 18 July 1996, p 3.
- 7 This was itself a remarkable event. No Bill or resolution was before the House. The debate was introduced by two non-parliamentarians: pro-euthanasia advocate, Professor Peter Baume; and anti-euthanasia spokesperson Mr Tony Burke (representing Euthanasia-No) and was followed by contributions from 49 parliamentarians. See Mark Riley, "Euthanasia Stirs Emotions of MPs", *The Sydney Morning Herald*, 17 October 1996, p 5.
- 8 G Alcorn, "The Fight to End Life", *The Sydney Morning Herald*, 27 September 1996, p 10. Since then, three other people have ended their lives in accordance with the legislation: see Report of the Senate Legal and Constitutional Committee note 30 *infra*.
- 9 J Brough, "Fischer Warns of a 'Culture of Death'", *The Sydney Morning Herald*, 27 September 1996, p 1.

implications arising under Article 6 of the International Covenant on Civil and Political Rights (“ICCPR”). Although the scope of the right to life under customary international law is arguably different from that under Art 6 of the ICCPR, this article does not investigate this issue. The article will consider preliminary issues (including the resurgence of the euthanasia debate, terminology, the current law); the *Rights of the Terminally Ill Act* 1995 (NT); proposed federal legislation; the ICCPR and Australian law; potential enforcement options under the ICCPR in relation to the ROTTIA; potential violations of the ICCPR by the ROTTIA; relevant statutory ambiguity in the ROTTIA; and the potential for an adverse view by the Human Rights Committee (“HRC”). The article will focus on the ROTTIA because the issues cannot be fruitfully explored at the abstract level. It will also focus on the ICCPR because its provisions largely coincide with those in other relevant human rights instruments such as The Universal Declaration of Human Rights.

II. SOME PRELIMINARY ISSUES

A. The Resurgence of the Euthanasia Debate

The euthanasia debate has been fuelled by a number of social and legal developments. These include: the advent of modern medical technology and the availability (and use) of artificial measures to prolong life; landmark cases in other jurisdictions such as *Airedale NHS v Bland* (UK),¹⁰ *Rodriguez v B-C(A-G)* (Canada)¹¹ and *Re Karen Am Quinlan* (US),¹² which have challenged laws criminalising euthanasia; the increase in the number of people affected by HIV/AIDS;¹³ a growing population of elderly people; and the declining influence of organised religion. In Australia, a sharp focus to the debate has been provided by the enactment of the ROTTIA and the direct and indirect responses to that legislation referred to above.

B. Terminology

In examining the impact of the ICCPR on euthanasia laws, clarification of terminology is essential. The discourse on euthanasia is bedevilled by notorious problems of shifting and uncertain descriptions of key concepts. Central to the debate are notions such as ‘involuntary’, ‘non-voluntary’ and ‘voluntary’. Also ‘active’ and ‘passive’ are used, particularly in combination with ‘voluntary’ euthanasia.

10 [1993] AC 789.

11 (1994) 107 DLR (4d) 342.

12 70 NJ 10, 355 A 2d 647 (1976); see also P Bailey, *Bringing Human Rights to Life*, The Federation Press (1993) pp 55-61.

13 For an account which does not necessarily argue for voluntary euthanasia but outlines the reality of the consequences of the illegality of voluntary euthanasia in NSW for persons suffering from HIV/AIDS, see: G Bloom, “Dying in the Shadow: The Negative Consequences of the Illegality of Voluntary Euthanasia in NSW” (1996) 7 *Polemic* 40

In general, the following might be said:

- involuntary euthanasia refers to the termination of life against the will of the person killed;
- non-voluntary euthanasia refers to the termination of life without the consent or opposition of the person killed;
- voluntary euthanasia refers to the termination of life at the request of the person killed;
- active euthanasia refers to a positive contribution to the acceleration of death;
- passive euthanasia refers to the omission of steps which might otherwise sustain life.

It is obvious that these 'definitions' are not exhaustive. One would need to flesh out the circumstances in which termination of life is said to be permissible to conduct an intelligible debate. The definitions are also arbitrary. For example, it is quite possible to argue that an omission amounts to a positive act and that the boundaries between active and passive euthanasia are blurred.

Ultimately, the use of such conceptual categories is limited in asking questions about whether a particular law has violated the ICCPR. It is relatively straightforward to conclude that involuntary euthanasia infringes Art 6(1). However, beyond this a different approach is necessary.

It is suggested that rather than investigate broad conceptual categories of non-voluntary or voluntary euthanasia for their purported conformity to Australia's international obligations under the ICCPR, it is preferable to scrutinise the precise legislative provisions: to examine their specificity and their material operation. The product of this process must then be assessed against the benchmarks provided by the ICCPR (which are themselves problematic, see part VII below). In this case, it is essential to examine the ROTTIA.

C. The Debate

The suggestion that euthanasia should be authorised by law, in some form, raises moral, ethical, philosophical and religious issues as well as the legal and constitutional status of such laws. The vast literature on these issues¹⁴ will not

14 For a small sample consider: Asian Human Rights Commission, *Human Rights and Spirituality: Dialogue of Religions on Human Rights*, AHRC (1996), PH Bailey, *Human Rights: Australia in an International Context*, Butterworths (1990); RM Baird and SE Rosenbaum (eds), *Euthanasia: The Moral Issues*, Prometheus Books (1989); T Cipriani, "Give Me Liberty and Give Me Death" (1995) 3 *JLM* 177; AB Downing and B Smoker (eds), *Voluntary Euthanasia: Experts Debate the Right to Die*, Peter Owen (1986); D Humphry and A Wickett, *The Right to Die: Understanding Euthanasia*, Collins (1987), K Joseph, "Some Observations on the Ethics of Euthanasia" (1995) 63 *New Doctor* 3; H Kuhse and P Singer, "Active Voluntary Euthanasia, Morality and the Law" (1995) 3 *JLM* 129; H Kuhse and P Singer, *Should The Baby Live? The Problem of Handicapped Infants*, Oxford University Press (1985); N Lacey, C Wells and DR Meure, *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process*, Weidenfeld and Nicolson (1990); D Lanham, "Euthanasia, Painkilling, Murder and Manslaughter" (1994) 1 *JLM* 146, D Lanham, "Withdrawal of Artificial Feeding from Patients in a Persistent Vegetative State" (1994) 6 *Current Issues in Criminal Justice* 135, D Lanham and S Woodford, "Refusal by Agents of Life-Sustaining Medical Treatment" (1992) 18 *MULR* 659; D Lanham, *Taming Death By Law*, Longman Professional (1993); Law Reform Commission of Canada Working Paper 28,

be canvassed here. One recurrent argument worth mentioning is the so-called 'slippery slope' argument - that introduction of one form of euthanasia (regarded as 'acceptable' because of the requirement of consent and the specification of detailed safeguards) will invariably lead, in practical terms, to less acceptable forms (for example voluntary euthanasia without proper safeguards, or even non-voluntary or involuntary euthanasia). This is a regular feature of the case against any form of euthanasia. It can be put in crude or sophisticated versions. The crude version (which is correspondingly easier to rebut) is the conspiracy theory that supporters of voluntary euthanasia have a hidden agenda which, in extreme cases, is redolent of the Nazi regime and its extermination policies with respect to specific target groups (identified by such characteristics as race, disability). However, a more sophisticated version which must be taken seriously is whether it is possible, in practice, with the best of intentions, to conceive a legislative scheme which is immunised against potential abuses.¹⁵ This concern is well-expressed by the UK House of Lords Select Committee established following the *Bland* case which reported in 1993 and said:

We do not think it is possible to set secure limits on voluntary euthanasia. It would be impossible to frame safeguards against non-voluntary euthanasia if voluntary euthanasia were to be legalised. It would be next to impossible to ensure that all acts of euthanasia were truly voluntary, and that any liberalisation of the law was not abused. Moreover, to create an exception to the general prohibition of intentional killing would inevitably open the way to its further erosion, whether by design, by inadvertence, or by the human tendency to test the limits of any regulation. These dangers are such that we believe that any decriminalisation of voluntary euthanasia would give rise to more and more grave problems than those it sought to address.¹⁶

This has direct implications for the ROTTIA, the credibility of which is contingent on the efficacy of its detailed statutory safeguards.

Euthanasia, Aiding Suicide and Cessation of Treatment (1982); I Temby, "Euthanasia - Is It Murder" (1988) 21 *The Australian Journal of Forensic Sciences* 2; PB Thompson, "The Law and Active Euthanasia: Whose Life Is It Anyway?" (1995) 2 *Journal of Law and Medicine* 233; B Tobin (ed), *Euthanasia: Proceedings of a Seminar held at the Metcalfe Auditorium, State Library of New South Wales, Monday 7 November 1994*, John Plunkett Centre for Ethics in Health Care (1995); Working Party on the Implementation of the Rights of the Terminally Ill Act (Northern Territory Attorney-General's Department and the Territory Health Services), *Report on the Implementation of the Rights of the Terminally Ill Act*, May 1996; R Gaita, "Reflections on the Euthanasia Debate" (1995) 5 *Eureka Street* 22; Report on the Inquiry by the Select Committee on Euthanasia (Legislative Assembly of the Northern Territory), *The Right of the Individual or the Common Good?* (1995); PE Mullen, "Euthanasia. An Impoverished Construction of Life and Death" (1995) 3 *JLM* 121; GS Neeley, *The Constitutional Right to Suicide: A Legal and Philosophical Examination*, Peter Lang (1994); New South Wales Department of Health, *Dying with Dignity Interim Guidelines on Management*, March 1993; Director of Public Prosecutions, *Withdrawing Life Support - Murder or Mercy*, Address to Medico-Legal Society, March 1992; M Orlowski, "Mercy Killing Cases in the Australian Criminal Justice System" (1993) 17 *Criminal Law Journal* 10, B Pollard, "The Many Sides of Euthanasia" (1991) 12 *Quadrant* 44, B Sneiderman, "Why Not A Limited Defence? A Comment on the Proposals of the Law Reform Commission of Canada on Mercy-Killing" (1985) 15 *Manitoba Law Journal* 85.

15 Editorial, "The Right to Life is Now Compromised", *The Weekend Australian*, 3-4 June 1995, p 22.

16 Cited in BA Santamaria, "Euthanasia's Bell Tolls for Thee", *The Australian*, 13 July 1996, p 22. Interestingly, the majority of the Senate Committee in Canada and the New York Task Force reached a similar conclusion on a similar basis.

Some of the moral and ethical concerns which arise specifically in relation to the ROTTIA are well summarised in the following extract of an article recently published by Frank Brennan:

Many Australians still believe that physician assisted suicide is wrong. While prepared to see a machine turned off, they are opposed to the administration of a lethal injection. They would never seek it for themselves. As health professionals they would never provide such assistance. Others are worried by the possible abuses, fearing that a lethal injection could be administered during a down period in a person's life, which need not necessarily be the end. But should there be a law against the administration of the injection given that many other Australians believe individuals should have a right to choose?

Now that the Northern Territory, by the narrowest of margins, has been the first legislature in the post-war world to legalise such a choice, should the courts strike down the legislation? Should the Commonwealth Parliament override it? Should Northern Territory Chief Minister Shane Stone, an opponent of euthanasia and the legislation, use his good offices to suspend its operation.

While NT church leaders and doctors hope the courts will strike down the NT legislature's attempt to extend the freedom of the individual to end life, Americans are preparing for Supreme Court challenges aimed at striking down state attempts to limit the freedom. In 1994, a US Federal District Court judge for the first time struck down a state law prohibiting assisted suicide. She relied upon the claim by three Supreme Court Justices in a recent abortion case that "matters involving the most intimate and personal choices a person may make in a life-time are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, or meaning, of the universe, and of the mystery of human life".

This was part of the Supreme Court's new rationale for a woman's right to choose abortion. The trial judge thought it pointed to a right of a competent dying person to take their own life with state authorised assistance. Professor Ronald Dworkin has recently published *Freedom's Law: The Moral Reading of the American Constitution* claiming that "Making someone die in a way others approve, but he believes contradicts his own dignity, is a serious, unjustified, unnecessary form of tyranny".

Church leaders, the AMA and many others are concerned to maintain the integrity of the doctor-patient healing relationship and the relationship between the dying person and relatives whom they do not wish to burden. They want to limit the options available to the dying person so that all dying persons, doctors and relatives at the time of death may be spared the burden of choice. Legalised active euthanasia requires every dying person to consider questions like, "Should I end my life now so my estate can educate the grandchildren rather than providing me with nursing care?"

These issues are more acute in the Northern Territory which is notoriously under-resourced in the provision of palliative care. Also many Aborigines from remote communities with traditional belief systems and fear of "white fella" medicine will be even more afraid and confused by doctors and hospitals when the foreign medical technology is known to be used not just for sustaining life but also for imposing death. Even the late Wesley Lanhupuy, the one Aboriginal parliamentarian who supported the Perron bill, admitted in debate, "The people at every Aboriginal outstation that I visited told me to 'give it away'". If the legislation were passed, he wondered whether "suspicion will be held forever by the family because of the powers given to the doctor in this bill".

In these cross-cultural situations, consent is never simple nor what it seems. A generation ago, many Aboriginal women had their fallopian tubes tied. No doubt all doctors and nurses would swear the procedure was always performed with informed

consent. The present "Stolen Children" Inquiry relates to Aborigines who in hindsight have no doubt that they were taken without consent. Some public servants and missionaries at the time were convinced they were acting not only with parental consent but in the best interests of the child. As the Royal Commission into Aboriginal Deaths in Custody heard, "It is likely that those who administered the white law did so with the assurance that they were helping to assimilate these children into the dominant community." A casual visitor to the Darwin hospital at Casuarina sees Aboriginal patients recuperating outdoors, tentative strangers to the stainless steel and ether behind the air conditioned concrete walls. Many will now stay away rather than visit a place of death administered by white hands.¹⁷

Some opponents, including Catholics like myself, espouse a principle of life's sanctity which we think the state should uphold. Of course such a principle is not trumps if there be disagreement about its application. While these common good and public arguments have limited place in the American judicial balancing of ordered liberty under the bill of rights, they are legitimate and central considerations in the Australian parliamentary processes at State and Commonwealth levels.¹⁸

In reviewing the relevance of international human rights law to legislation which authorises euthanasia in some form, morality and ethics cannot be excluded. As will appear in the discussion below, imprecise terms in international instruments will frequently involve an engagement with moral discourse.¹⁹

D. The Current Law in Australia

The ROTTIA is unique not only within Australia, but, as far as can be ascertained, in the post World War II world. It is the first law which authorises a limited form of voluntary active euthanasia.²⁰ For this reason alone, a cautious approach is desirable. It should also be observed that in those jurisdictions where the formal prohibition against medically assisted voluntary euthanasia persists, there is a gap between law and practice. Although it is not possible to point to systematic, scientific evidence to this effect, there appears to be considerable anecdotal support for the proposition that some medical practitioners technically violate existing laws by accelerating the death of patients in circumstances currently prohibited.²¹ Caution is required in interpreting such evidence as the evidence is influenced by the respondents'

17 The point made by Brennan about fears in the Aboriginal community is reinforced by the findings of the Working Party on the Implementation of the Rights of the Terminally Ill Act, see note 14 *supra*, at 18.

18 F Brennan, "Euthanasia - The Debate", (1996) 5 *Uniya Focus* 1 at 1-2. A shorter version of this article entitled "Federalism Calls the Shots When a Territory Goes It Alone" appeared in *The Australian*, 12 July 1996, p 15.

19 See *Bland* note 10 *supra* at 825, per Hoffman LJ.

20 There is a popular misconception that voluntary euthanasia has been authorised by legislation in The Netherlands. In fact, voluntary active euthanasia is illegal subject to a limited necessity defence. A similar approach based on a defence plea is advocated by American philosopher James Rachels. See J Rachels, "Euthanasia" <http://www.lcl.cmu.edu/phildept/ethicsintro/part3/Rachels.txtpp26-27>. Whether this approach solves the problems in the manner suggested is arguable. Criteria for the new defence would require formulation. Would this be by statute? Would not a very similar set of issues arise for judge/jury determination in relation to a potential prosecution against a medical practitioner in the Northern Territory who allegedly failed to comply with the requirements of the ROTTIA?

21 P Baume and E O'Malley, "Euthanasia: Attitudes and Practices of Medical Practitioners" (1994) 161 *Medical Journal of Australia* 137; H Kuhse and P Singer, "Doctors' Practices and Attitudes Regarding Voluntary Euthanasia" (1988) 148 *Medical Journal of Australia* 263.

perceptions of what voluntary euthanasia is and what is permissible under current law. Nevertheless, if one is entitled to assume that there is a gap between the medical practice of voluntary euthanasia and the law, this has important implications for the debate as to the desirability or otherwise of regulation. Advocates of regulation (along the lines of the ROTTIA or permutations thereof) insist on the need to clarify the law and to remove the risk of criminal prosecution of medical practitioners who are acting in good faith at the request of patients. Protagonists for the status quo (in jurisdictions where the law prohibits voluntary euthanasia) insist that this best reflects conflicting values in a pluralistic society and that the actual risk to medical practitioners is minimal.²²

III. THE RIGHTS OF THE TERMINALLY ILL ACT 1995 (NT)

In essence, the ROTTIA provides for medically assisted voluntary euthanasia at the request of a terminally ill person ('the patient') and the protection from civil or criminal liability of medical personnel and organisations who give (or choose not to give) such assistance.

In *Christopher John Wake and Djiniyinni Gondarra v The Northern Territory of Australia and The Honourable Keith John Austin Asche AC, The Administrator of the Northern Territory of Australia*²³ the plaintiffs challenged the validity of the ROTTIA. The grounds relied upon were, essentially, that no valid assent had been given to the Act and that the legislative competence of the Northern Territory did not extend to the making of such a law. In relation to the latter submission, it was sought to argue that the Parliament lacked legislative competence because: (i) the Act sought to confer judicial power (in terms of Chapter III of the Constitution) on persons not qualified to hold such power (the 'separation of powers' argument); (ii) the Northern Territory's legislative power is subject to a fundamental principle underlying the common law that there is an undeniable right to life ('the fundamental right' argument) and that the ROTTIA violated this right and was therefore invalid; and (iii) the legislative power of the Northern Territory Parliament should be read down so as not to empower the making of laws which allow the abolition of the suggested fundamental right without more specific words, given that the Northern Territory had yet to achieve complete self-government.

The challenge was unsuccessful. The Supreme Court upheld the validity of the ROTTIA by a majority of two to one.²⁴ The majority decision was essentially based on the validity of the assent. The argument as to separation of

22 Prosecutions are rarely launched. If they are launched, juries refuse to convict. Consider the experience of the much prosecuted Dr Jack Kevorkian in the United States who has invariably been acquitted for assisting terminally ill patients to die despite the formal illegality of this practice in Michigan

23 Note 1 *supra*.

24 *Ibid*, per Martin CJ and Mildren J, Angel J dissenting.

powers was not pursued by the court.²⁵ The Supreme Court was unanimous in holding that the fundamental right argument could not succeed.²⁶ No member of the Court was prepared to rule that there was a principle of law, whether common law or statutory, either in the Northern Territory or Australia, supporting an inalienable right to life. Justice Angel said, "I respectfully take leave to doubt the existence of a 'right' to life. It seems to me to speak of a 'right' to life is essentially meaningless if by that expression is meant a legal right".²⁷ Chief Justice Martin and Justice Mildren said there is no right which cannot be taken away if the language is clear and unambiguous. To the extent that the Act effects any abrogation of fundamental rights, Parliament has used clear and unambiguous language.²⁸ None of the judges made reference to international human rights law. The plaintiffs have lodged an application for special leave to appeal to the High Court which may be heard in 1997. It is suggested that the constitutional and fundamental rights arguments will encounter difficulties in the High Court. In relation to separation of powers, assuming that the court could be persuaded to overrule *The King v Bernasconi*,²⁹ it is by no means clear that the appellants could establish that the ROTTIA involved a relevant exercise of judicial power by the executive. In relation to the fundamental rights argument, there is no clear-cut common law principle to support an inalienable right to life. Even if there were such a principle, its scope would be contentious. Moreover, the statute would prevail over the common law unless the principle had a constitutional basis. There is no express reference in the Constitution to such a principle. The prospect of the High Court deriving an implication of such a principle, while theoretically possible, must be regarded as extremely remote.

IV. PROPOSED FEDERAL LEGISLATION: EUTHANASIA LAWS BILL 1996

Mr Kevin Andrews, a Liberal MP, introduced a private member's Bill (Euthanasia Laws Bill 1996 Cth) which would override the ROTTIA and would also prohibit the introduction of such a law in the ACT and Norfolk Island. The proposal attracted support from sections of both major parties, including the Prime Minister and the Leader of the Opposition. The Prime Minister announced he would allow a 'conscience vote'.³⁰ The Federal Parliament clearly

25 Because of the conflicting High Court authority of *The King v Bernasconi* (1915) 19 CLR 629, the plaintiffs conceded they could not succeed in this Court and foreshadowed a challenge to the decision if the matter reached the High Court.

26 Justice Angel considered moral and ethical arguments at length but regarded them as ultimately inclusive. See note 1 *supra* at [19-35], per Angel J.

27 *Ibid* at [34], per Angel J.

28 Note 1 *supra*, per Martin CJ and Mildren J at [37], [39].

29 Note 25 *supra*. This case holds that the doctrine of separation of powers does not apply to the Territories.

30 The Bill was passed by the House of Representatives by a vote of 88 to 35 on the third reading. The Bill was introduced to the Senate on 12 December 1996 and referred to the Senate Legal and Constitutional Legislation Committee. That Committee reported in March 1997. Senate Legal and Constitutional

has constitutional power to enact such legislation pursuant to s 122 of the Constitution which grants plenary powers in respect of the Territories. In practice, the power has been exercised infrequently since the advent of self-government in the Northern Territory in 1978.

Another constitutional path theoretically open to the Federal Government would be to enact general legislation to override voluntary euthanasia throughout Australia, relying on its external affairs powers. However, apart from the likely reluctance, politically, to choose this option, such a law may not achieve the desired result. A law enacting a wholesale prohibition of voluntary euthanasia is likely to be constitutionally invalid as there is no treaty to which Australia is a signatory expressly containing such provisions. Yet, if the law enacted sought to ensure constitutional validity by reflecting the relevant provisions relating to a qualified right to life in the ICCPR, there is no guarantee that such a federal law would effectively override the ROTTIA.³¹ However, it seems clear that the s 122 option will be pursued and the complexities of the other path will be left to another day.

V. THE ICCPR AND AUSTRALIAN LAW

The ICCPR was adopted by the UN General Assembly on 16 December 1966 and entered into force on 23 March 1976. From that date, the ICCPR was legally binding for those States (including Australia) which have become parties to it. Australia ratified the ICCPR on 13 August 1980.

The First Optional Protocol to the ICCPR was adopted on 16 December 1966, at the same time as the Covenant itself. The Optional Protocol entered into force on 23 March 1976. By ratifying, or acceding to, the First Optional Protocol, a state party recognises *competence* of the Human Rights Committee ("HRC") to receive and consider communications from individuals alleging that the state has violated provisions of the ICCPR. Since 25 December 1991, when the First Optional Protocol entered into force, Australia has recognised the competence of the Human Rights Committee to consider communications from individuals subject to Australia's jurisdiction concerning violations or rights contained in the ICCPR.

The ICCPR requires state parties to adopt legislative or other measures to give effect to the rights recognised in it. The Parliament of Australia has not enacted the ICCPR as part of Australian law. Instead, the ICCPR is attached as a

Committee, *Consideration of Legislation Referred to the Committee. Euthanasia Laws Bill 1996*, Commonwealth of Australia (1997). Although the Committee made no formal recommendation to the Senate, a majority of the Committee's members *advised* that: it is desirable for the Euthanasia Laws Bill 1996 to be passed without amendment; that there are no constitutional implications for the Territories, that there will be no adverse implications for the Northern Territory's Criminal Code; and that the ROTTIA has had, and will continue to have, an unacceptable impact on the attitudes of the Aboriginal community to health services. Several Committee members expressed their dissent from this advice.

31 In order to do, so the Federal law would need to produce relevant inconsistency in conformity with the requirements of s 109 of the Constitution.

schedule to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

In relation to the ICCPR, the powers of the Human Rights and Equal Opportunity Commission are largely of a promotional and policy nature. In connection with complaints of violations of the ICCPR against federal agencies, the Commission is empowered to attempt to reach a conciliated settlement and where settlement cannot be reached, to report to the Attorney-General.³² The powers, duties and functions of the Commission in relation to examining laws for conformity with human rights, reporting to the Minister and intervening in relevant court proceedings are discussed below.³³

Although the ICCPR is not part of municipal law and therefore not directly enforceable in Australia, it is now well established that the ICCPR is relevant to the resolution of common law or statutory ambiguity.³⁴ On the other hand, it is equally clear that an explicit municipal law which is inconsistent with international law will override the latter.³⁵

VI. POTENTIAL ENFORCEMENT OPTIONS UNDER THE ROTTIA IN RELATION TO THE ROTTIA

The above discussion as to enforcement options is only relevant to the ROTTIA:

- (i) in the international arena, if the ROTTIA violates the ICCPR; and
- (ii) in relation to the Optional Protocol, if the ROTTIA violates the ICCPR (and other conditions of admissibility are satisfied).

Also, in judicial interpretation of the ROTTIA, the ICCPR is only relevant if it can be shown that the ROTTIA violates the ICCPR and that there is a statutory ambiguity which the ICCPR may assist in resolving.

The common theme in each of the situations enumerated is the requirement (as a threshold condition) to establish a violation of the ICCPR by the ROTTIA. Obviously other issues arise in relation to remedial action under, for example, the Optional Protocol.³⁶

32 The above material is drawn from S Pritchard and N Sharp, *Communicating with the Human Rights Committee*, Australian Human Rights Information Centre, Human Rights Booklet No 1 (1996)

33 See Part IX below.

34 *Dietrich v R* (1992) 177 CLR 292 at 305; *Kioa v West* (1986) 60 ALJR 113 at 120, 147. See generally M Kirby, "The Role of International Standards in Australian Courts", in P Alston and M Chiam (eds), *Treaty-Making and Australia. Globalisation versus Sovereignty*, Federation Press (1995) p 81.

35 *Dietrich* *ibid*.

36 Apart from alleging a violation of a human right which is contained in the ICCPR, the communication must: be in writing; come from an individual or his or her authorised representative; not be an "abuse of rights of submission" (that is, it must have something in fact or law to support it); not be anonymous. The violation referred to in the communication must not be under examination by another international investigation or settlement procedure. All "effective and available" domestic remedies must be exhausted before making a communication: Pritchard and Sharp note 32 *supra*, p19.

It is crucial to examine the ICCPR to assess which, if any, of its provisions could conceivably provide a foundation for an argument that its terms have been violated by the ROTTIA. Accordingly, the following issues will be considered:

- (a) Which, if any, of the provisions of the ICCPR, is/are violated by the ROTTIA?
- (b) Assuming there is one or more potential violations, is there any statutory ambiguity in the ROTTIA to which the ICCPR is relevant? If so, how?
- (c) Assuming there is one or more potential violations, what are the prospects for the HRC expressing a view to this effect? What are the implications for Australia of such a finding? Australia as a state party has obligations: first, under Art 2 of the ICCPR to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR; and second, under Art 40 of the ICCPR to submit reports on measures adopted which give effect to the rights recognised in the ICCPR.

VII. POTENTIAL VIOLATIONS OF THE ICCPR BY THE ROTTIA

There is no judicial consideration of the relevance of the ICCPR to the ROTTIA in *Wake and Gondarra*. Accordingly, it is necessary to look at this question from first principles and by reference to the available literature. One cannot pose an abstract question as to the impact of a 'euthanasia law' on the ICCPR or vice versa. The precise law and its effects are crucial. The provisions of ROTTIA and their relationship to the ICCPR must be examined.

For example, if legislation provided for involuntary euthanasia there would appear to be a clear violation of Art 6 in view of the arbitrary deprivation of life that such a law involved. If, however, legislation was concerned with authorising non-voluntary euthanasia the issue may be less clear-cut. There would certainly be a strong argument that such legislation failed to recognise an inherent right to life and that the protection afforded by law was inadequate. But the issue would arguably remain controversial. As the ROTTIA is not concerned with non-voluntary euthanasia, the matter need not be canvassed further here.

It should be emphasised at the outset that the ROTTIA establishes a permissive statutory regime relating to voluntary euthanasia which involves no formal element of compulsion in relation to patients, doctors, relatives or anyone else.³⁷ Pursuant to the statutory scheme, an individual who is terminally ill may, in very limited circumstances, request assistance to terminate his or her life and medical practitioners who comply with such a request and who abide by the stringent legislative requirements are immune from criminal or civil liability. There is a complex set of statutory safeguards. It is against this background that the provisions of the ICCPR should ultimately be examined. However, a very

37 See note 116 *infra*. Of course, it is possible to argue that there are many indirect pressures and influences on all of these stakeholders and that it is disingenuous to focus on legal formality. This is one of the key arguments of those who say that *in practice* it is impossible to ensure watertight safeguards.

brief summary of the jurisprudence relating to Article 6 of the ICCPR is first set out.³⁸

A. Article 6 (The Right to Life)

Art 6(1)³⁹ of the ICCPR provides as follows:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(i) *The Significance of the Right to Life*

The right to life is the most significant of all human rights. The existence and operation of other human rights are predicated on the effective guarantee of the right to life.⁴⁰ Dinstein puts it thus:

Civilized society cannot exist without protection of human life. The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization. In the final analysis, if there were no right to life, there would be no point in the other human rights.⁴¹

Its importance is underlined by the fact that it is one of the non-derogable rights referred to in Art 4(2) which cannot be suspended notwithstanding life-threatening national emergency.

Commentators have noted the use of the term “inherent” as adding significance.⁴² Dinstein argues that the term “inherent” suggests that the framers of the ICCPR regarded the right to life as part of international customary law.⁴³ Note that the right is also recognised in the Universal Declaration of Human Rights (Art 3), the American Convention on Human Rights (Art 4) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art 2). If, as seems to be the case, the right to life is part of general international law, which is also relevant to Australia, it raises interesting issues as to whether there is any difference in terms of its ambit compared with Art 6(1) of the ICCPR. Nowak also highlights the use of the declaratory present tense “has” instead of “shall have”.⁴⁴ The intention of the majority of delegates in the General Assembly’s Third Committee was, apparently, to entrench the natural law basis of the right to life. It has also been observed that the location of “the

38 Although Art 6(1) is the only provision directly on point other provisions (not canvassed in this article) which may have a tenuous connection include: Article 7 (Prohibition on inhuman or degrading treatment and non-consensual experimentation), Article 17 (protection against arbitrary inference with privacy), Article 18 (right to freedom of thought, conscience and religion); Article 26 (right to equality before the law).

39 The remainder of the Article deals with the death penalty (Art 6(2), 6(4), 6(5), 6(6)) or genocide (Art 6(3)).

40 M Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary*, NP Engel, Kehl (1993) p 104, Y Dinstein, “The Right to Life, Physical Integrity and Liberty” in L Henkin (ed), *The International Bill of Rights* (1981) p 114; Bailey note 14 *supra*, p 248; BG Ramcharan, “The Concept and Dimensions of the Right to Life” in BG Ramcharan (ed), *The Right to Life in International Law* (1985) p 6.

41 Dinstein *ibid*, p 114.

42 Nowak note 40 *supra*, p 105; Dinstein note 40 *supra*, p 115.

43 Dinstein *ibid*

44 Nowak note 40 *supra*, p 105 points out that this terminology can be traced back to a proposal by Uruguay and Colombia.

inherent right to life” in the first sentence of Art 6(1) extends beyond the draft prepared in 1954 by the Human Rights Commission⁴⁵ and also beyond the comparable texts adopted in regional human rights conventions.⁴⁶

The upshot of this is that the fundamental nature of the right⁴⁷ and the degree of significance accorded to it by those responsible for including it in relevant international treaties and the institutions seeking to interpret it have implications for its interpretation. The Human Rights Committee has resolved that the right to life ought not to be given a narrow construction.⁴⁸ A further issue arises as to whether the right is discretionary or mandatory.⁴⁹ If it is mandatory, it is inalienable and accordingly incapable of waiver irrespective of the wishes of the beneficiary of the right. If it is discretionary, the right-holder is capable of waiving the right. The characterisation of the right as discretionary or mandatory is described by Ramcharan as the “crux of the problem of voluntary euthanasia”.⁵⁰ Unfortunately no clear guidance on this issue is offered by this author. The matter is left as inconclusive.⁵¹

(ii) *Duty of the State to Protect the Right to Life*

The second sentence of Art 6(1) imposes on states Parties, such as Australia, the obligation to provide legal protection of the right to life.⁵² This has been interpreted as a requirement by states parties to take positive measures to ensure the right to life.⁵³ Although some states have sought to construe the protection obligation as limited to “a claim to forbearance by the State,”⁵⁴ the majority of states parties supported an approach which recognised this duty but extended it also to protecting life on “the horizontal level”.⁵⁵ This important right is recognised as having “all-round-effects”.⁵⁶

45 Article 6 of the text enacted by the Human Rights Commission (1954), in E/2573, 66.

46 Nowak note 40 *supra*, p 105.

47 The notion of fundamental human rights vested in individuals which governments should not violate can be traced to the English philosopher John Locke. According to Locke’s natural law, all individuals were of equal status and had natural rights to life, liberty and property: P Parkinson, *Australia and The Western Legal Tradition*, Law Book Company (1994) p 48. Significantly, these fundamental rights were regarded as inalienable and could not be surrendered: *ibid.*, p 49.

48 Nowak note 40 *supra*, p 105 citing Gen C 6/16 paras 1, 5: “It is a right which should not be interpreted narrowly” (6/16 1); “Moreover, the Committee has noted that the right to life has been too often narrowly interpreted” (6/16, 5).

49 A Redelbach, “Protection of the Right to Life by Law and Other Means” in BG Ramcharan note 40 *supra*, p 199.

50 *Ibid.*

51 *Ibid.*

52 See also Art 2 European Convention on Human Rights, Art 4 Asian Convention on Human Rights. Moreover, the state’s duty is to protect the right to life of all individuals, without discrimination, within its territory and subject to its jurisdiction: Art 2(2) ICCPR.

53 Nowak note 40 *supra*, p 105.

54 Notably the United States: *ibid.*

55 *Ibid.*

56 As Nowak *ibid.*, p 106 footnote 12 points out: The term “all-round-effects” (Rundumwirkung) was coined by Küchenhoff and Küchenhoff, *Allgemeine Staatslehre* 55 (7th ed, 1971) (Stuttgart) In comparison with the terms “horizontal effects” or “third-party effects”, it better paraphrases the function of civil and criminal legislation as expressed in the human rights catalogues of the 18th century, namely. to ensure

But the duty to protect the right to life is not absolute. States have a discretion as to how the duty is carried out. Nowak has argued that “[a] violation of the duty of protection can be assumed only when State legislation is lacking altogether or when it is manifestly insufficient as measured against the actual threat”.⁵⁷ Protection implies protection by the law in the formal sense.⁵⁸ Complete lack of protection is relatively easy to assess as a violation.⁵⁹ However, whether a legislative measure is “manifestly insufficient” is by no means clear. Implicit is the notion that the protection measure is not proportionate to the threat to the right to life. Nowak recalls that the Human Rights Committee has expressed the opinion that a law which granted a broad self-defence justification to police officers in relation to certain offences would constitute a violation of Art 6(1).⁶⁰

The scope of the right to life (see part (iii) below) will influence the operation of the obligation to provide legal protection. In other words, legal protection is only required to the extent implied by the scope of that right.

If the right is regarded as limited to the “right to protection against arbitrary killing”,⁶¹ the obligation of states parties extends no further than the criminalisation of homicide offences.⁶² However, Nowak draws attention to a broader construction espoused by the HRC. The HRC has expanded the ambit of the protection to other threats to life including “malnutrition, life-threatening illness, nuclear energy or armed conflict”.⁶³ The Committee has specifically stated that:

the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be *desirable* for states parties to take all possible measures to eliminate malnutrition and epidemics.⁶⁴

Some commentators argue that the terminology of the second sentence of Art 6(1) clearly imposes a duty of protection on the legislature.⁶⁵ This construction would appear to be contestable, especially in common law jurisdictions where legal protection is effected in the normal course through a combination of statutory or common law rules.

However, Nowak’s approach to a narrower interpretation of law receives support from Dinstein who, after acknowledging that the term “law” is broad and

solemnly proclaimed fundamental rights against encroachment by private parties and governmental organisations alike”.

57 *Ibid.*

58 *Ibid* at footnote 13 citing Dinstein

59 Nowak *ibid*, p 106 gives the example of a country which granted immunity from prosecution for murder and manslaughter.

60 *Ibid* at footnote 15. It may be interesting to compare the effect of the recent private member’s Bill - Home Invasion (Occupants Protection) Bill 1995 (NSW) - which purported to justify resort to lethal force in self-defence in circumstances well beyond those allowed by the existing common law principles relating to self-defence

61 Dinstein note 40 *supra*, p 115 at footnote 1.

62 Nowak note 40 *supra*, p 107

63 *Ibid.*

64 *Ibid* footnote 17 citing Gen C 6/16, para 15 (emphasis added).

65 *Ibid*, p 107

encompasses statutes, constitutions, unwritten law and administrative regulations, continues:

The inviolability of life is so important, however, that a strict interpretation of "law" is here called for. The international obligation requires that the right to life be protected by higher forms in the legislative hierarchy, by statute or constitutional provision.⁶⁶

In any case this debate may be academic because, as Nowak points out:

Farther-reaching duties to take *judicial, administrative or other measures* may, however, be inferred from the general duty to ensure rights in Art 2(1) and (2).⁶⁷

(iii) Scope of Article 6(1)

The third sentence of Art 6(1) limits the scope of the right to life. But the HRC has expressed the view that the protection against arbitrary deprivation of life is of paramount importance.⁶⁸ It has already been mentioned that the recognised ambit of the right to life will determine the nature of the required legal protection. So, what is the ambit? The terminology is rather vague. The key terms are "arbitrarily" and "deprived". In a limited sense, deprivation of life refers to homicide. The right to life, according to Dinstein does not include the freedom to choose a particular lifestyle or a right to a suitable standard of living.⁶⁹

Dinstein regards the right to life as the right to be protected against arbitrary killing.⁷⁰ He distinguishes "mere toleration of malnutrition by a state" (not a violation) from "purposeful denial of access to food, eg to a prisoner" (violation).⁷¹ Similarly, he claims that failure to reduce infant mortality does not violate Article 6, whereas practising, or indeed tolerating infanticide would do so.⁷²

Once one has determined what amounts to a *deprivation of life*, a fundamental issue remains. It is implicit in the terminology of Art 6(1) that not every deprivation of life amounts to a violation of the provisions. Only deprivations of life which can properly be characterised as "arbitrary" constitute infringements. Which deprivations of life can be classified in this manner?

Clear parallels exist with municipal law in Australia. Only homicides which are not accidental, justifiable or excusable are unlawful.⁷³ These notions may provide some guidance. The word "arbitrary" in its ordinary English language meaning, may mean: "subject to individual will or judgment"; "discretionary"; "not attributable to any rule or law"; "accidental"; "capricious"; "uncertain";

66 Dinstein note 40 *supra*, p 115.

67 Nowak note 40 *supra*, p 107. See also Ramcharan note 40 *supra*, p 17.

68 HRI/GEN/1/Rev 2/GC/6, 6.3

69 Dinstein note 40 *supra*, p 115. Dinstein notes that human needs such as food, clothing, housing and medical care are more appropriately regarded as aspects of social (rather than civil) rights and are recognised in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

70 *Ibid*, p 115.

71 *Ibid*, p 116.

72 Contrast the views of the Human Rights Commission referred to above

73 B Fisse, *Howard's Criminal Law*, The Law Book Company (1990) p 25

“unreasonable”; “uncontrolled by law”; “using or abusing unlimited power”; “despotic”; “tyrannical”; “selected at random”.⁷⁴

The inclusion of the term “arbitrarily” was the subject of criticism when the Covenant was being drafted. It was referred to as “ambiguous and open to several interpretations”.⁷⁵ Dinstein raises an important conceptual issue: “whether any actions sanctioned by statute may qualify as arbitrary”.⁷⁶

Ramcharan argues that the right to life is an “imperative norm of international law”⁷⁷ but acknowledges that the right is not absolute.⁷⁸ “Certain carefully controlled exceptions are permitted...the categories of exceptions must be considered as closed and that even where exceptions are recognised, they must be carefully controlled by international law”.⁷⁹ In the context of Art 6(1), Ramcharan argues that the word “arbitrarily” admits of exceptions to the right to life but that the history of the debates indicates that the word “arbitrarily” was chosen “with the intention of providing the highest possible level of protection of the right to life and to confine permissible deprivations therefrom to the narrowest of limits”.⁸⁰ Factors which may assist in determining whether a deprivation of the right to life is an arbitrary one include: strict legal controls and proportionality.⁸¹

Nowak also recognises the criticism of the vagueness of the term “arbitrarily” but notes that the HRC embraced the term notwithstanding their awareness of this problem and after much debate.⁸² Arbitrary deprivation of life has meant, to the HRC, more than just instances of intentional killing.⁸³ But presumably not all cases of intentional killing would be regarded as arbitrary: consider justifiable/excusable homicides in relation to which self-defence, duress or coercion could be established. Such killings are clearly intentional but are justified or excused in municipal law (depending on the legal analysis adopted). It should also be recalled that Art 6 permits countries which have not abolished the death penalty to impose a sentence of death for serious crimes.⁸⁴

The debate in relation to “arbitrarily” continued in the Third Committee of the General Assembly.⁸⁵ Nowak comments:

Despite strong criticism of the word “arbitrarily” and a Dutch proposal that Art 6 be formulated in reliance on Art 2 of the ECHR, the majority insisted on the formulation adopted by the Human Rights Commission, even though its meaning had not been clarified.⁸⁶

74 *The Macquarie Dictionary*, Macquarie University (1982) p 127.

75 Dinstein note 40 *supra*, p 116 at footnote 13.

76 *Ibid.* See discussion below.

77 Ramcharan note 40 *supra*, p 6

78 *Ibid.*, p 15.

79 *Ibid.*

80 *Ibid.*, p 19

81 *Ibid.*, p 20

82 Nowak note 40 *supra*, p 110.

83 *Ibid.* at footnote 35.

84 There are, of course, requirements as to due process and a prohibition on imposition of the death penalty on persons under 18 and pregnant women.

85 Nowak note 40 *supra*, p 110 at footnote 36.

86 *Ibid.*

A number of delegates supported a view that “arbitrarily” could be equated with the familiar phrase in Anglo-American jurisprudence “without due process of law”.⁸⁷

The Committee of Experts concluded that the arbitrary deprivations of life “contained elements of *unlawfulness* and *injustice*, as well as those of *capriciousness* and *unreasonableness*”.⁸⁸

It has been argued that those instances of permissible deprivation of life set out in Art 2(2) of the European Convention on Human Rights (“ECHR”) necessarily take them out of the category of arbitrary within the meaning of Art 6(1) of the ICCPR.⁸⁹ Nowak endorses this approach on the basis that the preliminary criterion in Art 2(2) ECHR of “absolutely necessary use of force” introduces the elements “essential for the prohibition of arbitrariness, namely, reasonableness (proportionality) and justice; the listed cases, on the other hand, have to do with lawfulness and predictability”.⁹⁰ Some authors have attempted to provide exhaustive lists of cases which could be covered by the term arbitrary deprivation of life.⁹¹ Such attempts have been criticised on the basis that, although they provide useful benchmarks, they cannot exhaust all possibilities and they do not sufficiently recognise that the term “arbitrarily” aims at specific circumstances of an individual case and their reasonableness (proportionality), making it difficult to comprehend in *abstracto*.⁹²

It remains to consider the extent to which Art 6(1) admits of a moral or ethical component. Nowak has commented, rather cryptically:

Others argued that it [the term “arbitrarily”] contained an ethical component, since national legislation could also be arbitrary.⁹³

If one accepts that “national legislation could also be arbitrary” - and logically this would appear to be compelling⁹⁴ - then the moral content of the law falls to be evaluated.

In this context, it is difficult to contend that the analysis should be simply concerned with a clinical, exegetical construction of international law, evacuated of moral content. This is because the fundamental principle involved - the scope of the right to life - is essentially linked to morality.

But, it might be retorted, so do many laws and yet morality is cast aside as a relevant tool for analysis. This response is made more difficult when one considers not only the fundamental principle involved but that it is articulated in an open-textured manner which does not seek to foreclose moral options.

87 *Ibid.*

88 *Ibid.*, p 111.

89 AH Robertson, *The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights*, British Yearbook of International Law, vol XLIII (1968-69) at 30; Dinstein note 40 *supra*, p 119; Nowak *ibid.*, p 111.

90 Nowak *ibid.*

91 For example Ramcharan note 40 *supra*, pp 19-20.

92 Nowak note 40 *supra*, p 111.

93 *Ibid.*, p 110.

94 Note the concern expressed by Dinstein note 40 *supra*, p 116 as to “whether any action sanctioned by statute may qualify as arbitrary”.

It is by now abundantly clear that the use of the term “arbitrarily” leaves considerable room for interpretation. Value judgments must be made (arguably moral value judgments) as to whether laws authorising the deprivation of life are nevertheless arbitrary. In an extreme case - the notorious hypothetical statute authorising the killing of all blue-eyed babies - the answer is clear. Notwithstanding its status as a statute of a sovereign, democratically elected legislature, such a statute is a blatant violation of Art 6(1). It is not necessary to inquire as to which of the precise meanings of “arbitrarily” should be relevantly invoked for each is offended by such a law. So too is any acceptable notion of morality. It is here where the rule of law and human rights part company. Where the law authorising deprivation of life is more circumspect, proportional or conditional the answer is not so readily found. And in such cases perhaps one must turn to morality. Certainly this was the view of Hoffman LJ in *Bland*⁹⁵ and of Angel J in *Wake and Gondarra*.⁹⁶

(iv) *Application of Art 6(1) to Euthanasia*

Article 6(1) does not directly deal with the definition of human life. The state’s duty to guarantee the right to life is clearly governed by the notion implied by “life”. There has been controversy in relation to the point at which the protection of human life begins.⁹⁷ Likewise, the end of life issue has not been resolved. The definition of death has been affected by developments in technology and modern medicine. This discourse has included the extent to which it is appropriate to deploy sophisticated technology to ensure a person’s survival and the related issue as to the allocation of scarce, and in some cases, diminishing, resources to save people’s lives.⁹⁸ The criteria for the point at which a person may be pronounced dead⁹⁹ for the purpose of organ transplants, for example, are important. In the current context, euthanasia measures will only relevantly apply to termination of life. If this has already occurred according to accepted legal definitions, then the euthanasia law is irrelevant and, likewise, any protection afforded by Art 6(1). An interesting issue would arise if the municipal law sought to define legal death in a totally unethical manner. Would the legal definition of death by the municipal law preclude the invocation of Art 6(1) on the ground that the municipal measure was not a deprivation of life? Or would this be seen as a subterfuge and an ‘acceptable’ definition of death substituted? Surely the latter view would prevail.

Nor does Article 6(1) specifically address the issue of euthanasia. When do municipal laws which authorise the provision of assistance to terminate the life of an individual who seeks “release of death from hopeless and helpless pain”¹⁰⁰

95 Note 10 *supra*. In this case the dilemma was expressed in terms of conflicting fundamental moral principles: the sanctity of life versus autonomy (self-determination).

96 Note 1 *supra*

97 Nowak note 40 *supra*, p 122.

98 Dinstein note 40 *supra*, p 120

99 See, for example, Arnet, “The Criteria for Determining Death in Vital Organ Transplants - A Medico-Legal Dilemma” (1973) 38 *Modern Law Review* 220.

100 See G Williams, *The Sanctity of Life and the Criminal Law*, Faber and Faber Limited (1958) p 277.

violate Art 6(1)? The answer is partly to be found in the definitions of euthanasia adopted.¹⁰¹ Commentators seem to be agreed that involuntary euthanasia is prohibited by Art 6(1).¹⁰² The right to life is not diminished because of an individual's status or afflictions. It applies to all human beings. As Nowak points out:

The cruelty of National Socialism has brought clearly to light the necessity of protecting by law so-called "undesirable life". Since Art 6 protects human life until death, every arbitrary deprivation of life, ie of the incurably ill, mentally ill, etc by State organs constitutes a violation of this right.¹⁰³

Dinstein, also, after references to the condemnation in the International Military Tribunal at Nuremberg of the annihilation of thousands of "useless eaters" by Nazi Germany, similarly comments:

The Covenant surely forbids systematic homicide by public authorities, even if carried out in order to relieve society of the economic and social burden of maintaining hospitals, sanatoriums, asylums etc.¹⁰⁴

Where death is the incidental result of lawful and appropriate treatment for pain relief there will be no violation.¹⁰⁵ Also, passive euthanasia (or euthanasia by omission)¹⁰⁶ would appear to be permissible under Art 6(1). If a person declared by medical practitioners to be in an irreversible 'vegetative' state where the vital body processes can only be sustained by technological intervention (for example the well-known cases of *Quinlan* (in the US) and *Bland* (in the UK)), such artificial life support may be withdrawn without infringing Art 6(1). Dinstein argues¹⁰⁷ that the test developed in *Quinlan*, that is, "if there is no reasonable possibility of a person ever emerging from a comatose condition to a cognitive state, life-preserving systems may be withdrawn" provides guidance for an interpretation of Art 6(1) in relation to passive euthanasia:

It is a plausible interpretation of the Covenant, too, that when life becomes an indignity endured without autonomy or awareness, death may be permitted to take its natural course.¹⁰⁸

An argument can also be mounted that non-voluntary euthanasia amounts to a violation of Art 6(1). Certainly this would appear to be so where termination of life takes place on a mass scale only on the basis that the individuals concerned were 'useless'. Such cases are technically distinguishable from the involuntary euthanasia cases where deprivation of life occurs *against* the will of the individual concerned. The lack of consent (usually through inability to give it)

101 See discussion above at Part IIB.

102 Dinstein note 40 *supra*, p 120; Nowak note 40 *supra*, p 124.

103 Nowak *ibid*, p 124.

104 Dinstein note 40 *supra*, p 120.

105 M Otlowski, *Active Voluntary Euthanasia - A Timely Reappraisal*, Occasional Paper 1, The University of Tasmania Law School, (1992) p 19. Providing medication for pain relief in such circumstances does not entail any criminal liability, if death results, as long as due professional care is exercised and the medication is not one which only causes death and does not in itself relieve pain. L Gillam, "Medical End-of-Life Decisions: The Law in Australia" in B Tobin note 14 *supra*.

106 Note 100 *supra*, p 326.

107 Dinstein note 40 *supra*, p 121

108 *Ibid*

distinguishes non-voluntary cases. Yet such cases would seem to fall within the notion of arbitrary deprivations of life. The issue of non-voluntary euthanasia perhaps becomes more complex if one assumes that the decision relates to a single person in a persistent vegetative state on a life support system with compassionate and competent medical care, extensive consultation with family members. Such a situation is difficult to distinguish from the *Quinlan* and *Bland* cases which are often characterised as passive euthanasia or euthanasia by omission.

But whether such instances can be regarded as passive euthanasia or the steps taken (for example withdrawal of life support) can be properly characterised as active euthanasia, the moral content of the conduct is different from involuntary euthanasia or gross forms of non-voluntary euthanasia. Such withdrawal of life support is arguably capable of being regarded as non-arbitrary and therefore as not infringing Art 6(1).

There remains to be considered the important question of active voluntary euthanasia. This is here defined as the taking of positive steps (with the patient's consent) to hasten the death of a patient (for example, by administration of a lethal injection to a terminally ill patient) or the provision of assistance (by medical practitioners) to terminally ill patients to enable them to bring about their own death. Does Art 6(1) extend to laws seeking to authorise this form of euthanasia? This involves asking, among other things, whether the consent of the patient makes any difference. Will the consent of the patient render nugatory what would otherwise constitute an infringement of Art 6(1)? Asked another way: can someone waive his or her right to life?¹⁰⁹ Against the effective waiver argument at least two responses spring to mind. First, the argument that the right to life is fundamental and inalienable and transcends the individual. Second, it is worth recalling the common law position with regard to the operation of consent. Consent ceases to be legally effective when the consensual infliction of serious harm is involved.¹¹⁰ Dinstein notes that some HRC members have expressed the view that "euthanasia was inconsistent with the Covenant".¹¹¹ It is assumed that the reference here is to active voluntary euthanasia. However such an assumption may be unwarranted. Dinstein notes that one state was the subject of particular criticism, not because it authorised voluntary euthanasia, but because its legislation allowed penalty mitigation for homicide when the motive involved was mercy.¹¹² Ultimately, Dinstein's view on whether active voluntary euthanasia infringes Art 6(1) appears to be that it is permissible in limited, tightly defined circumstances.

109 F Jacobs, *The European Convention on Human Rights*, Clarendon Press (1975) p 22.

110 See *R v Brown* (1993) 2 All ER 75.

111 Dinstein note 40 *supra*, p 121.

112 UN Doc CCPR/C/SR 222 para 6 (1980) cited in Dinstein note 40 *supra*, p 121. The Jordanian expert Sadi was critical of the relevant provisions of the Colombian Criminal Code which provided for penalty mitigation for mercy killing. Interestingly, a mitigated penalty for a mercy-motivated homicide was one of the recommendations by the majority of the Special Committee of the Senate of Canada in 1995: "The majority recommends that voluntary euthanasia remain a criminal offence. The Criminal Code, however, should be amended to allow for a less severe penalty similar to that provided for non-voluntary euthanasia in cases where there is the essential element of compassion or mercy".

Having highlighted the danger of abuse, especially when state officials are authorised to carry out voluntary euthanasia, Dinstein implies that, in certain circumstances, voluntary euthanasia would not amount to a violation:

If a state is permitted to excuse euthanasia, it is indispensable to assume that the consent is authentic and to set the precise form in which waiver of the right to life must be expressed to be valid. Euthanasia practiced [sic] by state officials is especially suspect and would require particularly rigorous safeguards.¹¹³

Dinstein appears to accept that waiver *can* be effective and that the key issues are authenticity, reliability and safeguards which will ensure the validity of the waiver. Nowak would appear to agree:

If a national legislature limits criminal responsibility here [in relation to active and passive euthanasia] after carefully weighing all affected rights and takes adequate precautions against potential abuse, this is within the scope of the legislature's discretion in carrying out its duty to ensure the right.¹¹⁴

But the validity of waiver cannot, it is submitted, be considered in isolation from the deprivation of life sought to be authorised by such waiver.

B. Application of Art 6(1) to ROTTIA

The right to life in international law is clearly regarded as a fundamental right. Whether it is absolute or inalienable is, however, questionable having regard to the terms of Art 6(1) and the interpretation of its provisions by authoritative commentators.

The references in the second sentence of Art 6(1) to the need for legal protection and in the third sentence to a prohibition against arbitrary deprivation of life have been construed as qualifying the absolute nature of the right suggested by the first sentence. A concession that the right is less than absolute does not logically or automatically entail that the reduced form of that right is thereby to be regarded as not inalienable. Theoretically, it is possible to argue that any law authorising waiver of the reduced right ought to be regarded as an arbitrary deprivation of that right. However, having regard to the commentaries on Art 6(1) it seems that waiver can be effective if it is authentic and reliable and that appropriate safeguards are in place to ensure that this is so. It is at least implicit in the commentaries that even authentic waiver will not be effective in *any* circumstances and that the law should be scrutinised as to whether arbitrary deprivation of life is sought to be authorised.

The State is granted a degree of autonomy in setting the limits on what is to be regarded as the arbitrary deprivation of life.¹¹⁵ Moral and ethical considerations are clearly relevant here. It is, however, essential that legal protection be afforded against such *arbitrary* deprivations of life.

Applying this analysis to the ROTTIA, it is arguable (but by no means clearcut) that the legislation would not be regarded as a violation of Art 6(1) of the ICCPR. The legislation is not concerned with either involuntary or non-voluntary euthanasia. It seeks to regulate a very restricted form of active

113 Dinstein *ibid.*

114 Nowak note 40 *supra*, p 125.

115 See note 118 *infra*.

voluntary euthanasia. Not only is the consent of the person concerned crucial but rigorous statutory safeguards are in place to ensure the authenticity and reliability of that consent, including a ‘cooling off’ period. Moreover it is not an unfettered authorisation to seek medical assistance to terminate life. The legislation can only be effectively triggered by a person who is suffering a terminal illness. There are numerous statutory preconditions to the provision of assistance.¹¹⁶

In the circumstances, it is at least arguable that the legislation would not be regarded as an arbitrary deprivation of life. The limited form of voluntary euthanasia permissible can only take place strictly in accordance with law. Forms of homicide which fail to conform with the legislation are not afforded legal protection.¹¹⁷

It should be observed that *any* law authorising voluntary euthanasia would not necessarily be consistent with Art 6(1) of the ICCPR. Legal authorisation does not guarantee that a deprivation of life is not arbitrary. Similarly, the nature of the deprivation of life sought to be authorised by law might be such as to render waiver ineffective. However, these issues do not arise for consideration in the present context.

VIII. RELEVANT STATUTORY AMBIGUITY IN THE ROTTIA?

There does not appear to be any statutory ambiguity in the ROTTIA capable of resolution by reference to the ICCPR. In the circumstances, the ROTTIA must prevail in domestic law.

IX. POTENTIAL FOR ADVERSE VIEW BY HRC?

It is arguable that the HRC would not find that the ROTTIA violated Art 6(1) or any other provisions for the reasons discussed above. This argument may be fortified by the margin of tolerance¹¹⁸ allowed by the HRC in respect of a state’s

116 The law allows a mentally competent adult to request assistance to voluntarily terminate his or her life. There are numerous safeguards to ensure that the patient, all medical personnel and any hospital or nursing home involved all participate in the termination of the patient’s life on a voluntary basis. A series of factors must be considered before reaching and implementing the decision to terminate the patient’s life. At least three medical practitioners must be involved in the decision-making process as to the nature of the terminal illness and the competence of the patient. The patient must be given information on available palliative care.

117 Subject, of course, to other legal exceptions such as self-defence

118 The so-called “margin of appreciation” or “margin of discretion” is the subject of considerable controversy in relation to decisions of the European Court of Human Rights based on the European Convention. There is no readily ascertainable European morality and States have been accorded considerable latitude. Morality is interpreted by reference to national conceptions even though this appears to conflict with a guaranteed set of international norms. The difficulty of identifying universal morality for an instrument such as the ICCPR which straddles a much more diverse collection of nation

autonomy as to moral issues.¹¹⁹ The appropriate responses of the Australian government if a violation were to be established are not considered in detail. Briefly, if the HRC expresses a view that there has been a violation of Art 6(1), the Australian government has obligations to: (i) take necessary steps to adopt legislative measures to give effect to the rights in the ICCPR (Art 2.2); (ii) report on measures adopted (Art 40). The appropriate response pathway has been clearly established in relation to *Toonen v Australia*.¹²⁰ However, in the case of the ROTTIA, the constitutional authority for the enactment of an overriding law applicable to the Northern Territory pursuant to s 122 of the Constitution is unquestionable.¹²¹

Once the High Court challenge is heard (and assuming it fails), there would be no obstacles to either or both of the individual co-plaintiffs lodging a communication with the HRC under the First Optional Protocol to the ICCPR.¹²²

X. CONCLUSIONS

The right to life under international law is widely regarded as a fundamental right. The term 'fundamental' is ambiguous. It is variously used as synonymous with 'absolute', 'inalienable', or both. In the present context it is intended to mean no more than 'of cardinal significance'. Despite the conflict in the writings, there is a consensus on this lowest common denominator denotation. However, the right to life is not absolute. In carefully circumscribed circumstances, there would not appear to be a violation of the right to life provided that:

- (i) the law seeking to diminish the effect of the right does not involve an *arbitrary deprivation* of life;
- (ii) *legal protection* is afforded in such a manner as to delimit such authorisation to the non-arbitrary sphere.¹²³

What is "arbitrary" or "non-arbitrary" is contentious and allows the consideration of moral and ethical issues. A state is accorded a degree of autonomy in defining this boundary.¹²⁴

There are conflicting views as to whether the right to life (whether absolute or qualified) is an inalienable right. It would seem that an effective legal waiver can operate in restricted circumstances if it is authentic, reliable and subject to

States than the European Convention is even greater. See generally: HJ Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals*, Clarendon Press (1996) pp 600-39.

119 This situation is complicated in the case of a federation such as Australia where the national and regional levels of government disagree, as may be the case in relation to the ROTTIA.

120 CCPR/C/D/488/1992, 4 April 1992.

121 The alternative pathway, that is, the enactment of a general overriding law pursuant to the Federal Parliament's external affairs power, based on the ICCPR, is legally more difficult for the reasons outlined earlier in Part IV, and is unlikely to be pursued.

122 See Part V *supra*.

123 This would seem to be the case in respect of Art 6(1). Arguably, the restrictions may be greater in relation to customary international law.

124 See note 118 *supra*.

appropriate safeguards. A waiver will arguably not be effective in all circumstances. It is submitted that the likelihood of a legally effective waiver diminishes as the potential erosion to the right to life increases. Applying these conclusions to the ROTTIA, it would appear that the legislation does not violate Art 6(1) or any of its other provisions, given its very limited scope and extensive statutory safeguards. Even if this argument as to the specific effect of the ROTTIA were to be accepted, it should not be regarded as applicable to all forms of voluntary euthanasia legislation. Each specific law must be carefully assessed both as to its formal provisions and its material operation.

Finally, a trite but important observation is apposite. Political and moral judgments in relation to voluntary euthanasia are not ultimately capable of resolution exclusively by reference to international human rights standards. Probable legal conformity with human rights standards (for example Art 6(1) ICCPR) is not determinative of the moral or political appropriateness of a particular law such as the ROTTIA. The Human Rights and Equal Opportunity Commission can advise as to the likely human rights implications of such a measure. But the final political and moral judgment (which necessarily includes an assessment of whether it is possible to guarantee via safeguards that a statutory scheme authorising limited active voluntary euthanasia will never be abused) must be one for the legislature.