

Moral Legislation in The Netherlands on Euthanasia and Animal Experimentation

A Philosophical Analysis

The principal objective of this article is to reflect (in a philosophical manner) on recent developments in moral legislation in The Netherlands. The term ›moral legislation‹ refers to all forms of legislation on issues which can be regarded as ›moral‹ – such as euthanasia and animal experimentation. The reason for focussing on The Netherlands is that, on an international level, it is a country which has gained a reputation for being ›liberal‹, and is therefore admired by some and held in abhorrence by others.

1. The case of euthanasia

1.1. Loss of dignity and the compassionate physician:

a ›simple case‹

Imagine the following situation. A friendly and compassionate physician, doctor A, pays a visit to his patient B, an elderly woman who is severely ill. He finds her in a deplorable state, for which the Dutch language has coined a special term, the word *ontluistering* – usually translated as ›loss of dignity‹ (although a more accurate translation would be ›loss of grace‹). It is a terrible scene: the aspect of a patient whose physical state has suddenly deteriorated.

Moreover, a few days before this event, the patient had asked her physician whether he would be prepared to commit euthanasia if her physical condition were to deteriorate, and he, the friendly and compassionate physician, promised he would do so – to her great relief. Finding her in this deplorable state, he takes out the cocktail which he already had prepared for the occasion, and administers it. She dies. Is there something wrong with this?

I think there is. In order to be able to judge the case, however, we have to analyze it. From a methodological point of view, the proper starting-point for an ethical analysis are the words we actually use. Now by far the most salient and intriguing linguistic expression is the phrase *loss of grace* (›ontluistering‹). But before turning to ›ontluistering‹ – or: the ›object‹-side of the case – I would like to have a look at the ›subject‹-side of it, the expression *compassionate physician*. What does it refer to? Allow me to answer this question by giving an example.



In 1990, I participated in an international conference of the *Right to Die Societies* in Maastricht, The Netherlands. Dr. H. S. Cohen, a Dutch physician, presented a rather interesting paper in which he, to a considerable extent, relied on his own ›bedside‹ experience. In this paper, he presented himself as a physician who was willing to take the patient's request for euthanasia seriously. Whenever the suffering patient's request for euthanasia is ›seriously negotiated‹, he claimed, his or her despair would give way to a state of ›tranquility‹ or even ›radiating peace‹. He stressed, moreover, that euthanasia forced the physician to communicate about life and death in a direct and personal manner:

»A tendency towards nonverbal communication comes quite naturally. Hugging and kissing are not inappropriate. Doctors should not discuss euthanasia, standing at the foot of the bed, in a white coat, mumbling latin incantations. The least is to sit down, hold hands, and speak only if silence does not speak for itself.«

To opponents of euthanasia who maintain that it is not allowed to kill people, he replied: »I do not kill people, I only kill friends.«

During the subsequent discussion, an elderly woman from the audience reacted thus:

»I wanted to tell Dr. Cohen how he touched me with his humanness, I think we all wish we could have a doctor who would sit with us, hold our hands, and who would listen to us. I want to thank you for that.«

Let this suffice as a picture of what a compassionate physician looks (or rather: sounds) like, in order to turn to the object-side of the case: the deplorable physical state in which the elderly patient suddenly finds herself. It was this same Dr. Cohen who, in the verbal version of his paper, used the phrase *ontluistering* (›loss of grace‹) to refer to such a state. The phrase was coined to indicate that patients can physically suffer even in the absence of pain. It denotes general physical deterioration, with or without mental despair or physical pain. In the case of a dying patient, pain is (or should) not be the crucial issue because, in most cases, pain can be alleviated or repressed. Yet, even in the absence of pain, loss of dignity can be repulsive and revolting.

Now what causes our uneasiness in this ›simple case‹ of a compassionate physician killing his suffering patient? In my view, it is the absence of what I will refer to as a third term. No doubt, the vivid picture of a suffering patient (A) is likely to trigger a compassionate response (B).

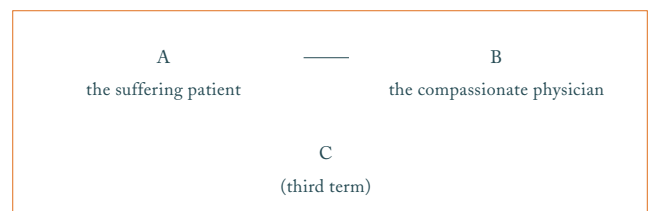
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We immediately tend to sympathize with the compassionate physician. Can there be anything wrong with being compassionate in the face of suffering? *Loss of grace* refers to a de-humanizing condition. The visual image referred to by this key word is something unbearable and intolerable, from the point of view of the compassionate physician.

Yet, in matters of life and death, we can never rely merely on feelings of compassion. The physician in our ›simple case‹ acts out of a personal response to an image *he* experiences as intolerable. But how can we be sure that his reaction is *truly* moral, and *really* in accordance with the patient's interests or wish? In order to judge the moral quality – *Gehalt* – of his response, the presence of a third term or element is inevitable. A law, a second opinion, an established procedure – all such elements may perform this indispensable function. Now in my view, the debate on euthanasia in The Netherlands can be interpreted as a series of efforts to establish a ›third term‹.

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1. 2. Euthanasia in The Netherlands, or: the quest for a ›third term‹

The history of the euthanasia debate in The Netherlands can be regarded as a persistent quest for a ›third term‹. As long as active euthanasia remains a crime, the dual, two-sided relationship of patient suffering (A) on the one hand and silent, impulsive compassion (B) on the other, is bound to reproduce itself time and again. Indeed, advocates of a legal arrangement for euthanasia have always argued that, in cases of suffering and despair, euthanasia *will* be committed. Should euthanasia remain a crime, however, the compassionate impulse is bound to remain silent, is forced to hide itself under the surface of legal patient-physician interaction. If, on the other hand, legal obstacles to euthanasia are alleviated, the compassionate physician will be able to step forward, will be offered an opportunity to defend his case, to *justify* his decision, and to act in accordance with established guidelines and procedures. A legal arrangement of euthanasia does not mean that anything goes, or that physicians from now on are allowed to terminate life in all circumstances. On the contrary, it means that legal boundaries can be defined, that a legal structure can be imposed, and that from now on a distinction can be made between legitimate and criminal instances of termination of life. As long as the physician acts within these established boundaries, and in accordance with established structures, his compassionate decision will be condoned, and he will not be punished.

In 1993, after decades of intensive public debate, a bill on euthanasia was passed in the Dutch Parliament. In principle, euthanasia is still regarded as a criminal offence and the Penal Code as such remained unchanged. Moreover, the attending physician is expected to report the case to the local coroner who will inform the prosecutor, who will then decide whether prosecution is to follow. Yet, it is stipulated that prosecution will not follow if certain criteria are met. Most notably, the patient's request to end his or her life must have been voluntary and carefully considered, the patient's situation must have been hopeless and the physician must have asked for a second opinion. Moreover, the actual practice of euthanasia in The Netherlands is carefully monitored by a prominent research group.

This arrangement, however, did not at all succeed in erasing the discontent. On the liberal side of the moral spectre, it is deplored that euthanasia still remains a crime, and the compassionate physician still runs the risk of finding himself exposed to legal prosecution. On the conservative side of the moral spectre, however, several drawbacks of the present arrangement are emphasized as well. It is indicated, for example, that all efforts to publicly control the practice of euthanasia are now dependent on the cooperation of physicians who are involved in what is basically still considered an illegal practice. How can they be expected to disclose their illegal act, especially if one of the criteria mentioned above was not met? Moreover, Welie and Ten Have argued that the arrangement itself is part of what they refer to as a ›culture of death‹: suffering is to be relieved by all means, even if it entails the elimination of the sufferer.

In the eighties, physicians who committed euthanasia were considered guilty of a criminal act. Yet, legal jurisprudence indicated that they could forgo conviction if the severely suffering patient had made a serious and well-considered request in the face of death. He then acted in a case of necessity – *noodgeval* in Dutch – and submitted to what is legally referred to as force majeure – *overmacht* in Dutch. In the nineties, however, these very phrases were used in the famous Rammelink Report to justify the termination of the life of severely suffering patients who were no longer able to express their wishes and to utter a request. Apparently, the ›classical‹ case of active euthanasia on the patient's request was no longer regarded as something intrinsically problematic, an act on the boundary of the legitimate, but had suffered a form of ›de-problematization‹. Euthanasia as such was no longer regarded as problematic. Instead, failures to meet the established criteria had to be justified by appealing to ›necessity‹, ›emergence‹ and ›force majeure‹.

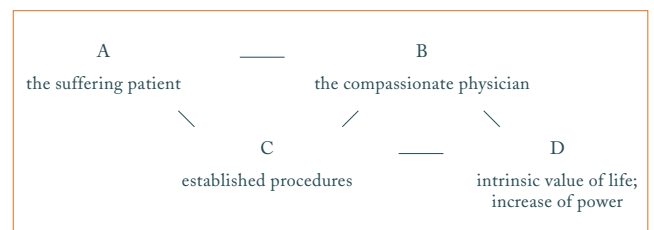
This remarkable shift might explain part of the resurging discontent. Conservative critics of the current policy feel that euthanasia should *always* remain a problem. Indeed, euthanasia *becomes* a problem whenever it is no longer regarded as problematic. Apparently, the established procedure (C) has obscured

the problematic nature of the practice of euthanasia *as such*. Important aspects seem to be neglected or concealed. Even if the basic criteria – hopeless suffering, persistent request, second opinion – are met, the tragic dimension is bound to persist and the physician *has* to do something he *should* not do, namely to terminate his patient's life. Whenever (due to the de-problematizing effect of the procedure) this tragic dimension disappears from view, uneasiness is likely to recur.

In my view, this uneasiness or discontent in the actual practice of euthanasia entails an implicit appeal to what could be regarded as a *fourth term* (D), although differences are likely to occur when it comes to articulating the moral content of this term. From a ›conservative‹ point of view, this fourth term might refer to an awareness of the intrinsic value of life *as such*. Although tragic situations do occur in which termination of life on the patient's persistent request imposes itself as an inevitable act of compassionate duty, the decision remains tragic (that is: highly problematic) *in itself*.

From a ›critical‹ point of view, however, the fourth term will rather point to the significant increase of power on the part of contemporary medicine. Euthanasia as a legal possibility becomes part of the technological drive to control death. Rather than reacting with prudence and moderation to terminal illness, contemporary medicine is likely to opt for an aggressive stance. If things go wrong, euthanasia is always available as an escape route.

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2. The ethical logic of animal experimentation

2. 1. The traditional point of view

Imagine a sensitive human person who, for the first time in his or her life, enters a university laboratory where experimentation on animals is being performed. Animals like rats, mice and goats are subjected to experimental trials and bound to experience suffering, or at least some level of ›discomfort‹. Finding him- or herself exposed to such a situation, he or she will experience feelings of uneasiness or even disgust. Like in the euthanasia case, that is, we start from a dual, two-sided situation: on the one hand the moral image of the suffering animal (A), and on the other the sensitive moral subject (B). Responding to the situation in an impulsive manner, the sensitive person might for example flee the laboratory, or try to free the suffering animals from their cages. But even if the person



involved opts for a more passive stance, he or she will experience what Nietzsche refers to as the origin of good and evil: »Ursprung von ›gut‹ und ›schlecht‹ – Eine Verbesserung erfindet nur Der, welcher zu fühlen weiss: ›Dies ist nicht gut‹«.

The mere feeling that something is »not good«, however, does not suffice as a moral judgement. Ethics basically entails the postponement of impulsive possibilities for action like the ones mentioned above, in order to reflect on the origins of our moral feelings – thus causing the »native hue of resolution« to be »sicklied o'er with the pale cast of thought«, as Hamlet has it. Taking the moral point of view implies that we explicitly ask ourselves *why* we experience uneasiness or even disgust in the face of animal discomfort or suffering. Eventually, an attitude of total rejection (or chronic suspicion) – that is: a judgement regarding the situation *as a whole* – will give way to the emergence of a ›third term‹, a moral structure which allows us to *analyze* the situation and to determine under what circumstances animal experimentation can be considered as legitimate.

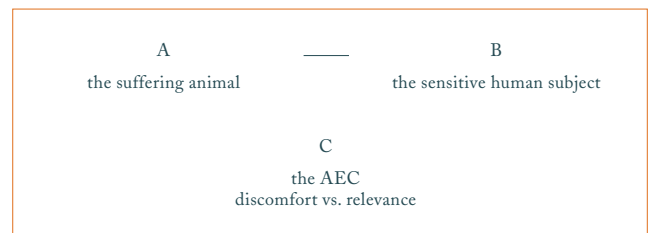
In order for such a moral structure to be developed, the question regarding the grounds of our uneasiness has to be posed. The traditional answer is that *human dignity* forbids needless cruelty to animals. In the »Metaphysik der Sitten« (Ethische Elementarlehre), for example, Kant argues that cruel treatment of animals is at odds with man's duties towards himself. He approves of animal experimentation *in principle*, for in »Der Streit der Fakultäten« he remarks in passing that medical experiments are to be performed on animal bodies, since their moral worth is limited as compared to the moral worth of human bodies – *Fiat experimentum in corpore vili*. A similar argument is made in his »Lecture on Ethics«: »Wenn also Anatomici lebendige Tiere zu den Experimenten nehmen, so ist es grausam, ob es gleich zu etwas Gutem gewandt wird. Weil nun die Tiere als Instrumente des Menschen betrachtet werden, so gehts an (...)«. Yet, in his »Metaphysik der Sitten« it is pointed out that »martervolle physische Versuche zum bloßen Behuf der Speculation« are to be loathed if the objective can be achieved by other means. It is *inhuman* to torture animals, unless we have a sufficient reason for doing so. In the absence of such a reason, however, torturing animals entails a lack of *self-respect*, but Kant nowhere argues that the animals themselves must be respected, or that the moral worth of the animals themselves must be acknowledged.

A similar line of thought can be discerned in moral legislation on animals as well, at least as far as The Netherlands are concerned. The Penal Code of 1886 banned pointless cruelty towards animals and protected them from being mistreated, primarily because such behaviour was regarded as an offence against the moral feelings of *other persons*. Of course, the emphasis is on words like ›needless‹ or ›pointless‹. Should there be a sufficient reason for cruelty – for instance if it is considered scientifically relevant to produce a certain amount of suffering in the course of a controlled experiment – the

suffering invoked is no longer regarded as pointless or immoral. On the contrary, it will be regarded as morally justified.

In the case of animal experimentation, like in the case of euthanasia, the ›third term‹ consists of a legally imposed arrangement or procedure. In The Netherlands, it is the legal task of animal ethics committees (AEC's) to determine whether experiments on animals (performed in a university laboratory for example) can be regarded as morally justified. In order to do so, the amount of *discomfort* experienced by the animal has to be ascertained in a more or less objective manner, on the basis of established scales and measures. Subsequently, it is balanced off against the scientific or social relevance of the experiment.

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2. 2. Intrinsic value, or: the quest for a ›fourth term‹

Sooner or later, however, sensitive members of animal ethics committees are likely to experience uneasiness once again – *Dies ist nicht gut*. Ethical procedures run the risk of becoming a routine. Discussions regarding the ethical acceptability of biotechnological research are often biased by feelings of sympathy with the researcher, with whom committee members are likely to identify themselves. Stafleu for example claims that the balancing process does not offer a fair chance to the laboratory animal. Once the scientific or social relevance of the experiment is established, even severe suffering is likely to be considered acceptable. Eventually, the procedure may no longer suffice to alleviate the moral response – *This is not good* – evoked by images of animal suffering. Apparently, some basic aspect or dimension has been neglected or forgotten. A sense of uneasiness recurs and triggers the quest for a ›fourth term‹. In The Netherlands, the concept of ›intrinsic value‹ of animals seems to be functioning as such.

In 1981, the concept of intrinsic value was introduced on the policy level in a memorandum on animal protection – the *Nota Rijksoverheid en Dierenbescherming*. In this memorandum, the recognition of the intrinsic value of animals is considered the point of departure for policy development on behalf of animal protection. Human beings are accountable for what they do to animals, their interests have to be taken into account and the economic value of animals is to be subordinated to their moral value.

In June 1995, a bill on research with animals was put forward in the Dutch Parliament. One of the amendments passed on that occasion demanded that the intrinsic value of animals was to be regarded as the basic assumption for judging animal experimentation. The amendment was included in the revised version of the Law on Animal Experimentation – *Wet op de dierproeven* – which became effective in February 1997. In short, the concept of ›intrinsic value‹ has become a key issue in ethical debate and policy development in The Netherlands.

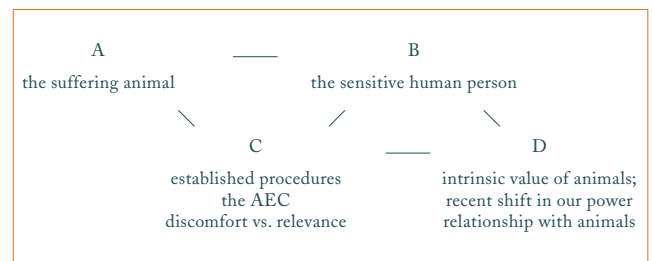
As was pointed out above, animal ethics committees are entrusted with the task of balancing human and animal interests. The amount of suffering must be in proportion to the scientific interests. In a recent report on animal experimentation, members of the Dutch Center for Bioethics and Health care law published a report in which a new model for balancing human and animal interests is presented. Items such as relevance and discomfort are to be carefully measured and scored in terms of a 10-point scale. Subsequently, the authors suggest that a fixed score of 2 points must be added in favour of animal interests in order to take their ›intrinsic value‹ into account.

On the other hand, the concept of intrinsic value is considered by many as highly problematic, and for good reasons. How can we attribute intrinsic value to animals when we are at the same time using and instrumentalizing them? The ethics of intrinsic value seems to be quite at odds with actual practice, and might even function in an ideological manner, obscuring what is actually happening to animals in real life. The discourse on intrinsic value of animals fails to discern the extent to which, during recent decades, and in spite of the apparent increase of our sensibility when it comes to animal suffering, our actual exploitation and instrumentalization of them has intensified considerably. From a philosophical point of view, therefore, I would consider it more relevant to focus on the remarkable shifts in the power relationship between humans and animals that have recently occurred.

Since time immemorial we have been treating animals not as ends-in-themselves, but in an instrumental way. We cannot ask them to consent to what is being done to them. They either remain indifferent, or offer resistance, and we train and domesticate them in order to subdue their basic No. In a famous passage in his ›Antigone‹, Sophocles already pointed to the basically violent relationship of man towards animals. Not as a kind of moral critique; rather, Sophocles gives voice to the awareness that we cannot refrain from bullying bulls, we cannot do otherwise. Yet, something seems to have changed since then. Sophocles emphasizes our ancestors' abilities to trap and tame animals and break their resistance. That is, he

stresses their *negative* power over them. But quite recently, something astonishing has happened: an unprecedented power relationship between humans and animals has managed to establish itself. Our ability to mould and modify them and transform them in accordance with our interests, has increased dramatically. On entering a university laboratory, this change becomes apparent. Our *positive* power over animals has increased, most notably due to the development of techniques for genetic modification. New characteristics are produced at an astonishing high pace. Securing and increasing animal well-being has become a principal objective in our management of them. Our power has become productive rather than repressive. And the discourse on ›intrinsic value‹ might be an inherent part of this development, rather than a critical reflection.

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3. Concluding remarks

Rather than relying on impulsive and immediate responses, the human world is structured in a moral manner, and this goes for our relationship towards animals as well. Feelings of admiration at the sight of a wolf in the distance, for example, or of anger at the sight of a rhinoceros who has been killed by raiders, do not suffice as a truly *moral* response. Rather, a moral stance entails the willingness to account for one's reactions. A moral judgement regarding animal experimentation, for example, involves *counting* the numbers of animals, and assessing (in a *quantitative* manner) the level of discomfort involved.

The theory of Kant basically consists of a procedure for producing moral judgements, independent of our subjective and immediate responses to terrible images. The claim that ethical procedures must be regarded as a hindrance to animal research (or, for that matter, to practicing euthanasia) is thoroughly misguided. Rather, the ethical procedure establishes an indispensable moral infrastructure that allows animal research (or other practices, such as voluntary euthanasia) to be performed. Without a structure of this kind, scientific research

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(or medical decision-making at the end of life) would be utterly impossible. It allows the practitioner to distinguish between legitimate and illicit actions, or at least offers some guidance. The ethical procedure functions as an indispensable ›third term‹ between the subject (the physician, the researcher, etc.) and the object (the patient, the laboratory animal, etc.).

Yet, ethical procedures, as they develop in actual practice, are always on the verge of complicity. They always run the risk of becoming a bureaucratic institutional routine. Their critical import is weakened as they start functioning as an institutional alibi, thus triggering the quest for new critical concepts and, eventually, revised procedures. In terms of this dynamical structure, actual deliberation on issues like euthanasia and animal experimentation can be reconstructed. Meanwhile, we always seem to be striving for a middle position between too much and too little moral regulation.

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