

University of Strasbourg

European Master's Degree in Human Rights and Democratization  
Academic Year 2013/2014

# The scope of application of the right to life

Does Article 2 of the European Convention on Human Rights  
include a right to die?

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## ***Abstract***

*How do European societies influence international Human Rights Law and how does the European Court of Human Rights respond to the demands of an evaluating and pluralistic society? Those are the questions that will be analysed in this thesis, with regard to a specific topic which is ever more emerging within Europe: euthanasia and assisted suicide. In relation to this, special consideration will be given to the margin of appreciation system, leading to a variety of accepted national interpretations of Article 2 with regard to the alleged implied “right to die” within the meaning of the right to life. Considering the case law on euthanasia and assisted suicide of the ECtHR, deductions and possible changes within the law will be evaluated. Since the topic of euthanasia does not only include a legal, but also a philosophical and moral aspect, concepts like dignity and morality will also be treated in this thesis in order to position euthanasia within those concepts and with regard to the meaning of the European Convention of Human Rights as a living document. To concretize the different theoretical claims, the thesis will focus on a specific country (Luxembourg), which has decriminalized euthanasia and assisted suicide. Altogether, the thesis deals with the questions on how to organize legislation at European level if there are considerable discrepancies concerning a specific subject at both national and international level, how to handle social evolution and emancipation and how to define a democracy in Europe in terms of individual rights.*

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# I. Introduction

## 1. The right to life in its historical context

The European Convention of Human Rights (ECHR) was drafted in the aftermath of World War II by the Council of Europe in order to achieve two main purposes: On the one hand the ECHR was conceived to ensure the protection of certain fundamental rights and freedoms in all member States to the Convention and on the other hand, it was meant to contribute to the establishment of democratic societies across Europe which ought to be built on the basis of the rule of law. Before the establishment of the ECHR the principle of national sovereignty regulated the relationship between States. This concept led to the fact that the protection of Human Rights was seen as a matter of internal State affairs. States were themselves in charge of establishing Human Rights within their jurisdiction, without fearing interference from other states in case of non-respect or failure to comply with Human Rights.

After World War II, it however became clear that this method of protection was not adequate and that states need to rely on the control of higher instances to avoid further atrocities like the ones experienced during the War. The Nazi regime presented one of the biggest threats to Human Rights principles by constantly violating the right to life at its worst. After the horrors of the Holocaust, the European population needed to ensure that such actions would not be repeated in the future. With this purpose in mind, the members of the Council of Europe drafted the ECHR guaranteeing as the first right, the right to life, which is also referred to as article 2 of the ECHR. As the Court pointed out in its jurisprudence, the right to life is of such importance that the “enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory”<sup>1</sup> without it.

Article 2 was primarily conceived with regard to the post-war situation and social context of that time. Hence, article 2 was not only meant to avoid arbitrary killings by State authorities but also to guarantee a higher standard of security within the population. To achieve this aim, article 2 obliges States to respect three different aspects of the right to

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<sup>1</sup> Pretty v UK [ECtHR, 2002]

life: first, a negative obligation prevents States from depriving people unlawfully of their lives; second, States have a positive duty to investigate suspicious deaths; and third, States have to take preventive measures under certain circumstances to avoid loss of lives. Altogether, the right to life was understood as a fundamental right built upon basic principles on how to preserve lives. With the historical context in mind, the scope of application of the right to life in 1950 was relatively clear. It did not raise philosophical questions on where life starts or where life ends, if the right to life implies a negative aspect, namely a right to die, or if article 2 could even be evoked with reference to socio-economic and cultural rights in terms of State contributions to health care. These are modern questions which evolved in line with the medical and technological process, but also with the development of multicultural societies, the evolution of norms and the emancipation of morals and beliefs.

As the social context nowadays is not the same as half a century ago, the ECHR has to be interpreted in a new light, in line with the conditions of the time. This is the task of the European Court of Human Rights (ECtHR), which has to take into consideration the new aspirations of the European population. Thus, the ECtHR has the power to change and to create European Human Rights Law due to the living character of the ECHR as a Human Rights instrument.

## **2. The European Convention of Human Rights as a living instrument**

Since 1950 the meaning and the interpretation of the ECHR have considerably evolved. Consequently, the ECHR created by and for humans, can also be changed by humans in order to adapt to new situations. Take the example of the death penalty and the evolution becomes concrete. Whereas capital punishment was still common practice during the drafting time of the ECHR and therefore authorized by the law in force and by the ECHR, the rising awareness of the European community eventually entailed its prohibition in all member States to the Convention. Amendments are regularly added to the ECHR, such as the sixth protocol of 1983 concerning the abolition of the death penalty which states that “considering [...] the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of death penalty,

[...]”. This statement reflects perfectly the living character of the ECHR, which has to evolve in the same rhythm as the population which it is supposed to protect. Of course, such an inversion of the law does not happen from one day to another, just as the tendencies of a population take time to change direction. Whereas the protocol of 1983 still allows a provision for the death penalty during war times, the thirteenth protocol of 2002 prohibits the practice in all circumstances, as “everyone’s right to life is a basic value in a democratic society and [...] the abolition of the death penalty is essential for the protection of this right and for full recognition of the inherent dignity of all human beings”. In the end it had taken 52 years before the full abolition of the death penalty was achieved. The abolition of the death penalty is obviously just one of numerous examples of how the changing convictions among European societies are able to change the law. Being a fairly new practice among current medical possibilities, euthanasia may undergo a similar process of evolution to the abolition of the death penalty.

Despite the fact that the Court “is not formally bound by precedents”<sup>2</sup> and even though there has been some evident evolution concerning the articles of the ECHR and the case law of the Court, it must also be pointed out that the ECtHR has to maintain a certain coherence of judgements. It cannot, suddenly or arbitrarily, deviate from former judgements. To change its jurisdiction, it is necessary for the Court to have “compelling reasons” in order to guarantee a “legal stability and foreseeability of rulings”<sup>3</sup>. On the other hand, the Court has classified the ECHR as a living instrument:

“The rights enshrined in the Convention have to be interpreted in the light of present day conditions so as to be practical and effective. Sociological, technological and scientific changes, evolving standards in the field of human rights and altering views on morals and ethics have to be considered when applying the Convention.”<sup>4</sup>

The challenge is now to figure out which changes within a given society are considerable enough to also mediate a change in the case law of the Court, and which ones need to be given more time to fully develop. It is up to the Court to decide when the time is ripe to

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<sup>2</sup> <http://echr-online.com/>

<sup>3</sup> <http://echr-online.com/>

<sup>4</sup> <http://echr-online.com/>

be responsive to scientific developments and new moral standards. The Court also has to assess consequences, implications, advantages and disadvantages of the modification of the jurisprudence and evaluate the necessity for such a change. This is currently the case in the discussions about euthanasia. Considering the ever growing upcoming tendency in some European countries to take into consideration the legal allowance of euthanasia, the Court has to deal with questions about the legal structure, scope and limitations of such a law, and finally on its worthiness to be adopted into European law.

### **3. Euthanasia and the Right to life**

With the achievements linked to medical research, new concepts have been born or at least considered in a new, modern angle. Concepts which are aligned with the question on human life are mainly the ideas of abortion and euthanasia. New theories even evoke the right to life in combination with an alleged duty of the State to provide medical health care. Whereas economic obligations of the State are contestable and difficult to enforce, euthanasia does not demand any economic contribution from the State. Euthanasia, just like abortion is merely a civil/political right (whether as yet only alleged as such at European level), which corresponds to the initial meaning of the right to life. Those practices do not claim financial aid entailing potential economic barriers. The decision on whether to legalize or to criminalize those practices, is thus based on moral reasons. The ethical nature of legislation on euthanasia makes it hard for the European judge to introduce a general European rule on it.

On the one hand the ECtHR has the power to interpret legal notions from the Convention autonomously, but on the other hand those terms may not have the same scope of application within the domestic legal framework of the respective member States. This may create confusion for individuals trying to achieve their presumed rights before the Court. Furthermore “the Court does not consider itself bound by the meaning which [the terms employed in the ECHR] have in a domestic jurisdiction”<sup>5</sup>. This again might entail a discrepancy between the protection guaranteed by the Convention and the one afforded

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<sup>5</sup> <http://echr-online.com/>

under domestic law. Basically, the protection offered under the ECHR is wider than the one provided by the national legislation. In the case of euthanasia, this means that even if the national law states clearly that the practice of euthanasia is forbidden, applicants will still have the possibility to win their case before the European Court of Human Rights. In practice, however, the ECtHR leaves a wide margin of appreciation to the States because of the moral character of euthanasia. States are supposed to be better placed in terms of deciding how to reflect the values of their society. For this reason, applicants claiming a right to euthanasia will have to face problems in the achievement of their goals.

Euthanasia in relation to the right to life is mainly based on the question if there is an implied right to die within the meaning of article 2. As it has so far been impossible to claim such a right before the ECtHR, given that a right to die is not intended by national legislation, euthanasia is more frequently required with regard to article 8, which is the right to private life. Chances on winning a case on euthanasia are higher when euthanasia is claimed as falling within the scope of article 8 than when referring to a negative aspect of article 2. At European level, claims on euthanasia are regulated with regard to the national margin of appreciation on the one hand, but also by taking into account recommendation 1418 of 1999 on the "Protection of the human rights and dignity of the terminally ill and the dying" on the other hand. Recommendation 1418 allots the possibility of a limited form of euthanasia if its purpose is to preserve the inherent dignity of the patient. Nevertheless, recommendation 1418 contains no reference to actively assisted suicide. It only comments on the use of intense medication, which can in some cases lead to an obstacle to human dignity. Already in its recommendation 779 of 1976, the Assembly pointed out that "the prolongation of life should not in itself constitute the exclusive aim of medical practice, which must be concerned equally with the relief of suffering". Strict conditions, though, have to be respected to make sure that the cessation of life-extending medical treatment is in the self-determined interest of the patient. The European legal framework on euthanasia and especially on assisted suicide is not clearly defined, due to a lack of consensus between contracting States.



## **II. The importance of the margin of appreciation**

### **1. Human Rights as norms**

The idea of Human Rights, just like the idea of Law in general, aims at reflecting a general human view on what is right and what is wrong. The law should guarantee and facilitate access to what is right, and diminish threats of what is wrong. A threat, however, can only be considered as such if an individual perceives certain actions as a threat, for example, to human life, dignity, beliefs, personal integrity, morals etc... The aim of the law is to protect people from what they consider to be threatening. The best way to achieve this aim is to identify in the first place what those threats are. Sometimes this can be an easy task, namely if there is a commonly recognized threat. Arbitrary killings, for instance, are generally recognized as posing a threat to human life. Hence, they must be prohibited by law. In some other cases however, threats cannot be clearly identified as such, because of a wide range of different opinions and conflicting interests. Euthanasia is one example. Some consider the allowance of euthanasia from the angle of a life-taking practice and therefore as a threat to their religious belief or individual conviction. Others qualify the prohibition of euthanasia as inhuman and degrading and accordingly as being a threat to their inherent human dignity. As the conceptions of the nature of dignity and of the meaning of human life can differ vastly from person to person, euthanasia can be seen as a life-threatening practice but also as a practice which is apt at preserving human dignity by leaving the decision on one's own life to the individuals themselves. The ECtHR intends to solve the problem by introducing the margin of appreciation system, which "refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights"<sup>6</sup>.

The discourse on euthanasia is an example reflecting the problematic of Human Rights in general: Human Rights, compared to ordinary criminal Law, have a considerable moral background. These rights exist in both morality and law. As soon as morality is involved, it becomes difficult to establish some common ground. If there is a wide range of different

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<sup>6</sup> Concil of Europe: [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)

and conflicting views and opinions concerning the legal allowance or prohibition of a practice, it is up to the legislator to draw a line between the conflicting interests. The legislator must find the right balance to cope with the diversity within the society under his jurisdiction. By doing so, he creates norms that must be respected within that respective society. Human rights should therefore be considered as norms, lying in between the social “right” and “wrong”. They cannot reflect an absolute truth. This raises the question on their universality, which is so often claimed in relation with Human Rights. Universality is a theoretical concept, which reflects the ideology of Human Rights. Reality, however, is different. The margin of appreciation reveals that norms can indeed be established at international level, but the compliance with the norms can be different in the respective States.

If a decision has to be made on what is morally right or wrong, there will always be different opinions by different individuals. Both the European and the national legislator face difficulties in their law-making process. Nevertheless, opinions might be closer to one another in a smaller, that is a national society, than in bigger communities, such as the European community. The European Human Rights Law defines norms which contribute to the establishment of a certain standard of Human Rights. In that sense, the articles of the ECHR define the space between the normative “right” and “wrong” and the contracting States build their national legislation within that space. This space is called the margin of appreciation. The margin of appreciation allows States to decide how and to what extent they want to comply with the articles set forth in the ECHR, as long as they stay within the limits of the norms:

“The ECHR obliges member states to secure certain rights, but it is silent as to how precisely they have to meet this obligation. States have a **margin of appreciation** when ensuring the rights enshrined in the Convention. It is to a certain extent for the states to determine which measures they take to make sure that the convention rights are respected. If different rights guaranteed by the ECHR collide, the member states have a degree of discretion when deciding which of the rights they prioritize.”<sup>7</sup>

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<sup>7</sup> <http://echr-online.com/>

As mentioned in this quote, the margin of appreciation is also relevant when it comes to conflicting rights. Conflicting rights of the ECHR are, for example, article 8 and article 10, which are the right to private life and freedom of expression. The States must decide in the interest of their society if it is useful to ascribe more importance to article 8 or to article 10. Such a decision always depends on the general opinion and morals of each society. The Court emphasizes that there is no common understanding of the term “morals” within Europe. Accordingly, it is primarily the task of the domestic courts to establish the meaning of this notion. As a consequence, domestic court judgements which are based on moral grounds are hard to be appealed against before the ECtHR. Returning to the concept of euthanasia, the following two facts must be considered: First, there is no European consensus, hence a wide margin of appreciation. Second, member States justify their decision by referring to the moral framework of their society.

## **2. Cultural diversity and European consensus**

“We are uniting people, not forming coalitions of States”

- Jean Monnet

This was the aim of the founders of the European Union. The idea was to “moderate destructive nationalism” and “to weaken national animosities by establishing an international legal order that would constrain realist anarchy”.<sup>8</sup> However, diversity of languages and cultural backgrounds is a common reality in European societies and complicates the agreement on a common legal basis. Cultural diversity in Europe mainly includes different kinds of art, science, cuisine, sports, clothing, philosophy and religion. Some of them, like the culture of arts or cuisine have a very low potential for influencing or even hampering legal consensus at international level. Cultural diversity of this kind is considered as a very positive aspect of European societies. Religion, Philosophy or Clothing (linked to religion), however, may pose an obstacle to the establishment of

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<sup>8</sup> Marks, 1999, p.69

European consensus. These terms include moral connotations and value judgements. Since morals and beliefs always entail a variety of opinions, the European law encounters most difficulties in giving just and equal consideration to the different religions and philosophical views in Europe. Euthanasia falls into the scope of such religious or philosophical views. As death is one of the major concepts that religion deals with, all faiths offer a meaning and explanations for death and dying.<sup>9</sup> Most religions disapprove of euthanasia and some of them absolutely forbid it. The Roman Catholic Church, which has been the most influential religion in Europe for at least 1500 years, is one of the most active institutions opposing euthanasia.<sup>10</sup> The reasons why adherents of religion cannot accept euthanasia are based on the belief that life is given by God and only God can take life. Non-interference with the natural process of death is therefore a major religious principle. On the other hand, Europe experiences a considerable alteration through the dispersal of more liberal theories. Hence, the growth of a new generation, to whom religion is becoming less important; individual worldviews and choices are being given greater importance. In fact, cultures in Europe are becoming ever more similar. Through multiculturalism, European citizens have adopted and mixed up cultures, which is slowly resulting in a cult of a common European culture. Human Rights organizations like UNESCO also foster a “rapprochement of cultures”, for example, by organizing a variety of activities contributing to this aim.<sup>11</sup>

Despite the approximation of different cultures, the European legislator has to face the fact that “different societies understand and organize human lives differently”<sup>12</sup>. How can the international legislation system adapt its law to this reality? The aim of the Court is to reach European consensus, which means that the Court accepts the interpretation of the Convention by the member States, if the interpretation happens to be the same in all the member states:

“The Court interprets the Convention as a living document, often applying a teleological reading to the text based on observed consensus rather than the intent of the drafters.”

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<sup>9</sup> BBC: <http://www.bbc.co.uk/ethics/euthanasia/religion/religion.shtml>

<sup>10</sup> BBC: <http://www.bbc.co.uk/ethics/euthanasia/religion/religion.shtml>

<sup>11</sup> UNESCO: <http://www.unesco.org/fr/rapprochement-des-cultures>

<sup>12</sup> Parekh 2000, p.16

However, European consensus can only be achieved, if the understanding of the ECHR is the same in each of the member States. As already mentioned, articles involving morality rarely end up being interpreted in the same way by all the countries. As long as this is the case, the margin of appreciation seems to be the best solution. The more disagreements, the larger the margin of appreciation. This entails, for example, common European principles of Human Rights, but the protection is not exactly the same in all the member States. In the end, there remain different degrees of protection depending on the value judgements of the different societies. In the United Kingdom for example, article 9 on freedom of religion is interpreted in such a way that female students are allowed to wear the Islamic veil in school, whereas in France the hijab is completely banned from publicly funded primary schools and high schools. This is an example of how differently European countries interpret one and the same article. The ECtHR accepts to a certain extent both interpretations. To explain why the Court has to leave the decisions on issues like religious clothing to the States, Jacobs and White point out that:

“Given the diverse cultural and legal traditions embraced by each Member State, it was difficult to identify uniform European standards of human rights”<sup>13</sup>

In this sense, they refer to the ECHR as “the lowest common denominator”<sup>14</sup>. The entire international legal framework is based on the consent of the contracting States. Same as for the meaning of “morals”, the ECHR also stipulates a margin of appreciation for the States to interpret certain terms enshrined in the Convention, such as “for the protection of morals”, “necessary in a democratic society” or “in the interest of national security”.<sup>15</sup> Laws which are built upon those terms mostly fall into the limits of the margin of appreciation. So, if France prohibits the hijab in public schools in the interest of national security, the Court will have to accept the national law of that country. Furthermore, it is stated that

“the margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States and enables the Court to

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<sup>13</sup> Jacobs & White, 2007

<sup>14</sup> Jacobs & White, 2007

<sup>15</sup> For example in article 10.2 of the ECHR

balance the sovereignty of Member States with their obligations under the Convention.”<sup>16</sup>

Even though the margin of appreciation leads to different standards in different States, it seems to be an appropriate response to European cultural diversity. It fulfils the demands of different societies with different cultures. However, besides this positive aspect, addressing the lack of European consensus, the margin of appreciation might hamper equal access to rights and liberties by the European community as a whole. The margin of appreciation might be considered as a means of exclusion, as soon as citizens of a certain State start comparing their rights to those rights enjoyed by citizens of another State. Even if States make their laws with regard to the general framework of their society, there are always citizens who are not sharing the common view of the majority. If the general opinion of a society entails, for instance, a legal prohibition of euthanasia, there might be people who disagree with the State’s decision. Cultural diversity does not only exist between different States, but also within the States themselves and this entails cases before the ECtHR. The decision of allowing or prohibiting euthanasia is usually based on the opinion of the majority, for example, by using the method of referendums. Those belonging to the minority often use the term “Human Rights” “as encouragement to demand the same status and even the same standard of living as their supposed global betters”<sup>17</sup>. As “Human Rights are by their nature inclusive of all”, they “allow for the challenging of social orders based on exclusion”<sup>18</sup>. Applicants bringing cases on euthanasia before the European Court of Human Rights, often refer to arguments raised by States which allow euthanasia. The problem is that only States benefit from the margin of appreciation, because they have to take decisions with regard to the common good of an entire society. Individuals, however, do not increase the chance to win their case by referring to the legislation of another State.

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<sup>16</sup> Council Of Europe: [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)

<sup>17</sup> Koen de Feyter, 2011, p.17

<sup>18</sup> Koen de Feyter, 2011, p.17

In conclusion, not everyone benefits from the same rights. At European level, rights are relative and depend on the discretion of different States. This is one of the problems resulting from cultural diversity, lack of consensus and the margin of appreciation.

### **3. The margin of appreciation with regard to euthanasia**

Cases before the ECtHR which deal with euthanasia mostly involve article 2 and/or article 8 of the Convention. Applicants claim a violation of their right to life or their right to private life. In 2002, during the case of Diane Pretty, the Court refused to recognize a right to die, as an implied right in article 2. The Court held that article 2 cannot be interpreted in such a way as to protect the “right to self-determination in relation to issues of life and death”<sup>19</sup>. This judgement of the Court left no doubt that contracting States do not have an obligation under the ECHR to allow for assisted suicide or euthanasia, no matter how compelling the circumstances are. The margin of appreciation, being “a core principle controlling the ECHR”<sup>20</sup> is applied in cases of euthanasia. Lack of European consensus suggests that the matter is better left to the individual States, as there seems to be a “difficulty in identifying uniform European conceptions of the extent of rights and restrictions”<sup>21</sup>. Multiple factors can lead to an enlargement of the margin of appreciation. In cases of euthanasia, such factors are, for example, domestic laws adapted to the social framework or the general view of a society on morals and values.

Euthanasia has been qualified as being a “highly sensitive issue”<sup>22</sup> and therefore the margin of appreciation is a large one. The size of the margin of appreciation is of major importance, as it allows in many cases to measure the level of protection required by member States. The determination of its size “depends on the totality of the circumstances”<sup>23</sup>. Assisted suicide and euthanasia include complex circumstances. There is, for instance, the interest of the State who is representing the interests of a society as a whole, the cooperation and practice of other member States, the national law in place, the

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<sup>19</sup> Pretty v UK cited by : Emily Wada, 2005, p. 275

<sup>20</sup> Emily Wada, 2005, p. 275

<sup>21</sup> Iain Cameron & Maja Kirilova, cited by: Emily Wada, 2005, p. 275

<sup>22</sup> Emily Wada, 2005, p. 276

<sup>23</sup> Emily Wada, 2005, p. 279

different possibilities of interpreting the ECHR and there is as well the interest of the applicant whose suffering and compelling needs must be assessed and evaluated by the Court. In other words, the size of the margin of appreciation “depends on the fundamental nature of the asserted right in comparison to the objectivity and importance of the State practice in question, and the degree of convergence among Member States.”<sup>24</sup>

Another important factor influencing the margin of appreciation in regard to euthanasia is the Hippocratic Oath, which is one of the oldest ethical codes and binding documents determining the practice of doctors and physicians. Since the 4<sup>th</sup> century before Christ, healthcare professionals have referred to the Hippocratic Oath when promising to practice medicine honestly and in good faith. Amongst others, the honest practice of medicine is understood in the classical Oath as follows: “I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan”<sup>25</sup>. This clearly prohibits all forms of euthanasia and assisted suicide. Significantly, the original statement has been modified to the extent that it can be interpreted differently in the light of the modern version of the Hippocratic Oath: “I will apply, for the benefit of the sick, all measures [that] are required, avoiding those twin traps of overtreatment and therapeutic nihilism” and “most especially must I tread with care in matters of life and death. If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty.”<sup>26</sup> Due to a change in medical ethics, there is no longer any absolute or explicit prohibition for doctors to provide patients with a lethal dose of medicine. The reference to an “awesome responsibility” that must be treated with high prudence leaves space for a possible allowance of euthanasia. However, opinions concerning the interpretation of this text differ widely, as revealed, for example, by an online debate forum. According to this forum, 44% of its members think that euthanasia violates the Hippocratic Oath and 56% think that it doesn’t. The reasoning behind both positions is mainly reflected by two examples of opposed interpretations of the document:

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<sup>24</sup> Emily Wada, 2005, p. 279

<sup>25</sup> Classical version of the Hippocratic Oath

<sup>26</sup> Peter Tyson, 2001



“The Hippocratic Oath dictates that physicians should not deliberately do harm to their patients. This means that they should not intentionally worsen the case of a patient who is ill. This worsening of the case would potentially bring upon death quicker than it otherwise would. Therefore, Euthanasia is against the Hippocratic Oath's spirit and word.”<sup>27</sup>

Or:

“The Hippocratic Oath is an oath taken by physicians, essentially promising to use their knowledge to help, and essentially improve the quality of life. Due to this oath, a doctor has the responsibility if asked by a person living in constant pain, who wants to be at peace, to end their life, as living in constant pain seems to be living in a bad quality of life- at least in my opinion.”<sup>28</sup>

Those two comments made by users are meant to reflect the power of the opposed perceptions and interpretations of one and the same text. Both opinions are justified in their own manner and it is no easy task to assess objectively which of the arguments is more valuable than the other. The debate on the meaning of the Hippocratic Oath can be seen as metaphorical for the debate on the meaning of the ECHR and its interpretation of euthanasia. Three aspects must be considered:

- (1) The text of the ECHR itself leaves space for different interpretations.
- (2) The individuals belonging to the European population interpret the text with regard to their own convictions, which leads them to adopt a clear position on the issue. Although these positions end up being diverse and contradicting when compared to each other.
- (3) The European Court of Human Rights is the neutral instance which has to consider the different subjective opinions of its population. It must balance the conflicting reasoning and argumentation of the different positions and try to find an objective and workable solution.

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<sup>27</sup> [www.debate.org](http://www.debate.org)

<sup>28</sup> [www.debate.org](http://www.debate.org)

Hence, the Court must apply the Convention with caution, while dealing with a variety of potential interpretations and social opinions. Applying the Convention with caution means in the case of euthanasia, that the Court should make the most of the margin of appreciation doctrine.

### **III. The case law of the European Court of Human Rights on euthanasia and assisted suicide**

#### **1. Pretty v The United Kingdom**

The most important case dealing with euthanasia and assisted suicide is called “Pretty v The United Kingdom” and was heard in 2002. The Pretty case is often referred to in the case law of the ECtHR if the Court has to judge in matters of life and death and whether or not the ECHR contains a right to die or a right to assisted suicide. The case of Diane Pretty involved 5 Articles of the Convention from which a right to assisted suicide might potentially be derived or which can be applied in cases concerning assisted suicide. Therefore “Pretty v UK” provides a showcase on how the Court handles the assessment of the conflicting interests between individuals who want to escape from suffering and the State which has to apply the Law in place with the aim of safeguarding the lives of other individuals and protecting them from abuse. Comprehensible arguments can be found on both sides and the Pretty case demonstrates how the ECtHR strikes the balance between the competing interests.

##### *a. Facts and circumstances*

Diane Pretty was a forty-three-year-old British citizen who had suffered since 1999 from a degenerative and incurable illness called motor neurone disease (MND). At the time she requested a permission for assisted suicide, she was in the advanced stages of MND, which is an untreatable progressive neurodegenerative disease affecting the voluntary muscles. As a consequence, Mrs Pretty became quadriplegic. In 2001, Mrs Pretty was already paralysed from the neck down, was unable to speak properly and had to be fed through a tube. Most often, the disease results in death caused by respiratory failure. The life expectancy of Mrs Pretty was very low at that time and could be measured in weeks or months. It is important to point out that the disease does not affect the intellect and the mental ability of the patients. As the final stages of MND inevitably lead to intense suffering and an undignified end of life, Mrs Pretty “desired to die at a time and in a state

of her choosing”<sup>29</sup> in order to avoid unnecessary suffering and indignity. However, due to her paralysis she was unable to commit suicide without the assistance of her husband. Although in the UK suicide is not a crime, it is prohibited by British Law for anyone to assist another in accomplishing the act of suicide. Aiders of suicide are criminally liable under s.2.(1) Suicide Act 1991<sup>30</sup>. Therefore Mrs Pretty appealed to the Director of Public Prosecutions (DPP). The solicitor of Mrs Pretty asked the DPP, in a letter which dated from 27 July 2001 written on her behalf to obtain a permission for the husband to help her commit suicide in accordance with her wishes. Mrs Pretty wanted her husband to be safe from criminal proceedings if he assisted her in fulfilling her desire to die in dignity. The United Kingdom rejected the claim and Mrs Pretty applied for judicial revision of the DPP’s decision. After having exhausted the domestic remedies (the Divisional Court and the House of Lords) unsuccessfully, Mrs Pretty launched an application before the European Court of Human Rights on 21 December. She alleged that the decision of the DPP to refuse to grant immunity from prosecution to her husband if he assisted her in committing suicide violated her rights guaranteed under the articles 2, 3, 8, 9 and 14 of the ECHR.

*b. Article 2*

Mrs Pretty: The applicant claimed that article 2 must be interpreted in a way that it protects the *right* to life, but not life itself. The purpose of article 2 is to protect individuals from third parties, like the State or State authorities, but is not meant to undermine the right to self-determination of individuals “in relations to issues of life and death”<sup>31</sup>. Therefore, article 2 in combination with Protocol 6 Article 1 and Protocol 6 Article 2 guarantees the right of individuals to choose whether or not to live. Consequently, a person does not only have the right to refuse life-saving or life-prolonging medical treatment, but may also decide to end his/her life actively to avoid excessive sufferings while facing a natural death. This means that article 2 acknowledges the right to end one’s

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<sup>29</sup> Rosalind English: [http://www.1cor.com/1315/?form\\_1155.replyids=299](http://www.1cor.com/1315/?form_1155.replyids=299)

<sup>30</sup> Rosalind English: [http://www.1cor.com/1315/?form\\_1155.replyids=299](http://www.1cor.com/1315/?form_1155.replyids=299)

<sup>31</sup> Pretty v UK [ECtHR, 2002]

life lawfully. To justify her claim, Mrs Pretty argued that the right to die flows directly from the right to life:

“While most people want to live, some want to die, and the Article protects both rights. The right to die is not the antithesis of the right to life but the corollary of it, and the State has a positive obligation to protect both.”<sup>32</sup>

Following the reasoning of Mrs Pretty, the State has an affirmative duty to protect the right to self-determination in relation to issues of life and death and thus, has to accept the applicant’s wish for a premature termination of her life.

The State: The State held on to the opinion that the DPP’s decision of refusing to allow assisted suicide in the case of Mrs Pretty had not been illegitimate. The Secretary of the State argued that “the starting point must be the language of the Article”<sup>33</sup> and that Article 2 could not possibly contain an implied right to the converse which is the right to die.<sup>34</sup> An article with the purpose of protecting life cannot be used to allow for the taking of life by third persons, which would be the perfect opposite of its aim.

Additionally, the State noted that authorities of domestic decisions are more limited than international authorities. However, Mrs Pretty based her argumentation and her case on the ECHR without taking into consideration two important principles of the English domestic law: First it is a common principle that “someone else cannot take a person’s life” and second, there is a general opinion within the English society that “whilst proper medical treatment might shorten a patient’s life, fatality could not be the primary aim of the treatment”<sup>35</sup>. Furthermore, the burden of proof was conferred to the applicant, as she was asking for a derogation of the positive law. Yet, her argumentation had been insufficient to prove that the British government acted inconsistently with the Convention.

Assessment of the Court: The Court held first, that Article 2 does not only contain a negative duty for the member States to refrain from arbitrary killings, but also obliges

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<sup>32</sup> Pretty v UK [ECtHR, 2002]

<sup>33</sup> Pretty v UK [ECtHR, 2002]

<sup>34</sup> Rosalind English: [http://www.1cor.com/1315/?form\\_1155.replyids=299](http://www.1cor.com/1315/?form_1155.replyids=299)

<sup>35</sup> Rosalind English: [http://www.1cor.com/1315/?form\\_1155.replyids=299](http://www.1cor.com/1315/?form_1155.replyids=299)

them to take positive action to safeguard the lives of the individuals within their jurisdiction. Taking appropriate steps to protect lives includes amongst others a duty of public authorities “to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”<sup>36</sup>. The Court does not interpret the right to life as involving a negative aspect and accordingly, there is no such thing as a right to die. Article 2 has no reference to the quality of life. Thus, a right to self-determination with regard to issues of life and death cannot derive from the right to life. Assisted suicide is not a right guaranteed under Article 2 of the ECHR. The Court justifies its findings by establishing a reference to Recommendation 1418 from 1999. In the end, the Court decided that article 2 had not been violated by the UK.

*c. Article 3*

Mrs Pretty: Mrs Pretty alleged that the DPP's refusal of her claim violated Article 3<sup>37</sup> of the ECHR, as his decision would inevitably subject her to inhuman and degrading treatment. Besides the negative obligation of the State not to engage in any action of inhuman and degrading treatment, there is also a positive obligation for the State to take measures to prevent and to avoid the subjection of individuals to such treatment. Suffering which is due to the progression of an incurable disease may be considered as inhuman and degrading treatment if there is the alternative option for the State to prevent such suffering by allowing assisted suicide. By criminalizing such actions, the State fails to prevent suffering and is therefore in breach with article 3. Since the State is free to choose whether or not to refrain from prohibiting assisted suicide, the DPP supposedly has the possibility to accept Mrs Pretty's claim without interfering with the State's obligations under the ECHR. If, however, the DPP is not entitled to grant immunity against prosecution in such a case, the only explanation would be that section 2 of the 1961 Act is incompatible with the Convention.

The State: Nothing in Article 3 affects the individual's right to life or the right to choose whether to live or not. Even though a state might inflict inhuman or degrading treatment to serve the ends of Article 2, both articles should be interpreted as being complementary

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<sup>36</sup> Pretty v UK [ECtHR, 2002]

<sup>37</sup> Prohibition of torture and inhuman or degrading treatment

to each other. The negative prohibition in Article 3, which states that the proscribed forms of treatment must not be inflicted on anyone is absolute and was not breached by the State. The positive obligations, however, which demand positive action from the State in order to prevent such treatment, are not absolute. Due to the margin of appreciation method, the decision on the positive duty and the level of protection against the proscribed treatment is left to the contracting States. Even though such a decision cannot be “immune from review”, it must be “accorded respect”<sup>38</sup>. Mrs Pretty who is arguing that the State has an obligation not to interfere with her wish to terminate her life, cannot rely on Article 3 because “there is nothing, either in the wording of the Convention or the Strasbourg jurisprudence, to suggest that any such duty exists by virtue of Article 3”<sup>39</sup>. Relying on the margin of appreciation, the Secretary of the State concluded that: “The United Kingdom has reviewed these issues in depth and resolved to maintain the present position”<sup>40</sup>.

Assessment of the Court: Considering the case law on Article 3 reveals that this article has most commonly been applied in cases where an individual runs the risk of being subjected to an *intentional* infliction of the proscribed forms of treatment by public authorities. Suffering which is due to illness only falls into the scope of application of Article 3 if the disease can demonstrably be derived from conditions of detention, expulsion or other measures which can be attributed to the State. In cases of a naturally occurring illness, however, the State cannot be held responsible. In the case of Mrs Pretty, it is evident that the State has not inflicted itself an ill-treatment on the applicant. As the obligation of the State under Article 3 is mainly a negative one, Mrs Pretty cannot blame the State for being responsible for her suffering. In fact, the actual claim of Mrs Pretty was based on the assumption that the State engaged indirectly in inhuman and degrading treatment by upholding the DPP’s refusal, as the State would fail to protect her from a certainly occurring suffering. The Court found that such a claim goes beyond the original meaning of the proscribed treatments and extended the concept of ill-treatment. Even though the Court must consider the ECHR as a living instrument, “any interpretation must

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<sup>38</sup> Pretty v UK [ECtHR, 2002]

<sup>39</sup> Pretty v UK [ECtHR, 2002]

<sup>40</sup> Pretty v UK [ECtHR, 2002]

also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection”<sup>41</sup>. The Court also upheld the reasoning of the State according to which Article 3 must be interpreted in line with Article 2. As Article 2 prohibits any use of lethal force or conduct leading to the loss of a life and does not oblige the State in any way to facilitate someone’s death, the interpretation of Article 3 cannot conflict with the aim of Article 2. The Court concluded that there is no positive obligation for the State under Article 3 to provide a lawful opportunity for assisted suicide. Thus, there was no violation of Article 3.

*d. Article 8*

Mrs Pretty: Mrs Pretty claimed in particular “that Article 8 of the Convention embraced a right to self-determination, which included a right to choose when and how to die”<sup>42</sup>. Furthermore, the case law of the ECtHR reveals that article 8 protects the freedom from interference with physical and psychological integrity<sup>43</sup>, which can be interpreted in a way that everyone has the right to decide for him- or herself whether to live or not to live. Section 2(1) on “Criminal liability for complicity in another’s suicide” of the 1961 Act would therefore interfere with the right to self-determination. Mrs Pretty argues that it is the task of the United Kingdom “to show that the interference meets the Convention tests of legality, necessity, responsiveness to pressing social need and proportionality”<sup>44</sup>. Interfering with an intimate part of an individual’s private life, such as depriving Mrs Pretty of the right to make a private choice concerning her own life, requires particularly serious reasons to be justified. The Court must assess whether the decision of the DPP and the interference with Mrs Pretty’s right to self-determination is proportionate to the aim pursued when prohibiting assisted suicide. Mrs Pretty’s Counsel pointed out that certain features of this case should be given special consideration:

“Her [Ms Pretty’s] mental competence, the frightening prospect which faces her, her willingness to commit suicide if she were able, the imminence of death, the absence of

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<sup>41</sup> Pretty v UK [ECtHR, 2002]

<sup>42</sup> Rosalind English: [http://www.1cor.com/1315/?form\\_1155.replyids=299](http://www.1cor.com/1315/?form_1155.replyids=299)

<sup>43</sup> Moreham, 2008, p.44-45

<sup>44</sup> Pretty v UK [ECtHR, 2002]



harm to anyone else, the absence of far-reaching implications if her application were granted.”<sup>45</sup>

It was suggested by the Counsel that the prohibition of assisted suicide without taking into account the particularities of the different cases, was highly disproportionate and unjustified.

The State: The Secretary of the State claimed that Article 8 was not at all engaged in Mrs Pretty’s case: “the right to private life under Article 8 relates to the manner in which a person conducts his life, not the manner in which he departs from it”<sup>46</sup>. Any attempt to interpret Article 8 in light of an allegedly included right to die entails the same objections as those already mentioned with regard to Article 2. A right to die would destroy the very intention of the Article. Alternatively, even if Article 8§1 had been breached, the interference was sufficiently justified by the legitimate aim pursued, which is to protect the lives of vulnerable people and prevent any kind of abuse.

Assessment of the Court: To decide whether the UK has violated Mrs Pretty’s right under Article 8, the Court examines the right to private life by dividing it into two parts. Whereas the first part defines the rights protected under Article 8, the second part refers to possible circumstances in which State interference may be legitimate. First, the Court highlighted the fact that “the concept of “private life” is a broad term not susceptible to exhaustive definition”<sup>47</sup>. Article 8 protects the physical and psychological integrity of individuals. In legal terms, the notion of “integrity” covers certain specific elements, such as sexual orientation, gender identification or names. Other aspects belonging to the sphere of protection of Article 8 are the right to personal development or the right to establish relationships with other people. Until 2002, there had been no cases invoking Article 8 with regard to a right to self-determination. Nevertheless, “the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees”<sup>48</sup>. Opposing the argumentation of the Government, the Court found that Article 8 provided “the ability to conduct one’s life in a manner of one’s

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<sup>45</sup> Pretty v UK [ECtHR, 2002]

<sup>46</sup> Pretty v UK [ECtHR, 2002]

<sup>47</sup> Pretty v UK [ECtHR, 2002]

<sup>48</sup> Pretty v UK [ECtHR, 2002]

own choosing”<sup>49</sup> and thus, the refusal to allow the husband to assist his wife’s suicide could eventually be seen as interfering with the applicant’s rights under Article 8, because this article “may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned”<sup>50</sup>. Whereas Article 2 is not concerned with the quality of life, Article 8 does have to deal with the quality aspect of life. By preventing Mrs Pretty from exercising her personal choice to end her life voluntarily in order to avoid the naturally undignified end to her life, the State does indeed interfere with her right to respect for private life in the light of Article 8§1. Such breaches require justification by the State. Accepted circumstances to interfere with Article 8§1 are set out in 8§2: The interference must be “in accordance with the law”, has to “pursue a legitimate aim” and must be “necessary in a democratic society” and in proportion with the aim pursued. The prohibition of assisted suicide was indeed accorded by the British Law and the objective was to safeguard life and to protect the rights of others, which is accepted as a legitimate aim. This leaves the Court with the assessment of the necessity for the interference. Here, the Court applied the margin of appreciation system, which leaves the evaluation of the necessity within their respective society to the State. In general, the margin of appreciation is rather narrow when it comes, for example, to interferences in the intimate area of a person’s sexual life. However, the circumstances of the Pretty case cannot be compared to such issues and do not follow the same reasoning. Therefore the margin of appreciation must remain large. Neither does the Court consider that the interference was disproportionate:

“Strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law. In any event, the seriousness of the act for which immunity was claimed was such that the decision of the DPP to refuse the undertaking sought in the present case cannot be said to be arbitrary or unreasonable.”<sup>51</sup>

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<sup>49</sup> Pretty v UK [ECtHR, 2002]

<sup>50</sup> Pretty v UK [ECtHR, 2002]

<sup>51</sup> Pretty v UK [ECtHR, 2002]

Finally, the Court concluded that the interference in this case may be justified as being “necessary in a democratic society” for the protection of the rights of others. Accordingly, no violation of Article 8 could be found.

*e. Article 9*

Mrs Pretty: According to Ms Pretty, article 9 on freedom of thought, conscience and religion had been violated in the sense that her right to believe in the virtue of assisted suicide and manifest this belief had been infringed. She did not deny that the restrictions on this right might be justified, but she accused the blanket refusal by the UK to allow assisted suicide to be disproportionate regarding her situation. Special consideration should be given to the fact that no harm to anyone else can be identified. Therefore patients who are in a similar position to Mrs Pretty and who are in full command of their mental faculties as well should benefit from a higher protection concerning the restrictions of article 9§2.

The State: Mrs Pretty’s rights under Article 9 have not been infringed, as she was free to believe in the virtue of assisted suicide and she is free as well to express this belief. Nevertheless, a belief alone cannot lead to immunity from legal consequences for her husband, if he assisted her in committing suicide. A belief which is connected with positive actions cannot require exceptions from the law, if those actions go against the criminal law. And again, if a breach of Article 9 could nevertheless be established, the same justification used in relation to Article 8 would still defeat it.

Assessment of the Court: The Court considered that Article 9§1 does not protect every form of belief. Opinions, thoughts or convictions must be in agreement with what the ECHR reveals to be a belief protected under Article 9. As it is described in 9§1, a claim referring to freedom of religion has to involve a form of manifestation through worship, teaching, practice or observance. This may not be the case for Mrs Pretty’s claim. According to the Commission, even the term “practice” does not “cover each act which

is motivated or influenced by a religion or belief”<sup>52</sup>. Considering these different factors, the Court held that there was no violation of Article 9.

*f. Article 14*

Mrs Pretty: Finally, Mrs Pretty argued that her right not to be discriminated against under article 14 had been breached. She referred to a case called *Thlimmenos v Greece*, where a Jehovah’s Witness complained about being refused as a chartered accountant because of his past in prison due to his refusal of the military service. The Court held during the Thlimmenos case that one must differentiate between prisoners who committed a crime, which is morally wrong and prisoners who were sentenced because of something that is not necessarily morally wrong. Mrs Pretty based her argument on this judgement of the Court: Following the logic of *Thlimmenos v Greece*, she argued that a difference has to be made between patients who desire to commit suicide and who have the physical ability to do so and patients like herself who are physically unable to accomplish the act themselves. Thus, Mrs Pretty claimed, she was effectively discriminated against as a disabled person by the DPP’s refusal.

The State: Article 14 is not relevant in the Pretty case, as this article can only be exercised in relation to other rights enshrined in the Convention. Furthermore, criminal law and the suicide Act of 1961 cannot be said to be discriminatory since they apply to everyone in the same way.

Assessment of the Court: Because Mrs Pretty’s rights under Article 8 had actually been affected, her complaints about Article 14 must be considered, too. The Court has to deal with the question whether Mrs Pretty has been discriminated against by British Law, which permits physically capable persons to commit suicide lawfully, but prevents Mrs Pretty as a disabled person from receiving assistance from her husband in committing suicide. Article 14 prohibits differences in treatment between individuals in similar positions. If such a difference in treatment occurs, the State must provide an “objective and reasonable justification”<sup>53</sup>. To fulfil the demands of such a justification, it has to

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<sup>52</sup> Pretty v UK [ECtHR, 2002]

<sup>53</sup> Pretty v UK [ECtHR, 2002]

include a legitimate aim and a demonstration that the means employed and the aim pursued are not disproportionate. Moreover, States “enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment”<sup>54</sup>.

Considering the *Thlimmenos* case, States can also be held accountable for discrimination if they fail to provide an objective and reasonable justification for treating people differently even if their situations are not similar. This principle is called positive discrimination. However, this principle is not relevant in *Mrs Pretty*’s case, as the Court finds that there is reasonable and objective justification for not distinguishing in law between able-bodied and disabled persons, as it is hard to draw a line between the two categories and there may arise a high risk of abuse. For those reasons, no violation of Article 14 could be found.

## **2. Haas v Switzerland**

The case of *Haas v Switzerland* dates from 2011 and dealt with the question, if a State is obliged under the ECHR to provide a lethal substance called sodium pentobarbital if patients desire to end their lives painlessly and without risk of failure. Together with Belgium, Luxembourg and the Netherlands, Switzerland is one of the four European countries which have legalized euthanasia in a restrictive way and under strict conditions. To control the situation and to limit abuse, the Swiss legislation on euthanasia provides a criminal sanction for those who engage in the suicide of another person if their act is influenced by selfish motives. It is also prohibited to incite someone to commit suicide. Physicians, however, are not supposed to prescribe such dangerous substances for selfish reasons, therefore this provision does not apply to them. Nevertheless, they can be prosecuted if they prescribe a lethal substance without a reasonable justification.

Mr Haas was a 57-year-old man who suffered from bipolar disorder. He had been living with his mental illness for nearly 20 years. Since he considered his life as being

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<sup>54</sup> *Pretty v UK* [ECtHR, 2002]

undignified due to the bipolar disorder, he wished to commit suicide by consuming a lethal dose of sodium pentobarbital, which is only available on medical prescription. To obtain the drug, he contacted different psychiatrists, yet all of them refused to prescribe a substance designated to kill him. Mr Haas appealed to the domestic authorities in order to obtain permission to get sodium pentobarbital without the otherwise required prescription. All his attempts remained unsuccessful. The State authorities repeated that sodium pentobarbital could not be obtained without medical prescription. Moreover, the State did not have a positive obligation under Article 8 “to create the conditions for committing suicide without the risk of failure and without pain”<sup>55</sup>. Therefore, Mr Haas drafted a letter asking for a prescription, which he sent to 170 doctors. None of them accepted to grant him the prescription, whether for ethical reasons, or because they were not competent to deliver such a prescription, or because they thought that his condition was treatable. As a means of last resort, Mr Haas applied to the ECtHR and complained that his right to respect for private life had been violated by the State by refusing to provide him with a lethal drug. He argued that he was deprived of “his right to decide the moment and the manner of his death” and that “in exceptional circumstance, such as his, access to the necessary substances should be provided by the State”<sup>56</sup>. Contrary to the opinion of the State, Mr Haas did not assume that there were other options for ending his life. For him, death through a lethal dose of sodium pentobarbital “was the only dignified, certain, rapid and pain-free method of committing suicide”<sup>57</sup>. Additionally, Mr Haas referred to the fact that 170 doctors had refused to help him, which he considered to be ample proof that it is impossible to satisfy the conditions established by the Federal Court.

By contrast with its findings in *Pretty v. UK*, the Court held in this case that the choice to avoid what the applicant considers as an undignified and painful end of his life, did not fall within the scope of Article 8. Unlike Mrs Pretty, Mr Haas did not suffer from any physical obstacles preventing him from exercising that right. Neither could he rely on Mrs Pretty’s argument of being at the terminal stage of an incurable illness which would prevent him from going through with his plan. He was rather facing a technical obstacle:

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<sup>55</sup> Haas v Switzerland [ECtHR, 2011]

<sup>56</sup> Stijn Smet 2011

<sup>57</sup> Haas v Switzerland [ECtHR, 2011]

he could not find a physician who was willing to prescribe the substance he needed to commit suicide. Hence, the Court had to deal with the question whether “the State must ensure that the applicant can obtain a lethal substance [...] without a medical prescription, by way of derogation from the legislation, in order to commit suicide painlessly and without risk of failure”<sup>58</sup>. The answer was a negative one. The Court emphasized the fact that member States to the Convention enjoy a considerable margin of appreciation and that Switzerland pursued a “legitimate aim of protecting everybody from hasty decisions and preventing abuse, and, in particular, ensuring that a patient lacking discernment does not obtain a lethal dose of sodium pentobarbital”<sup>59</sup>. Where countries adopt a liberal approach to euthanasia, strict regulations are necessary to decrease any risk of abuse. Thus, the limited access of sodium pentobarbital must be maintained in order to protect public health and safety and to prevent crime. Considering the different elements, the Court decided that Mr Haas’ rights under Article 8 had not been violated.

### **3. Koch v Germany**

Following the case of Mr Haas, Koch v Germany from December 2012 depicts another example of how the ECtHR ruled on an application concerning assisted suicide. In this case, the applicant was the widower of a woman who wished to be assisted in her suicide. After an accident in 2002, the wife had been suffering from total sensorimotor quadriplegia. Since then, she had been in need of constant care and had been almost completely paralysed. A medical assessment revealed that she had a life expectancy of at least fifteen more years. Just as in the two preceding cases, Mrs Koch considered her condition as undignified and wished to commit suicide with the assistance of her husband. In 2004, the couple contacted the Federal Institute for Drugs and Medical Devices and requested a permission to obtain 15 grams of sodium pentobarbital to commit suicide at her home. Their request was refused because the aim of the substance, according to the Swiss Narcotic Act, was to support life and not to end it. Since they could not expect approval for assisted suicide in Germany, the couple went to Zurich in Switzerland, where

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<sup>58</sup> Haas v Switzerland [ECtHR, 2011]

<sup>59</sup> Haas v Switzerland [ECtHR, 2011]

assisted suicide had been decriminalized. With the assistance of an organisation called “Dignitas”, Mrs Koch committed suicide in Switzerland.

After the death of his wife, Mr Koch filed an application to the Cologne Administrative Court, asking the court “to rule that the refusal to procure the requested substance to his late wife had been unlawful”<sup>60</sup>. His appeal was declared inadmissible, because the applicant could not claim to be a victim himself. For this reason, the Court did not examine the merits. After another unsuccessful appeal before the Constitutional Court, Mr Koch filed an application before the European Court of Human Rights, alleging that his rights under Article 8 had been infringed. He claimed that his right to private and family life had been violated in two ways: “First by the refusal of the German Courts to examine the merits of the action he had submitted, second by the failure to provide his wife with the requested substance to commit suicide.”<sup>61</sup> Since Article 34 of the ECHR states that only applications of individuals who claim a violation of their own rights can be declared admissible, the Court must scrutinize whether Mr Koch satisfies this condition to launch an application before the ECtHR. After an examination, the Court considered that Mr Koch fulfilled the criteria according to which a third person can continue with a procedure pending before the Court, in cases where the actual victim passes away during the procedure. The Court recognized the close familial relation of the applicant with his wife, as well as the existence of his own personal and legal interests. Moreover, the Court took into account the fact that Mr Koch had previously expressed interest in the procedure. For those reasons, the case of Mr Koch was declared admissible.

In its judgement, the Court established that Germany interfered with Article 8 by having refused to examine the merits of the case. Thus, the main judgement relied on the question whether or not the interference had been justified. The Court found that no legitimate aim could be identified. Accordingly, there had been a violation of Article 8. As for the second complaint, namely that the refusal to grant his wife permission to obtain the lethal substance requested, the Court decided that there was no obligation to grant a right to

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<sup>60</sup> <http://echr-online.blogspot.com/2012/10/koch-v-germany.html>

<sup>61</sup> <http://echr-online.blogspot.com/2012/10/koch-v-germany.html>



assisted suicide and thus, the State had not been in breach with Article 8 by refusing to provide a lethal drug.

#### **4. Alda Gross v Switzerland**

The most recent case on assisted suicide dates from July 2013. Alda Gross, a Swiss national born in 1931 had long expressed her desire to terminate her life, because she wanted to save herself from suffering the detriments of her advanced age. In 2005, she attempted to commit suicide, yet failed and was hospitalized. Despite psychiatric treatment, she maintained her wish to end her life. She tried to obtain a lethal dose of sodium pentobarbital, but all her attempts, including applications before the domestic Courts, remained unsuccessful, mainly because Mrs Gross did not suffer from a fatal disease and because her desire to die was based on the mere fact of her growing fragility and the decline of her physical and mental capacities, which naturally occur during old age. Mrs Gross chose as a second option to try to obtain a permit to acquire a firearm, which was unsuccessful as well.

After having exhausted the domestic remedies, Mrs Gross alleged a violation of Article 8 before the ECtHR. She complained “that the Swiss authorities, by depriving her of the possibility of obtaining a lethal dose of sodium pentobarbital, had violated her right to decide by what means and at what point her life would end”<sup>62</sup>. According to the case law which had been established in the *Pretty* and *Haas* cases, the Court observed that Mrs Gross’s rights under Article 8 had indeed been affected. The Court stated that the Government could not rely on the “medical ethics guidelines on the care of patients at the end of their life”<sup>63</sup>, since those guidelines had been established by a non-governmental organisation and did not have the status of a legally binding document.

In the present case, as opposed to *Haas v Switzerland*, the Court considers that the actual question is whether the State has failed “to provide sufficient guidelines defining [...] under which circumstances medical practitioners were authorised to issue a medical

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<sup>62</sup> *Gross v Switzerland* [ECtHR, 2013]

<sup>63</sup> *Gross v Switzerland* [ECtHR, 2013]

prescription to a person in the applicant's position"<sup>64</sup>. As the guidelines were considered to be insufficient, the Court decided that the uncertainty resulting from such unclear guidelines concerning a particularly important aspect of Mrs Gross's life, must have strongly affected the applicant:

"The Court concludes that the applicant must have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life which would not have occurred if there had been clear, State-approved guidelines defining the circumstances under which medical practitioners are authorised to issue the requested prescription in cases where an individual has come to a serious decision, in the exercise of his or her free will, to end his or her life, but where death is not imminent as a result of a specific medical condition."<sup>65</sup>

Even though the Court acknowledges that there might be "difficulties in finding the necessary political consensus on such controversial questions", the Court considers on the other hand that this is no reason to "absolve the authorities from fulfilling their task therein"<sup>66</sup>. Furthermore, the Court recalls the principle of subsidiarity, according to which it is primarily the task of the States to establish clear guidelines which should not be leading to confusion. In the light of the different findings, the Court concluded that the failure of the State to establish comprehensive legal guidelines violated Article 8 of the ECHR. However, the Court remained silent about the substantive content of such guidelines.

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<sup>64</sup> Gross v Switzerland [ECtHR, 2013]

<sup>65</sup> Gross v Switzerland [ECtHR, 2013]

<sup>66</sup> Gross v Switzerland [ECtHR, 2013]

## **IV. Deductions from the case law**

### **1. General observations**

The four cited cases suggest the broadness of possible scenarios when the Court has to treat cases on euthanasia and assisted suicide. The concept of assisted suicide has a lot of different aspects. Since all the circumstances must be taken into consideration and since they usually differ from case to case, it is hard to establish general conditions in order to judge whether a State has violated the ECHR or whether a domestic decision was taken within the limits of the national margin of appreciation. The lack of European consensus seems to result, amongst others, from the complexity that is inherent in the idea of assisted suicide. In the four mentioned cases, the conditions had been different and the complaints relied on different Articles and reasoning. First, the situations of the applicants were completely different: Mrs Pretty suffered from a terminal physical disease leaving her incapable of committing suicide without assistance; Mr Haas suffered from a mental disease, which did not render him physically dependent; Mr Koch complained on behalf of his wife and about the procedural system in Switzerland and Mrs Gross did not suffer from any disease at all but requested assisted suicide because of her advanced age. The case law reveals that the Court does not prescribe guidelines on the conditions which entitle patients to request assisted suicide. This task is left to the Member States due to the moral character of such a choice which falls into the scope of the margin of appreciation. What is relevant to the Court is the technical aspect of the cases, for example, how States justify the interference with the right to respect for private life of the applicants, how public authorities organize their policies on assisted suicide, or if the conditions set out by the Government are in accordance with the ECHR.

Second, the case law indicates that the ECHR must be examined as a whole in order not to be contradictory. Thus, the different Articles must always be interpreted in the light of the other rights guaranteed under the other Articles. This creates some sort of interdependency of the Articles. Since the drafters of the ECHR were not confronted with issues on euthanasia, there is no specific Article dealing with the idea of euthanasia. Mrs Pretty for example tried to rely on five different Articles to show that the United Kingdom

did not act in accordance with the ECHR. Since Mrs Pretty was the first applicant whose claim for a right to die had been treated before the ECtHR, there was no possibility to rely on previous case law. Thus, the outcome may have been predictable by examining the case law of the different articles at stake. Previous cases dealing with the interpretation of Article 3, for example, suggested that first, only certain types of treatment are recognized under European Law as instances of ill-treatments, and second, that a State cannot be held accountable for sufferings resulting from naturally occurring illnesses.

Moreover, the approach of the Court concerning cases on euthanasia and assisted suicide is purely technical. For example, the case of Diane Pretty has generated considerable compassion and sympathy among the European population, whereas the case of Alda Gross may have triggered sceptical and controversial opinions on the legitimacy of her request to obtain a lethal substance from the State. Reconsidering *Pretty v UK* at an emotional level, a positive answer to the request for assisted suicide would have been highly probable. Since MND is a particularly cruel disease, leaving the patient paralyzed, the wish to escape such a condition becomes comprehensible. The disease entails acute physical suffering, as the sensitive nerves are not affected. The patient is condemned to endure terrible pain without being able to take any initiative or action against it. The fact of being paralysed involves not only a huge physical strain, but also mental torture. The additional fact of being defenceless against any kind of physical pain increases the anguish at both mental and physical levels. Death through assisted suicide is the only possibility for people like Mrs Pretty to avoid a distressing and undignified end of their lives. These are compelling reasons leading the majority of people to be sympathetic towards the applicant's request for assisted suicide. Although the Court "cannot but be sympathetic to the applicant's apprehension that without the possibility of ending her life she faces the prospect of a distressing death"<sup>67</sup>, it did not observe any violation of the ECHR by the State. This means that the Court cannot take into consideration the emotional aspect of its cases. On the other hand, the Court does have the possibility to change its interpretation of the ECHR if there is a general opinion within the societies of member States. However, such a change of interpretation cannot arise suddenly and due

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<sup>67</sup> *Pretty v UK* [ECtHR, 2002]

to a common compassion in relation to one single case, but can only be developed over time and with regard to the totality of cases concerning a particular aspect. Concerning the general view on euthanasia, the Court points out “that the vast majority of member States seem to attach more weight to the protection of the individual’s life than to his or her right to terminate it”<sup>68</sup>. The case law reflects this general view and cannot opt for exceptions in particularly emotional cases, as this would disrupt the coherency within the case law.

Furthermore, the Pretty case has set certain guidelines which help subsequent applications to be more precise in their submissions. Whereas Mr Pretty alleged violations of 5 Articles, Haas, Koch and Gross only complained about breaches of Article 8. Even though a “right to die” does not exist overtly under any Article of the Convention, an insufficiently justified interference with the applicant’s right to make choices concerning his or her own life or unclear guidelines on how to obtain a lethal substance can constitute an unlawful interference with Article 8:

“The extent to which a State can use compulsory powers or the criminal law to protect people from the consequences of their chosen lifestyle has long been a topic of moral and jurisprudential discussion, the fact that the interference is often viewed as trespassing on the private and personal sphere adding to the vigour of the debate. However, even where the conduct poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant within the meaning of Article 8 § 1 and requiring justification in terms of the second paragraph.”<sup>69</sup>

Consequently, there is potential for applicants to win cases on euthanasia to the extent that they can rely on an interference with their right to private life which is not (clearly) prescribed by law, not sufficiently justified or disproportionate to the aim pursued. Nevertheless, the case law reveals as well that States enjoy a wide margin of appreciation in assessing such matters. Regarding Article 2, the principle of the sanctity of life seems

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<sup>68</sup> Pretty v UK [ECtHR, 2002]

<sup>69</sup> Bruder Müller & Marx & Schüttauf, 2003, p.237

to take precedence over the right to self-determination in matters of life and death. It has so far never been interpreted as including a negative aspect. Unlike Articles guaranteeing a “freedom”, the notion “right” to life does not imply a measure of choice as to its exercise. Hence, following the *Pretty* case, applicants abstained from claiming violations of Article 2 as such an attempt is most likely condemned to fail.

## **2. Is there an evolution of the case law?**

Since 2002, only four cases on euthanasia have been brought before the European Court of Human Rights. To assert a remarkable evolution of the case law, more time has yet to pass. Nevertheless, States and lawyers have become increasingly aware of the positive obligations under the ECHR and their enforcement by the ECtHR<sup>70</sup>. Since there are different possibilities on how to interpret the obligations under the ECHR, applicants and State authorities adopt contradicting views on how the State must ensure the enjoyment of the rights guaranteed under the Convention. Applicants who claim a “right to a dignified death” or a “right to assisted suicide” suggest that the State has a positive duty under Article 8 to support personal choices on one’s own death. In other terms, States would have to allow assisted suicide in cases where patients are not able to commit suicide themselves. The cases which followed *Pretty v UK* went even further, claiming a positive obligation of the State to provide a lethal dose of sodium pentobarbital to patients who want to commit suicide without pain or risk of failure. States, however, accord greater importance to their positive obligation under Article 2, which binds the State to take positive measures in order to maintain and to safeguard life. Since the Article on the right to life is seen as the most fundamental of all the Convention rights, it is natural that the ECtHR has so far always decided in favour of the State, when dealing with issues on an alleged right to die.

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<sup>70</sup> Paolo Vargiu and Ikhtisad Ahmed, 2009

However, attitudes have changed over the course of time, with the idea of assisted suicide becoming more acceptable than it used to be.<sup>71</sup> A subsequent result of this has been the inevitable scrutiny of a person's right to die:

“This now age-old legal debate, eventually born out of primary social and ethical considerations and examination, has therefore been revisited many times since the inception of the Convention and the augmentation of the positive obligations. Suggestions relating to extending the right to life under Article 2 of the Convention to encompass the right to die by way of an acceptable potential positive obligation have been fiercely argued. It has even been considered whether this morally unthinkable matter can be established as being legally possible by an implied assertion under Article 2, following the thoughts forwarded by the doctrine of positive obligation.”<sup>72</sup>

Even though the European population is about to develop a more liberal approach to the issue, an evaluative approach of the Court regarding the extension of the ECHR towards a “right to die” is yet undesired. There are no compelling reasons for the Court to break with its case law.

Moreover, the German Law Journal points out that the ECHR “should be an instrument of development and improvement rather than an ‘end game’ treaty which froze the state of affairs that existed 60 years ago”<sup>73</sup>. But at the same time, a change of the established case law and interpretation of the Convention should not be arbitrary. Granting a right to a dignified death under the ECHR at this stage of time would probably be considered as an arbitrary change of interpretation, since general consensus on the matter is yet far from being reached. Therefore, the Court which has to strike a balance between development and stability, still opts for stability of the case law at the detriment of the development aspect of the ECHR.

Nevertheless, minor developments within the jurisdiction on assisted suicide can be observed. *Koch v Germany* and *Gross v Switzerland* show that the topic of assisted suicide is given greater importance within the legal framework. Since *Koch v Germany*,

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<sup>71</sup> Paolo Vargiu and Ikhtisad Ahmed, 2009

<sup>72</sup> Paolo Vargiu and Ikhtisad Ahmed, 2009

<sup>73</sup> Kanstantsin Dzehtsiar, 2011

the case law of the ECtHR has restrained States from refusing to examine the merits based on the ground that the applicant is not the actual victim himself. At first sight this seems to be evident. However with regard to the Court's own decisions on the admissibility, it has emerged that the case *Sanles Sanles v Spain* in 2000 had been declared inadmissible because the applicant was the sister in law of the actual victim. Thus, there has been an evolution between 2000 and 2013, enabling under certain conditions family members of deceased victims to continue with the proceedings. Moreover, the case of *Alda Gross* revealed that even unclear guidelines around the topic of assisted suicide constitute a breach of Article 8. This reflects an arising awareness not only of the European population but also of the ECtHR that assisted suicide is a serious social issue, which must be controlled and adopted by the domestic and international legislation.

Furthermore, the Court has developed its case law on whether preventing a patient by law from exercising his/her choice to avoid an undignified death can be considered as a breach of Article 8. In 2002, the Court was "not prepared to exclude"<sup>74</sup> that hindering Mrs Pretty to commit assisted suicide constituted an interference with her right to respect for private life, as it is guaranteed under Article 8§1. Nine years later in *Haas v Germany*, the Court stated clearly that "an individual's right to decide the way in which and at which point his or her life should end, provided that he or she was in a position to freely form his or her own judgment and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention"<sup>75</sup>. Eventually the case law on euthanasia is yet to be fully developed, as the Court has not had many occasions to rule on cases of euthanasia and assisted suicide.

Having in mind the potential of the ECHR to contribute to the expansion of the content and the scope of human rights, an evolution of the international legislation on euthanasia might yet be to come. However, with regard to the near future, it seems that the Court won't be changing its case law on euthanasia considerably. Member States to the ECHR are unlikely to reach general consensus on such a controversial topic as euthanasia. Consequently the Court has to accept the policies of the different countries, which have

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<sup>74</sup> *Pretty v UK* [ECtHR, 2002]

<sup>75</sup> *Haas v Switzerland* [ECtHR, 2011]



been established within the margin of appreciation. The only way to achieve an evolution on the Court's case law is to change domestic legislations. This, however, lies in the hands of the different societies.

### **3. The interaction between the global and the local**

The relation between the domestic Courts of member States and the European Court of Human Rights is marked by the principle of subsidiarity according to which the rights and freedoms set out in the ECHR should be secured by the member States within their respective jurisdiction:

“It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity.”<sup>76</sup>

In other words, States are in charge of giving a “locally relevant content to abstract treaty norms”<sup>77</sup>. If applicants think that judgements held by the domestic Courts fail to comply with those abstract norms of the Convention, they can apply before the ECtHR. Accordingly the ECtHR serves as a supranational instance entitled to analyse whether or not a contracting State has violated a right under the ECHR. Precisely because of the fact that judgements of the ECtHR are of higher value than judgements of national Courts, they must reflect the meaning of the ECHR in the light of the totality of the document's national interpretations. The ECtHR must always express the interest of the European population as a whole. Therefore, judgements on topics on which a European consensus has been established are more foreseeable than rulings on a controversial subject based on moral values. In that sense and in the light of the margin of appreciation applied in situations of controversial issues, it is the “local” that dominates the “global”. On the other hand, since the ECtHR applies the rule of the entire European society, created upon the input of all the societies, it can impose European standards and guidelines upon contracting States. In other terms, the influence between the domestic courts and the ECtHR goes in both directions: Where a European consensus has been reached, it is

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<sup>76</sup> Alston & Goodman, 2013, p.436

<sup>77</sup> Koen de Feyter and Stephan Parmentier, p.37, 2011

mostly the ECtHR which affects the national jurisprudence, as there are commonly agreed standards that must be achieved in all the member States. In the alternative case, where the interpretation of a topic in relation to the ECHR is contested, it is the national legislation that influences the case law of the ECtHR, due to the margin of appreciation system. Euthanasia clearly corresponds to the latter. The ECtHR is an abstract instance, put in place to secure specific rights under a specific Convention whose text remains the same, but whose interpretation evolves. In light of the “living” character of the document, the Court cannot evolve without the influence of national legislations, which are supposed to reflect the aspirations and expectations of their respective societies. In relation to this, Koen de Feyter points out that “human rights crises initially emerge at the local level”<sup>78</sup>. In the end, changes within the international legislation originate within the member States. Even though national Courts also have a status of “abstract” instances, they are, if compared to the ECtHR, still closer to a concrete social population and their expectations as human beings.

Debates on cultural or moral conflicts cannot primarily be regulated by the ECtHR, but must first be resolved inside the individual States. Expectations within a given society as to what is considered to be decent behaviour or treatment should first be analysed by the respective national authorities in order to decide whether or not to adapt their national legislation to those expectations. Social claims and living ideas are essential for the development of national practice and may then be legalized at international level.<sup>79</sup> Nevertheless, not all local human rights claims necessarily lead to a legislative development at the higher European level. In any case, the ECtHR must be sensitive to the views of societies on the interpretation of the international norms set out in the ECHR.

The case law on euthanasia has revealed that decisions on how to interpret an Article in relation to strong and highly controversial moral issues like assisted suicide, are always left to the States. For the sake of national autonomy, the ECtHR cannot take decisions on how to legislate on moral debates at national level, as this would undermine the national

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<sup>78</sup> Koen de Feyter and Stephan Parmentier, p.1, 2011

<sup>79</sup> Koen de Feyter and Stephan Parmentier, p.26, 2011

legislator's capacity to establish rules in the name of the society under its jurisdiction. In relation to this, Pridgeon points out that:

“[A]ny part of the European superstructure that has the potential to significantly alter the functioning of any part of a member state's healthcare system will be highly controversial. It is due to this discordance amongst the states that the European Union will likely remain subordinate to the member states in areas of potential cultural conflict.”<sup>80</sup>

This is a possible explanation why the Court has never stated in its judgements on euthanasia that assisted suicide must be granted to the applicant or that the State has to provide the conditions for an individual who desires to commit suicide. Even in the Pretty case, where an exceptional allowance for euthanasia may have been accepted at a social level, the Court decided in favour of the State and has taken a backseat leaving the State to legislate on the issue.

As a matter of fact, local practice can be constitutive of international human rights norms. As Koen de Feyter points out, “the creation of human rights norms is often described as a process of the formulation of claims and responses”<sup>81</sup> from a sociological point of view. Claims emerge at national level and responses can shift between regional and international or global authorities. In the end, international human rights law includes a bottom-up approach, where “peoples and communities [are] the primary authors of global human rights”.<sup>82</sup>

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<sup>80</sup> Pridgeon, p.45, 2006

<sup>81</sup> Koen de Feyter and Stephan Parmentier, p.26, 2011

<sup>82</sup> Koen de Feyter and Stephan Parmentier, p.26, 2011

## V. Euthanasia as a Human Right

### 1. The purpose of the ECHR: Preserving human dignity

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

- *Universal Declaration of Human Rights*

After the atrocities of World War II, human dignity has become a conceptual tool for rethinking human rights and democracy.<sup>83</sup> After the adoption of the UDHR, “the international community increasingly began to use the language of human rights to address issues of human dignity”<sup>84</sup>. From 1948 until now, the very essence of the Convention, which was strongly influenced by the UDHR, has been respect for human dignity and human freedom. After the UDHR, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights both state in their preambles that all human rights derive from the inherent dignity of the human person. Accordingly, human rights aim to achieve human dignity.

Despite the important character of the concept of dignity, there is no specific definition of it. It is not clear whether the concept of dignity should be seen as the foundation of human rights, whether it constitutes a right in itself or whether it is just a synonym for human rights.<sup>85</sup> Despite the fact that there is little common understanding on the substantive content of dignity, everyone wants his/her dignity to be respected and protected. We understand this concept intuitively<sup>86</sup>, without necessarily being able to translate it into words. Furthermore, the question can be raised, to what extent the concept of dignity guides or influences the jurisdiction of the ECtHR. McCrudden argues that:

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<sup>83</sup> Dupré, 2011

<sup>84</sup> Koen de Feyter, p.11, 2011

<sup>85</sup> McCrudden, p.655, 2008

<sup>86</sup> Dupré, 2011

“the concept of human ‘dignity’ plays an important role in the development of human rights adjudication, not in providing an agreed content to human rights but in contributing to particular methods of human rights interpretation and adjudication.”<sup>87</sup>

Thus, dignity can be considered as a guiding principle of the Court’s decision-making process. Even though there is no commonly agreed meaning of “dignity”, McCrudden states that the term includes nevertheless a “basic minimum core”<sup>88</sup>. However, this “basic minimum core” does not provide a universalistic basis for judicial decision-making, rather it helps the Court to develop strategies on how to legislate in the Human Rights area. From a legal point of view, Dupré refers to dignity as being “an adjunct to human rights, which is used to protect people’s humanity and identity”<sup>89</sup>. In that sense, dignity is closely linked to other relevant concepts of Human Rights, such as freedom, equality and humanity. Laura Hillenbrand even claims that there is no identity without dignity: “In its [dignity’s] absence, men are defined not by themselves, but by their captors and the circumstances in which they are forced to live.”<sup>90</sup> Therefore, dignity is inherent in the human person and part of his identity. This is also the point of view which is reflected by the different Human Rights documents. Everybody is born with dignity and “it is not a quality or status that one has to deserve or may lose”<sup>91</sup>. Even though dignity is a concept with an “uncertain normative basis and definition”,<sup>92</sup> it seems to be both, the starting point and the aim pursued of the ECHR.

The theory of dignity being an intrinsic quality from birth cannot be underpinned by a coherent argumentation. So far, no secular justification could have been made out. This approach is supported by Catherine Dupré who argues that dignity is “a conceptual tool that enables us to justify having rights simply because we are human beings. It is a fatuous justification, but on balance it may do more good than ill in the world.”<sup>93</sup> On the other hand, the most recent attempt to justify the inherent dignity claim was made by George Kateb in his book called “Human Dignity”. Basically, he draws a line between the human

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<sup>87</sup> McCrudden, p.656, 2008

<sup>88</sup> McCrudden, p.656, 2008

<sup>89</sup> Dupré, 2011

<sup>90</sup> Laura Hillenbrand, Unbroken

<sup>91</sup> Dupré, 2011

<sup>92</sup> Dupré, 2011

<sup>93</sup> Dupré, 2011

race and the rest of the natural world. Thus, dignity can be attributed to humanity in virtue of their human exceptionalism. He claims that “the defense of human rights needs a philosophical anthropology that explores human uniqueness”<sup>94</sup>. This human uniqueness is defined amongst others by the concept of inherent human dignity. Kateb’s main claim relies on the idea that human rights are justified by the unique qualities and capacities of the human race. Humankind is therefore linked with a kind of dignity that cannot be found elsewhere in nature. Consequently, human rights should protect this particular status of humanity and facilitate access to a dignified life.

At this point, a new question can be introduced: does a “right to die” fit the needs of human dignity and does a denial of such a right constitute a breach human dignity? The answers to such questions are controversial and far from being unanimous. Dignity lies in the eye of the beholder. Some think that ending one’s life at the time and in the manner of one’s choosing in order to avoid unnecessary suffering does indeed contribute to the preservation of dignity. So, for example, the Swiss association with the aim of supporting and accompanying patients who desire to end their lives, has chosen the significant name “Dignitas”. Others argue that dignity can only be protected by prohibiting life-taking practices like euthanasia, since taking a life voluntarily may be equivalent to destroying human dignity. In the end, those in favour of euthanasia argue that euthanasia must be legalized with respect to human dignity and opponents argue exactly the opposite, stating that the practice must remain prohibited in the name of dignity. Shortly, “the concept of human dignity and what is required to respect it is at the centre of the euthanasia debate, but there is no consensus on what we mean by human dignity, its proper use, or its basis.”<sup>95</sup> According to the American political scientist Diana Schaub, the lack of consensus is due to the fact that “we no longer agree about the content of dignity, because we no longer share [...] a vision of what it means to be human”<sup>96</sup>. Since the establishment of a common understanding of dignity and humanity is not a straightforward business, one solution could be to establish definitions of concepts which are closely connected to dignity. As already mentioned, dignity and freedom, for example, are two concepts which

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<sup>94</sup> Kateb, p.122, 2011

<sup>95</sup> Somerville, 2009

<sup>96</sup> Diana Schaub, cited by: Somerville, 2009

have a lot in common and whose understandings overlap to a certain extent. A popular understanding of freedom is the one established in the 18<sup>th</sup> century by Immanuel Kant. In his *Doctrine of Right* Kant says that freedom means

“independence from being constrained by another’s choice, insofar as it can coexist with the freedom of every other in accordance with a universal law”<sup>97</sup>.

Freedom is the only original right belonging to every man by virtue of his humanity. This includes naturally the human right to be one’s own master. Thus, the concept of dignity in relation to the concept of freedom ought to be interpreted as including a right to euthanasia. However, not everyone shares such a liberal approach to the issue. This is, for example, due to the second part of Kant’s definition of freedom [“insofar as it can coexist with the freedom of every other in accordance with a universal law”]. A strong argument for the prohibition of euthanasia relies on the assumption that if it was authorised by law, it could be abused and thus risk interfering with the freedom and dignity of other persons.

Consequently, protecting and defining dignity through human rights law is not an easy task. Since there is no common understanding of dignity and of the way in which the State has to ensure it, legislation on euthanasia and other “rights” with a reference to dignity remains in the hands of the States themselves, as they usually reflect the general opinions of their societies. The ECtHR even goes as far as to claim that the protection of dignity is a question of civilisation. A breach of human dignity does not only affect the respective victims, but also society as a whole. Dignity always includes the question on how we choose to live and also on how we choose to die. The State in turn is requested to protect this way of living and thereby to protect human dignity. In this sense, human dignity is taken as a concept referring to humanity as a whole and not to individual human dignity. If the State fails to acknowledge the chosen way of living of its society, it would not only breach human dignity but also damage the quality of democracy.

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<sup>97</sup> Kant : *The Metaphysical First Principles of the Doctrine of Right*, cited by: Thomas Christiano, p.1, 2008

The conclusion that can be drawn from this paragraph and in relation to euthanasia is that the concept of dignity may mean a very thin line between a “human right” and a “crime”. What is recognized as a right in one State, can be considered as a crime in another State. It all depends on the general perception of dignity adopted by the society. Those perceptions can basically be divided into two conflicting theories: individualism and collectivism.

## 2. Human Rights and ethics

“The only purpose for which power can be rightly exercised over any member of a civilised community, against his will, is to prevent harm to others.”

-John Stuart Mill

Interfering with a person’s personal choice is only legitimate if the reason for the interference is grounded in the protection of the rights of others. This principle was advanced in the 19<sup>th</sup> century by John Stuart Mill, who is “one of the architects of the democratic doctrine”<sup>98</sup>. Nowadays, his utilitarian view on how to handle conflicting interests is widely spread within the European legislation. The articles of the ECHR are conceived in such a way that they fulfil exactly the demands of this principle; interferences must first pursue a legitimate aim and second, the interference must be proportionate to that aim. The legitimate aims can be formulated in different ways, such as “for the protection of national security”, “for the prevention of crimes” or “for the protection of the rights of others”, but in the end the general framework remains the same: Preventing harm to others. In short, the decisions of the Court should aim at maximizing the total benefit, with regard to the entire population within its jurisdiction. Therefore, Koen de Feyter points out that it is

“important not to perceive human rights as instruments that merely protect the individual interests of a claimant, but to carefully consider their social impact. Human

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<sup>98</sup> <http://www.ethicalrights.com/submissions/human-rights/83-the-right-to-die-with-dignity-euthanasia.html>



rights tend to be framed as individual rights, but they are meant to contribute to the common good, which could be defined as a life in human dignity for all.”<sup>99</sup>

What does that mean for the legislation on euthanasia? Following the logic of Mill’s theory, this means that if the Court has to balance between the interest of an applicant who asks for assisted suicide and the interest of the State which wants to protect vulnerable people from abuse, the decision should be determined by its resulting consequences. Proportionality is the key word: if the overall suffering of the applicant and the potential future applicants is higher than the overall potential damage caused by potential risks, assisted suicide should be (at a purely ethical level) accorded to the applicant. In turn, if the potential damage of the possible misuse of a euthanasia law is more important than the overall suffering of the applicants, assisted suicide should remain prohibited. In practice, however, it is impossible to evaluate the actual consequences of a judicial decision on euthanasia, since the elements that have to be taken into consideration cannot be foreseen and thus, an analysis of those factors would only be speculative. Factors like the number of further applicants, the frequency and sort of abuses or the overall damage on both sides cannot be anticipated.

Therefore, the question on whether or not euthanasia is a human right must first be discussed at a non-judicial level. Before the international Court can legislate on a human right, there must first be a general opinion within the society that the topic in question does indeed constitute a human right and thus falls within the scope of the ECHR.

### **3. The social discourse on euthanasia: Individualism vs. the common good**

Opinions on euthanasia diverge at social level. One’s opinion on how a democracy should function is decisive to determine one’s position on euthanasia. There are two conflicting concepts which set the principles for a democracy: individualism and collectivism. Advocates of euthanasia opt for individualism whereas opponents tend to support the ideas of the theory of collectivism. Individualists see the individual and his rights as the

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<sup>99</sup> Koen de Feyter, p.12, 2011

main focus of a democratic society. Collectivists, however, consider the common good as the principle purpose of society.

In the light of the individualism theory, a lot of people consider the “right to die with dignity” as an ethical right, and thus, as a human right. Advocates of euthanasia and assisted suicide claim that the right of the individual must prevail. However, individualism nowadays has a rather pejorative connotation. If something goes wrong in a society, especially collectivists blame society for being “too individualistic”. In other words, the question is whether it is the common good that is neglected in favour of individualism, or whether it is the common good that is promoted at the expense of the rights of the individual. In the sociological sense, a society is called individualistic if the autonomy conferred to the individuals by the laws, the customs and the social constraints is very wide. In that sense, euthanasia defenders consider human rights and human dignity with reference to the individual, such as Mrs Pretty, for instance. Alternatives to euthanasia such as palliative care may be progressive for the common good of the society and useful to help a lot of people; nevertheless, the suffering of some individuals like Mrs Pretty cannot be relieved to the extent that a life in dignity is possible. Individuals must not be sacrificed in the name of the common good.

In turn, opponents of euthanasia uphold the belief that the law should aim at protecting society as a whole, which can be referred to as “the common good”. This reflects the principles of the collectivism theory, according to which “some sort of group rather than the individual” should be “the fundamental unit of political, social, and economic concern”<sup>100</sup>. Opponents insist that the claims of groups must supersede the claims of individuals. In this sense, the rights of people like Mrs Pretty must be subordinated to the common good. They must sacrifice themselves for the alleged good of society. Since society is considered as being a kind of “super-organism”<sup>101</sup> which exists over and above its individual members, and which takes the collective to be the primary unit of reality and standard of value, euthanasia should be forbidden in order to protect society from its side-effects. Opponents claim that once euthanasia is allowed, “the categories of killable

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<sup>100</sup> Stephen Grabill and Gregory M. A. Gronbacher: <http://freedomkeys.com/collectivism.htm>

<sup>101</sup> <http://freedomkeys.com/collectivism.htm>

people expand steadily toward the acceptance of death on demand”<sup>102</sup>. Therefore, it is better to forbid it in all circumstances rather than to allow it in few circumstances, even if there are compelling reasons in individual cases.

Supporters of euthanasia mainly base their claims upon three elements:

(1) Everyone should have the right to decide about his own body, life and death.

The right to self-determination is fundamental in a democratic society. Like Mrs Pretty, supporters of euthanasia argue that the “right to life” is precisely no more than a “right”. The right to life does not demand that it must be exercised. It does not include a duty to live. A law preventing someone from taking their own decisions about their life or death constitutes a threat to individual human dignity. On the other hand, human dignity in the sense of the common good is also infringed by such a law, as it supposes that the members of the society are not capable of knowing themselves what is best for them. No law should take a decision concerning people’s own life or death on behalf of the individuals themselves. For those considering that the quality of life is more important than the quantity of life, euthanasia is a good option and the choice should be left to the individuals.

(2) The right to self-determination should not be undermined by a non-secular interpretation of human rights.

Supporters of euthanasia suppose that the prohibition of euthanasia is due to the fact that the majority of the European society is religious. As social beliefs and opinions are also relevant for the Law, the prohibition of euthanasia in nearly all the European States may indeed derive from a religious belief that “only God can give and take life”. States however, have a positive obligation to be neutral in relation to religion and therefore, religious beliefs should not be manifested in legislation. The State must ensure that the beliefs of a certain group within the society cannot be forced on other individuals. It is true that there are two kinds of euthanasia opponents: those who oppose it because of possible risks of abuse, and those who are against a legalization because of their own

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<sup>102</sup> Wesley. J. Smith, 2008

religious (or even secular) beliefs. From an ethical point of view, it should not be possible to impose one's own values on other people, especially, if those values are religious by nature. According to the philosophy of Voltaire, the clergy and other opponents should be allowed to remonstrate with people requesting euthanasia in order to make them change their minds, but they should not be able to compel them by insisting on a criminalizing law.<sup>103</sup> This should also be in the interest of any democracy. The concept of individualism is fundamental in a democracy, and therefore "the right for individuals to live their lives as they wish, without being constrained by the religious values of others, must be upheld"<sup>104</sup>. Tolerance is a fundamental element of multiculturalism. Therefore, supporters claim that everyone should have the choice and those who are against euthanasia need not ever request it. A possibility to choose euthanasia or not avoids a "tyranny of the majority situation"<sup>105</sup>, as the values of everyone could be respected equally.

### (3) Allowing euthanasia does not do harm to others

Regulations on a law like euthanasia can prevent abuses, or at least reduce the risk of abuse to a minimum. In any way, it is "preferable to have voluntary euthanasia tolerated in particular circumstances with stringent safeguards and a degree of transparency, than to continue to prohibit it officially while allowing it to be carried out in secret without any controls."<sup>106</sup> Strict measures have to be adopted: euthanasia must in all cases be patient-driven in the sense that the patient must himself take the initiative and start the process. He must be aware of all alternative options for treatment and palliative care. He should be accompanied by a psychologist and obtain opinions from different doctors. The effect on the family should be considered and the patient can of course change his mind at any time and stop the process.<sup>107</sup> If those safeguards are established efficiently, the risk

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<sup>103</sup> <http://www.ethicalrights.com/submissions/human-rights/83-the-right-to-die-with-dignity-euthanasia.html>

<sup>104</sup> <http://www.ethicalrights.com/submissions/human-rights/83-the-right-to-die-with-dignity-euthanasia.html>

<sup>105</sup> <http://www.ethicalrights.com/submissions/human-rights/83-the-right-to-die-with-dignity-euthanasia.html>

<sup>106</sup> Marshall Perron (former Australien politician)

<sup>107</sup> <http://www.ethicalrights.com/submissions/human-rights/83-the-right-to-die-with-dignity-euthanasia.html>

of abuse is very low. In addition, it is highly improbable that a variety of doctors would arrange the death of a terminally ill patient without his consent. Even if a “worst-case-scenario” can never be excluded, a legislated regime is still preferable to an unregulated activity of euthanasia which cannot be controlled. To support this hypothesis, supporters refer to countries in which specific forms of euthanasia have been allowed. In Europe, these countries are the Netherlands, Luxembourg, Belgium and Switzerland. In the United States, physician assisted suicide is legal in Oregon and in the State of Washington. The statistics of these countries reveal that the act of euthanasia is not out of control, as has been feared by opponents:

"Neither Oregon nor the Netherlands appear to have started down a slippery slope. [...] Also, physicians have become better equipped to offer a wide variety of palliative care, leading them to become more effective at it and very rarely having to resort to assisted death"<sup>108</sup>

A common argument advanced by those opposing euthanasia is based on the assumption that a decriminalization of euthanasia may lead to what they call a “slippery slope”. As soon as a limited form of euthanasia is allowed, people would ask for an extension of this right, possibly, leading to euthanasia of those who are a “burden” for society: euthanasia of disabled people, higher rates of non-voluntary euthanasia or euthanasia for financial reasons, etc. However, advocates of euthanasia claim that “this argument has no merit” and that “there would need to be evidence of more non-voluntary deaths within a tolerant, legalised voluntary euthanasia framework”<sup>109</sup>.

In relation to this last argument, opponents have a different view, arguing that “too many people think with their hearts instead with their brain”<sup>110</sup>. Even though it may be cruel to “sacrifice” individuals to safeguard the common good, which would come under threat if euthanasia was allowed, it is still the best solution. To justify this claim, opponents often refer to the Netherlands, where euthanasia was already practiced in the seventies. Since its legalization in 2002, regulations require that euthanasia be strictly limited to the sickest

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<sup>108</sup> Dr. Nancy W. Dickey, cited by: Amanda Gardner

<sup>109</sup> <http://www.ethicalrights.com/submissions/human-rights/83-the-right-to-die-with-dignity-euthanasia.html>

<sup>110</sup> Wesley J. Smith, 2008

patients, “for whom nothing but extermination will alleviate overwhelming suffering”<sup>111</sup>. This principle is called the “force majeure”. Despite the force majeure, Smith notes that

“once mercy killing was redefined as being good in a few cases rather than being bad in all circumstances, it didn’t take long for the protective guidelines to be viewed widely as impediments to be overcome instead of important protections to be obeyed.”<sup>112</sup>

As a result, doctors in the Netherlands are now allowed to euthanize not only terminally ill patients who ask for it, but also people who are chronically ill, people who are disabled, and people who are depressed, as long as they ask for it. Belgium has gone through a similar process, even though Belgium does not have such an important history of euthanasia as the Netherlands. The slippery slope has occurred at an accelerated pace. The Belgium Parliament has recently voted by 86 votes to 44, with 12 abstentions in favour of euthanasia for terminally ill children without any age limit.<sup>113</sup> These are empirical facts that confirm the risk of the slippery slope and support the relevance of the collectivism theory with regard to euthanasia. In the end, the decision on whether to adopt the individualist, the collectivist or no view at all remains a personal choice and is influenced by one’s own moral ideas and social conceptions.

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<sup>111</sup> Wesley J. Smith, 2008

<sup>112</sup> Wesley J. Smith, 2008

<sup>113</sup> BBC News Europe, 2014

## VI. Luxembourg - A country with a “right to die with dignity”

### 1. The law<sup>114</sup>

After its Benelux partners, the Netherlands and Belgium, Luxembourg passed a law on the legalization of euthanasia in 2009.<sup>115</sup> Rapporteur Myriam Pierrat states that the legalization of euthanasia came unexpectedly and that even the founders of the law were surprised that the country was ready for this kind of revolution. The change occurred quite rapidly, considering that *the patient or the beneficiary of medical care* only appeared in the Luxembourgish legislation some fifteen years ago with the adoption of the law on hospital facilities<sup>116</sup>, pursuing the aim of “bringing a certain number of guarantees regarding the respect of fundamental rights of the ill”<sup>117</sup>. Article 40 of this text granted not only the right to the patient to be informed about possible treatments applicable to his condition, but also the right to refuse any kind of treatment. The adoption of the law on hospital facilities entailed as a consequence that the Luxembourgish legislator started to have doubt about the absolute primacy of life over the physical or moral well-being of patients at the end of their lives.<sup>118</sup> The proposition of a law guaranteeing a right to die with dignity was first delivered by the deputies Lydie Err and Jean Huss in February 2003. The proposition was inspired by the Belgium model and accordingly pursued the legalization of euthanasia. It was examined for the first time by the State Council in 2007, together with the law project on palliative care. The Council considered that the condition of physical, mental, constant or unbearable suffering without prospect of amelioration, on which the decriminalization of euthanasia was based, could be avoided through the establishment of palliative care. The objective of the law on euthanasia was annulled by the consideration of the State Council. Therefore, amendments had been made, taking into consideration the different critiques formulated against the law proposition. Despite

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<sup>114</sup> All information are taken from the « Annales du droit luxembourgeois » from 2009

<sup>115</sup> Loi du 16 mars 2009 sur l’euthanasie et l’assistance au suicide

<sup>116</sup> Loi du 28 août 1998 sur les établissements hospitaliers

<sup>117</sup> Document parlementaire, 393, Exposé des motifs, p.4 : « d’apporter (...) un certain nombre de garanties quant (...) au respect des droits fondamentaux des malades ».

<sup>118</sup> Pierrat, 2009, p.207

the opposition of the Council, which considered the two texts on euthanasia and palliative care to be incompatible, the Chamber of deputies examined the text on euthanasia in February 2008. In March 2008, the Council refused to ascribe an exemption of the second vote to the Chamber of deputies, which would have led to the adoption of the law project on palliative care. The refusal concerned both texts, as the Council estimated that they were not entitled to choose between both texts by according an exemption to only one of the two texts. After further amendments had been made, the Chamber adopted both the text on palliative care and the one on euthanasia and assisted suicide on 18 December 2008. The Council accorded an exemption on the second vote to the Chamber and the laws were ready to be proclaimed. But when it became clear that the two texts were likely to be voted through, Grand Duke Henri announced officially that he would refuse to sign up to the law on euthanasia and assisted suicide. Indeed, Article 34 of the Luxembourgish Constitution states that new laws need approval and promulgation by the Grand Duke. Together with the Grand Duke, the government decided to proceed with a revised edition of the Constitution. This new edition stated that laws do not need to be approved, but only promulgated by the Grand Duke. Finally, the law on euthanasia and assisted suicide was passed on 18<sup>th</sup> December 2008 and was proclaimed on 16<sup>th</sup> March 2009, two days before the deadline.

The regulation on euthanasia has been strongly influenced by the Belgium model. Just as in the Belgium legislation, the argumentation for a decriminalization of euthanasia is based on Article 2 of the ECHR and on Article 6 of the International Covenant on Civil and Political Rights, both of which refer to the right to life. The Luxembourgish legislator interprets those Articles in such a way that the State does not have an obligation to protect life under all circumstances and against the will of the person in question. In fact, the reasoning is similar to the one given during the *Pretty* case in 2002, in which Mrs *Pretty* claimed that Article 2 only protects the right to life, and not life itself as a supreme objective value which is independent from the individual. Furthermore, the authors of the law on euthanasia had to face difficulties in establishing a balance between the right to life on the one hand and the right to self-determination on the other hand. To determine the balance, one must take into consideration the intensity of the desire of the individual. The Belgium authorities affirm that a person who takes the decision to stop life-preserving



treatment does in fact not renounce the right to life, but rather executes this right himself by fixing autonomously the limits of the protection. This is also the approach adopted by the Luxembourgish legislator. The right to be protected from inhuman or degrading treatment and the right to respect for the integrity of the person are two more Articles of the ECHR that can be evoked to claim a legalization of euthanasia and that may conflict with the right to life. To solve potential conflicts between those rights, the Belgium and Luxembourgish legislator point out that limits regulating euthanasia must be set in such a way that the law on euthanasia does not affect the dispositions of the penal code concerning the general penal protection of the right to life. Therefore, early directives<sup>119</sup> are of major importance for the Commission<sup>120</sup> when it comes to establishing the difference between life-taking actions, which are considered as crimes under the penal code, and those actions that fall within the scope of application of the law on euthanasia. Those early directives are called “dispositions de fin de vie” [dispositions on the end of life] and can be taken by those who are of full age and judicious<sup>121</sup>. The law stipulates an official recording system, registering those dispositions with the national Commission of Control and Evaluation. In their dispositions on the end of life, individuals can determine the circumstances and the conditions in which they want to have euthanasia in cases where they are no more able to express or manifest their wishes. The Commission has the duty to ask the declarant for a confirmation of his wishes every five years and has to register all the changes. Even if no changes have been made, euthanasia cannot be practised if the doctor gains knowledge about a subsequent manifestation of the patient’s wish to change his mind on having euthanasia. The declarant can designate a person of trust who is in charge of informing the doctor about the wishes of the declarant. However, the dispositions on the end of life must be written and signed by the declarant himself. In cases where the declarant finds himself physically and permanently unable to do so, the dispositions can also be written by a person of full age assigned by the declarant. In such a scenario, two witnesses must be present during the composition of the dispositions. On the other hand, it is not allowed to designate a representative to take decisions on health

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<sup>119</sup> « Directives anticipées »

<sup>120</sup> Commission nationale de contrôle et d’évaluation

<sup>121</sup> « Personnes majeures et capables »

care in cases where the patient becomes unable to take decisions himself. In theory, all decisions are taken by the patient himself. Nevertheless, this is no more than a theoretical claim, since neither the law nor the parliamentary documents reveal explicitly how to reconstruct the actual wish of the patient or to what extent evidence must be provided by the person of trust: “In fact no criteria has been established by law in order to handle the decision of the person of trust.”<sup>122</sup>

Since 2009, Luxembourgish law has allowed for active euthanasia and assisted suicide. Euthanasia is defined as being an “act conducted by a doctor which intentionally ends the life of a person after a voluntary and explicit request by that person” and assisted suicide as “the fact that a doctor helps intentionally another person to commit suicide or provides another person with the means to that end, after a voluntary and explicit request of that person”<sup>123</sup>. Prof. Stefan Braum from the University of Luxembourg states that two aspects can be derived from those definitions: First, Luxembourgish law does not make a difference between active and passive euthanasia. Second, the scope of application and the decriminalization of euthanasia are limited to medical practitioners. Every other person who commits an act of euthanasia is guilty of unlawful killing.<sup>124</sup> However, doctors only have immunity from prosecution if certain conditions apply: The patient must be at full age, capable and conscious at the moment of his request, which must be reflected and made on a voluntary basis. Moreover, the request should be repeated and must not be the result of any external pressure. The situation of the patient must be such that his condition is without any prospect of amelioration, while generating a permanent and unbearable physical or mental suffering, stemming from the accidental or pathological medical condition. The request of a patient to have euthanasia must be recorded in written form. These conditions have been established with the aim of having evidence that the doctor administering euthanasia had certainty about the true and reflected nature of the request of his patient. Furthermore, the doctor must provide all relevant information pertaining to his patient, such as his medical condition, life

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<sup>122</sup> Pierrat, 2009, p.204, Original quote : « Aucun critère n’est en effet mis en place par la loi en vue de gouverner la décision de la personne the confiance »

<sup>123</sup> Article 1 of the law on euthanasia and assisted suicide (translated)

<sup>124</sup> Braum, 2009, p. 222

expectancy, possible treatment or the consequences of potential palliative care. In addition, the doctor has to consult another doctor to double-check the incurable and degrading character of the patient's disease. Finally, he must ask the national Commission of Control and Evaluation if any dispositions on the end of life have been registered under the name of his patient.

After some amendments, the State Council decided that control mechanisms only occur *a posteriori*, and not before the execution of euthanasia. Within eight days after an act of euthanasia, the doctor has to submit to the Commission a report relating to the act. This report must contain two different sections: The first section remains confidential if no violation of the law can be found. It contains the personal data of the patient, of the doctor in charge and of all the people involved in the process. The second section is supposed to help the Commission to determine whether or not the act of euthanasia was lawful. It contains a reference to the existence of dispositions of the end of life or a request for euthanasia or assisted suicide. It reveals the age and sex of the patient and the disease from which he or she was suffering. It also includes the nature of the unbearable and inveterate suffering and the elements that have permitted to assume that the request was formulated in a reflected, repeated and voluntary manner. The procedure of the doctor, the qualification of the consulted doctors and the dates of consultation must be mentioned. Finally, the circumstances in which euthanasia was practised and the means used have to be elaborated in the report. If the Commission has a doubt on the lawfulness of the act, the doctor must provide them the information that is set out in the first section of the report. The Commission must then take a decision within two months. If the Commission thinks that the law has not been respected, it sends a copy of the report to the *Collège médical*, which decides whether judicial prosecution shall take place or not.

The adoption of the law on euthanasia is the result of numerous debates and makes the end of the legislative process that has been evolving for the past twenty years. In fact, no particular case has ever dominated public discussions on euthanasia, as it has been the case at international level with the case of Diane Pretty. Thus, it is not individual fate that triggered the discussions on the legalization of euthanasia; it was rather a question of principles, as Stefan Braum points out: "rights of the patients versus protection of life;

self-determination of the individual versus religious command, and finally liberty of conscience and the question about the individual preservation of dignity while facing death.”<sup>125</sup>

## **2. Euthanasia: doctor’s conscience vs. patient’s rights**

### **a. General**

The conflict between the doctor’s freedom of conscience/belief and the patient’s right to euthanasia under Luxembourgish law is a medico-legal problem that needs to be regulated in a pluralistic democratic society. With reference to profound technological and medical change, Frank Brennan points out that it “is now commonplace for doctors to be told to leave their consciences at the door, as their patients are consumers and they are suppliers and of course the market decides.”<sup>126</sup> This redefines the relationship between doctors and their patients as a relationship where doctors provide what consumers demand, as long as it is in accordance with the law in place. Such a definition of the relationship between doctor and patient is not in line with the traditional definition that emphasizes the emotional content. The doctor-patient relationship can be seen to shift away from the psychological aspect to a more commercially-orientated aspect in a State where individualism is rated higher than the common good, regarding “matters of life and death”:

“Debates about law and policy are often resolved with simplistic assertions about individual rights and autonomy, with little consideration for the public interest, the common good, and the doctor-patient relationship. Even conscience is said to be a matter for contracting out.”<sup>127</sup>

The threat that arises from the understanding of medical care as a provision of services is that those services may become compulsory for the doctors to provide, even if they are against their own moral values or beliefs. This has for example happened in Victoria,

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<sup>125</sup> Braum, 2009, p.219 (my translation)

<sup>126</sup> Frank Brennan, 2009

<sup>127</sup> Frank Brennan, 2009

where the 2008 Abortion Reform Law<sup>128</sup> forces doctors and nurses to perform or to assist in an emergency abortion if the life of the pregnant woman is in danger, regardless of their personal objections. However, the primary goal of the Luxembourgish legislator is the preservation of both the right of the patient to request euthanasia and the right of the doctor to object. One solution was given by Lord Joffe, who tried on several occasions to get his *Assisted Dying for the Terminally Ill Bill* passed by the House of Lords in the United Kingdom. According to him the patient himself would be required to ingest orally the lethal medication. In cases where patients are unable to swallow, they would still be required to pour the medication into their feeding tube. But for the Luxembourgish legislation, this cannot be an option since the law does not only allow for assisted suicide but also for euthanasia and so, there is no way for a doctor to get past undertaking the act of killing. Therefore, the law envisages that no doctor can be forced to perform an act of euthanasia, but is obliged to refer to another doctor who is willing to perform the act. If the doctor knows about the dispositions on the end of life of his patient, he is bound to take them into consideration, but not to respect them. If the early directive in question is contrary to the doctor's conviction, he must transfer the patient to a colleague who agrees to enforce the patients wish. This must happen within twenty-four hours after the patient's request to have euthanasia or after the doctor finds out about the dispositions of the end of life.

Even though no one can be forced to engage directly in the act of euthanasia, some doctors consider the fact that they have to refer to another medical practitioner as being against their freedom of conscience, since they may be indirectly involved into something that they profoundly disagree with. The second aspect includes the doctor-patient relationship, which is necessarily affected by the euthanasia law. Some doctors defend the traditional approach that the most important concern must always be with patient health. The focus should not be shifted in a sense that doctors become mere "providers of Government-defined medical services on demand"<sup>129</sup>. In that sense, the law on euthanasia and assisted suicide affects inevitably the work of doctors in Luxembourg and the way they consider

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<sup>128</sup> Abortion Law Reform Act 2008 , No. 58 of 2008

<sup>129</sup> Liberty of Conscience in Medicine

the relationship with their patients. Thus, the fact that doctors do not need to practise euthanasia due to conscientious objection does not avoid an indirect effect on their freedom of conscience in the field of the doctor-patient relationship.

b. Positions of different medical associations

In 2007, the Association of Doctors and Dentists (AMMD<sup>130</sup>) of Luxembourg conducted an opinion survey<sup>131</sup> of doctors in Luxembourg concerning the law propositions on palliative care and on the right to die with dignity. The members of the AMMD themselves concluded that adopting a law on euthanasia would break with the fundamental principles and values of the doctor's work and even though Belgium and the Netherlands had already adopted such a law, euthanasia would still represent an ethical and deontological "no man's land"<sup>132</sup> for the majority of doctors in Luxembourg, considering the different risks that are linked to such a law. Therefore, they decided to ascribe higher value to palliative care, but to be open to any debate and evolution on the subject.

The survey was built upon two different questions, which were addressed to doctors who had to answer as citizens and patients on the one hand and as medical practitioners on the other hand. Concerning their respective positions on palliative care and euthanasia, they were asked if they found them convenient or inconvenient or if they did not have an opinion at all. The general opinion on palliative care was clear: 92% consider palliative care as convenient. Nearly the same percentage rate was reached in relation to the legitimacy of passive euthanasia: 95% thought that passive euthanasia was convenient. On the other hand, positions diverged with regard to the necessity of active euthanasia: Whereas 49% of the doctors who replied as citizens thought that active euthanasia was convenient, 47% thought it was inconvenient and 4% refrained from taking a position. However, when replying with regard to their profession, only 32% considered active euthanasia as convenient, whereas 64% thought it was inconvenient and 4% did not express any position. These statistics reveal that the acceptance of active euthanasia can

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<sup>130</sup> Association des médecins et médecins-dentistes

<sup>131</sup> Enquête de l'Association des Médecins et Médecins-Dentistes auprès de ses membres concernant l'acceptation des projets de loi : les soins palliatifs et le droit de mourir en dignité

<sup>132</sup> Le Corps Médical, p.3, 2007

be rated differently by the same person, depending on his affiliation to his profession or his potential status as a patient. As a doctor, they may rather consider the complex and risky procedures linked to the right to euthanasia, but also their own conscientious barrier to execute an act of euthanasia. Otherwise as a citizen and potential patient, they may wish to have the possibility for themselves and for others to have a choice about the way they end their lives. A solution to avoid this kind of discrepancy has not yet been found.

During a Press Conference in 2007, positions of international associations were also taken into consideration. There was a general consensus between the positions of the Standing Committee of European Doctors (CPME), the Global Medical Association (AMM), the European Union of General Practitioners (UEMO) and the European Federation of Salaried Doctors (FEMS), which all concluded that their respective association “strongly encourages all physicians to refrain from participating in euthanasia, even if national law allows it or decriminalizes it under certain conditions.”<sup>133</sup> Thus, the global position of physicians concerning euthanasia is clearly against a legalization; so far, this position has been reflected by the ECtHR, which does not impose any duty to participate in a process of euthanasia, even if it is allowed by national legislation.

c. Personal remarks of a general practitioner in Luxembourg

Jil Koullen, former president of the Luxembourgish general practitioners, member of the AMMD and general practitioner since 1989 in a rural area highlights some problems that are linked to the current regulation of euthanasia and a set of recommendations on how to improve the situation. Since no doctor can be forced to perform an act of euthanasia, the law prescribes that in cases where a doctor objects to euthanasia, he must refer within twenty-four hours to a colleague who agrees to perform the act. The first problem arises due to the fact, that there is no list of accredited doctors who are willing to euthanize patients. The doctor has to find out himself which of his colleagues consent to and which ones object to performing euthanasia. The time pressure of finding one within twenty-four hours complicates this task even more. For those reasons, the regulation on

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<sup>133</sup> Le Corps Médical, p.11, 2007

euthanasia would be more efficient if the State provided a list to identify those doctors who are willing to participate actively in the euthanasia act.

Second, doctors agreeing to perform euthanasia will have to face technical constraints, as there is no set of agreed materials that is ready at their disposal. They have to gather the materials themselves and have to go through the procedure of setting up the catheter and filling it with the deadly substance, in cases where patients wish to die at their homes. This burden could be simplified, if the State provided a set of materials for cases of euthanasia, instead of leaving the doctor alone with this delicate task.

Moreover, the decision of the legislator that there should be no control before the euthanasia act is done leads to the fact that fewer doctors agree to perform euthanasia, as there is always a risk of being prosecuted afterwards. An adequate control *a priori* could provide certainty of the lawfulness of the act. Additionally, the complicated and time-consuming procedure that is required in cases of euthanasia keeps a lot of doctors from actually arranging a euthanasia act. It is being speculated that the legislator might have intended to keep the euthanasia rates in Luxembourg low by imposing such procedures and leaving physicians with a doubt on the lawfulness of the act until it is committed. In any case, it would be useful if there existed a specialised team for euthanasia, including amongst others specialists to confirm the distressing condition of the patient, an accredited doctor to execute the final act and a psychologist to assist the family. This might be a safer and more humane approach to regulating the euthanasia law, as the risk of unlawful actions would be diminished and the organisation could be improved.

Furthermore, there is an administrative deficit of the euthanasia law in relation to the death certificate, which is designed to reveal the nature and typology of deaths. The current certificate only refers to a differentiation between natural and violent death, but does not contain any reference to a death brought about through euthanasia or assisted suicide.

And last but not least, there is the risk of an unexpected crisis on the part of conscience of physicians after an act of euthanasia, since no one knows with certainty how they are going to deal with the truth of having killed a human being. Similar to the common



phenomenon that occurs after an act of abortion, where women regret their decision when it is too late, the personal consequences of a legally correct act cannot be foreseen.

Similar critiques and recommendations have been elaborated by the Commission of Control and Evaluation in their reports on the application of the euthanasia law.

### **3. Results and analysis of personal research**

#### **a. Explanation and organization of the survey**

The initiative for the law on the right to die with dignity in Luxembourg was launched by the politicians, whereas the citizens have not been able to express their wishes as a community. After it became clear that the law was going to be put to the vote, parts of the population became active by delivering to the authorities a request for a referendum. The Committee of the popular initiative had to collect 25,000 signatures for the referendum to take place. Additionally, the Constitution states that a referendum must take place within three months before or after the election, which corresponds to the time between the 7<sup>th</sup> of March and the 7<sup>th</sup> of September. In the end, no referendum ever took place. Now in 2014, I conducted a survey to get an insight into the way in which Luxembourgish society deals with the question of euthanasia and if there has been an evolution within the different generations in Luxembourg that might be contributing to a potential legal change possibly leading to euthanasia becoming a fundamental right. Since a society is always defined by its citizens, the survey was directed towards people of every age group and every social class. No differentiation was made between gender and nationality. The findings were supposed to reveal general conceptions of morality, the influence of religion within certain age groups, thus determining certain patterns within the answers of different groups of people. Those who participated in the survey were divided into five age groups and into groups of religious and non-religious persons. Finally their professions were classified into social, medical, technical and academic professions (including students), in order to find out whether or not different types of people feature different kinds of patterns. Even though the survey is not a representative one, the findings suggest certain patterns that could give reason to presume that, at national, level there are

some general opinions and positions on euthanasia, its status as a human right and the concept of dignity.

The poll raised following questions:

- What is your position on euthanasia?
  - I am in favour of euthanasia
  - I am against euthanasia
  - I don't have a clear position on euthanasia
- What is your position on euthanasia founded on?
  - Moral reason
  - Religious belief
  - Culture
  - Personal experience/involvement
  - Individual conviction
  - Other
- Have you ever changed your opinion on euthanasia?
  - Yes
  - No
- Do you consider euthanasia as a Human Right?
  - Yes
  - No
  - Abstain
- Do you think that euthanasia can contribute to protecting individual human dignity?
  - Yes
  - No
- Please indicate:
  - Age
  - Profession
  - Religion

In the end, the participants had the possibility to justify their opinion with a personal note. The survey was anonymous and available in three languages: German, French and English.

#### b. Results and interpretation of the findings

In total, three hundred citizens participated in the survey.<sup>134</sup> The statistics<sup>135</sup> reveal that 8% of the participants are younger than 19, 33% are aged between 20 and 39, 33% between 40 and 59, 20% lie between 60 and 79 and 6% are older than 80. Moreover, the results show that 69% are in favour of euthanasia, 14% are against euthanasia and 17% don't have an opinion. 25% claim to be atheists and 75% express a commitment to a religion, with the large majority being Catholics. In the end, the professions of the participants turned out not to have been relevant, first because no pattern could be attributed to any of the groups and second, because too many people did not specify their profession but merely indicated their status as "retired" or "employee".

Among those who are in favour of euthanasia, 82% are younger than 60 and 18% are above the age of 60. The main reasons for being in favour of euthanasia are first individual convictions (51%) and second moral reasons (37%). Among those who are against euthanasia, only 39% are younger than 60 and a majority of 61% are older than 60. The reasons for being against euthanasia are mainly based upon religion (51%) and morality (47%). Those numbers suggest that the conception of what is morally right or wrong often depends on the respective generation of the person asked. Participants who belong to a younger generation tend to take a favourable position on euthanasia and indicate that the reason for their choice is a moral one. On the other hand, those who belong to the older generations justify their opposition to euthanasia with moral reasons as well, which leads to the conclusion that conceptions of morality can differ widely when asking people belonging to different age groups. Considering the high number of younger generations that are in favour of euthanasia, whereas the majority of older generations are against it,

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<sup>134</sup> See annexe 1

<sup>135</sup> The results in percentages have been rounded

we can conclude that an evolution has occurred between those two age classes. Additionally, older generations are clearly more influenced by their religious beliefs than younger citizens. Younger generations, on the other hand, seem to opt for a more individualistic and liberal approach of their society, claiming that their individual convictions lead them to adhere to euthanasia.

The findings showed that 17% declared having changed their opinion on euthanasia. For those who are in favour of euthanasia, 89% indicate that this change of mind occurred through personal experience. Those who changed their opinion from being in favour to being against euthanasia declared that personal experience was not the trigger. On the other hand, none of those who indicated religious belief as their motivation for being against euthanasia has ever changed their minds. Given those statistics, personal involvement appears to be a mainspring for giving up one's opinion against euthanasia. This might be due to the fact that witnessing the suffering of a third beloved person, transposed to oneself, can make people change their minds. Furthermore, the fact that none of those who are opposed to euthanasia because of religious reasons has ever changed their mind on the matter was striking and thought-provoking. It seems that a position taken on religious grounds is less likely to be changed than a position taken for secular reasons.

Among those who ticked "religious belief" as the reason for their choice, 17% declared in the first question that their opinion on euthanasia was not clear. This could be explained by a possible confusion between their own morality on the one hand and the religious doctrine that prohibits any kind of life-taking practice on the other hand. Again, those kind of answers were mainly given by participants over the age of 60. The fact that 17% cannot position themselves on the question of euthanasia because of their religion, shows that religion can hamper people when it comes to making choices in favour of their own convictions or moral beliefs that are independent from what is prescribed as being moral by their religion.

In general, 72% of the participants consider euthanasia as a human right and 13% don't think that euthanasia should be a human right. 75% of the latter stated at the same time that euthanasia cannot help to preserve individual human dignity, whereas 93% of those

who consider euthanasia as a human right declared at the same time that they believed that euthanasia could contribute to the preservation of dignity. In theory, the belief that euthanasia should be a human right and the belief that it could contribute to the preservation of dignity should go in hand; however, not everyone who has chosen the one answer, has chosen the corresponding answer as well. Moreover, not everyone who is a supporter of euthanasia also thinks that it should become a fundamental right. What is more, some of those who are against euthanasia still stated that they considered euthanasia as a human right. Those results might have come about through a personal belief that euthanasia can be useful, but that this personal belief is not sufficient to make of euthanasia a fundamental and international right. However, amongst those who oppose euthanasia for religious reasons, no one considers it as a human right or thinks that it could preserve human dignity.

The personal comments at the end of the questionnaire revealed that the answers given by the participants mainly lead back to three different conceptions of society: individualism, collectivism and religion. Those who support the legalisation of euthanasia usually adopt a liberal and individual approach to the way in which the legal system should function. They often proceed by referring to a scenario of mentally competent patients who are not depressed but who are suffering unbearable pain, while facing terminal illness. Hence, they claim that everyone should have the possibility to choose what is best for himself. This also corresponds to the idea put forward by Lydie Err, who is the author of the euthanasia law, stating that a right to die with dignity is “a choice for everyone without imposing anything to anyone.”<sup>136</sup> Then, there are those who oppose euthanasia for secular reasons. Those participants argue, for example, that palliative care is sufficient to reduce the suffering of terminally ill patients to a minimum and to preserve human dignity up to the end of their lives. They also mention potential risks that are linked to the euthanasia law and thus take position in favour of the common good, rather than in favour of a choice for everyone. Finally, there are those who base all their reasoning on religious faith. Comments such as “only God can give and take life” are the most common

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<sup>136</sup> Lydie Err : «un choix pour chacun sans rien imposer à personne».

among the 51% who oppose euthanasia on religious grounds. The findings of the survey suggest that the majority of the Luxembourgish society tends to opt for an individualistic approach rather than a collective approach and that a majority of especially young citizens is in favour of euthanasia.

## VII. Conclusion

*Is the concept of euthanasia covered by the ECHR?*

So far, it has not been possible to deliver a clear answer to that question. First, one must take into consideration the living character of the ECHR as a human rights instrument, leaving space for different interpretations of its articles. Second, human rights are at the same time moral rights, whereas euthanasia is a practice that is highly contested in terms of morals. Hence, its status as a human right is not defined. Even though it can be considered as a human right at national level in States where this practice has been legalized, euthanasia has not yet achieved the human rights status at European level. On the other hand, it cannot be said that euthanasia is a concept that is completely external to and isolated from the ECHR and the ECtHR. Since the Pretty case in 2002, the Strasbourg Court has dealt with questions on euthanasia and assisted suicide, which means that the “right to die” must necessarily be connected to the ECHR, otherwise such cases would be declared as inadmissible by the Court. In fact, the ECHR neither allows for nor prohibits the practice of euthanasia explicitly. The ECtHR accepts both legislative choices of the contracting States due to the margin of appreciation system, which appears to be the best possible solution in cases where a European consensus seems impossible to reach at the present time. The Court does not officially recognize a “right to die” as a right of the Convention and thus as a fundamental right that must be guaranteed in all the member States. However, it does not exclude the possibility that national legislations may allow for euthanasia if based on solid regulations in line with their obligations under the ECHR.

*How can the concept of dignity be interpreted in relation to euthanasia?*

Dignity is the link between the different Articles of the ECHR determining its overall and conjunctive character. The interpretation of the dignity concept in relation to euthanasia is left to the States, since dignity is one of those terms that is not universally defined. Dignity is mainly a moral term and has a core principle that is understood intuitively by everyone. However, there is no consistent definition at international level on the content of this concept. As long as States comply with that core principle of the dignity concept,

the ECtHR usually accepts the more narrow interpretations of dignity by the respective States. So, for example, the Court accepts national legislation if it is based on what the society understands as being dignified or undignified. Take the Omega case, for example. The German national law prohibited the commercialization of laser-gun games on the grounds that the simulated killing of people is against the inherent human dignity. Even though no other member State to the Convention adopted such a law, the Strasbourg Court accepted Germany's position with regard to their special consideration of human dignity. The same logic can be used in relation to national law and euthanasia; if the general opinion of a society prefers a decriminalization of euthanasia in order to preserve human dignity, the ECtHR accepts such a legislation under the conditions that strict regulations are elaborated to prevent abuse.

*Does the ECtHR adopt an individualistic or a collective approach in its judgements on euthanasia?*

The ECtHR does not grant greater importance to either the collective or to the individualistic approach in matters of euthanasia and assisted suicide. The Court only applies the articles of the Convention and examines whether national legislation complies with the ECHR, which is a purely technical task. The final judgement might serve the individual rights or the common good or both. Preference for either the one or the other approach can only be found at national level: a State that allows for euthanasia might rather be considered as a liberal State and a State that criminalizes euthanasia may be seen as giving priority to the common good. Since the Court accepts both legislations, it cannot be said to be privileging either of the two aspects.

*Euthanasia as a Human Right?*

Currently, euthanasia is not a human right in the sense of a fundamental right at international level. Even though individuals might consider it as such at the social level, euthanasia is not a human right from a legal and international perspective. In the words of Koen de Feyter, a local claim should only be qualified as a human rights claim if three criteria are fulfilled: "the claim uses human rights language; it identifies a duty-holder;



and it insists on accountability from the duty-holder.”<sup>137</sup> Since the “essential aim of any human rights claim is to hold the duty-holder responsible for lack of compliance”<sup>138</sup>, euthanasia faces difficulties in being qualified as a human right. How could the State be held accountable for not having a law guaranteeing a right to die and how to define a breach of the right to die? As long as such questions cannot be answered, euthanasia cannot become an international human right. “Ultimately, this issue will likely remain regionalized and beyond the legislative scope of any pan-European body due to the potential for conflict and alienation of any number of member states.”<sup>139</sup>

*Do countries that adopt a liberal approach on euthanasia sacrifice part of the common good in the name of individualism?*

In the case of Luxembourg, the statistics do not reveal any reasons to suppose that the common good of the population is threatened by the law on euthanasia and assisted suicide. The aim of Lydie Err to leave the choice to everyone without imposing anything to anyone seems to be achieved, at least with regard to the reports that have been established by the national Commission of Control and Evaluation. So far, 19 people have been allowed to have euthanasia, whereas the Commission has never had any doubt on the lawfulness of the act after having studied the report of the respective doctor. It is true that the law on euthanasia has not been in place long enough to deduce clear patterns from the statistics, but so far the law does not seem to have been abused yet in a way that could pose a threat to the common good.

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<sup>137</sup> Koen de Feyter, p.18, 2011

<sup>138</sup> Koen de Feyter, p.20, 2011

<sup>139</sup> Pridgeon, p.46, 2006

## VIII. Bibliography

- Abortion Law Reform Act 2008, No. 58 of 2008, available at <http://www.hsph.harvard.edu/population/abortion/VICTORIA.abortion.pd>
- Amanda Gardner: Dutch Euthanasia rates steady after legalization, in: HealthDay News, available at <http://abcnews.go.com/Health/Healthday/story?id=4506995>
- Annales du droit luxembourgeois, Volume 19, Etablissements Emile Bruylant, Bruxelles 2010
- BBC: Belgium's parliament votes through child euthanasia, In: BBC News Europe, February 2014, available at <http://www.bbc.com/news/world-europe-26181615>
- BBC: Religion and Euthanasia, available at <http://www.bbc.co.uk/ethics/euthanasia/religion/religion.shtml>
- Bhikhu Parekh: Rethinking multiculturalism – Cultural Diversity and Political Theory, Macmillan Press, United Kingdom 2000
- Caritas Luxembourg: Ma vie. Ma mort. Mes dispositions de fin de vie, Luxembourg 2005
- Case of Gross v Switzerland, European Court of Human Rights, May 2013, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119703#%7B%22itemid%22:%5B%22001-119703%22%5D%7D>
- Case of Haas v Switzerland: European Court of Human Rights, January 2011, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102940#%7B%22itemid%22:%5B%22001-102940%22%5D%7D>
- Case of Koch v Germany: European Court of Human Rights, July 2012:, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112282#%7B%22itemid%22:%5B%22001-112282%22%5D%7D>
- Case of Pretty v United Kingdom, European Court of Human Rights, April 2002, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448#%7B%22itemid%22:%5B%22001-60448%22%5D%7D>
- Case of Thlimmenos v Greece, European Court of Human Rights, April 2000, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58561#%7B%22itemid%22:%5B%22001-58561%22%5D%7D>
- Catherine Dupré: What does dignity mean in a legal context?, In: theguardian.com, 2011
- Christoffer McCrudden : Human Dignity and Judicial Interpretation of Human Rights, In: The European Journal of International Law Vol. 19 no. 4, 2008

Commission de Contrôle et d'Évaluation de la Loi du 16. Mars 2009 sur l'euthanasie et l'assistance au suicide : Premier rapport à l'attention de la Chambre de députés (Années 2009, 2010)

Commission de Contrôle et d'Évaluation de la Loi du 16. Mars 2009 sur l'euthanasie et l'assistance au suicide : Deuxième rapport à l'attention de la Chambre de députés (Années 2011, 2012)

Commission Nationale d'Ethique (C.N.E): Faut-il dépénaliser l'euthanasie? La législation de quatre pays voisins et les réactions qu'elle suscita, CNE / Institut Grand-Ducal, 2007

Council of Europe: Recommendation 1418 (1999), Protection des droits de l'homme et de la dignité des malades incurables et des mourants, In : Gazette officielle du Conseil de l'Europe, 1999, available at <http://assembly.coe.int/Documents/AdoptedText/ta99/FREC1418.htm>

Council of Europe: The Margin of Appreciation, In: The Lisbon Network, available at [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)

ECHR: Koch v Germany, In: ECHR Online, October 2012, available at <http://echronline.blogspot.com/2012/10/koch-v-germany.html>

ECHR: The European Convention on Human Rights (ECHR) – Introduction, In: ECHR Online, available at <http://echr-online.com/>

Elizabeth Wicks: The right to life and conflicting interests, Oxford University Press 2010

Emily Wada: A Pretty Picture - The Margin of Appreciation and the Right to Assisted Suicide, Loyola Law School L.A. Law review, vol 27:275, May 2005

Felipe Gómez Isa: Freedom from want revisited from a local perspective: evolution and challenges ahead, In: The Local Relevance of Human Rights, Cambridge University Press 2011

Frank Brennan: Euthanasia: doctors' conscience vs patient rights, March 2009, lecture: *'Are Utilitarianism and Patient Autonomy Enough?'*, presented at the Medico Legal Society of Victoria, Melbourne Club, 28 February 2009, available at <http://www.eurekastreet.com.au/article.aspx?aid=12089#.U4xwfCjdLxw>

Gary Marks: Territorial identities in the European Union, in: Regional integration and democracy, Expanding on the European Experience, edited by: Jeffrey J. Anderson, United States of America, 1999

George Kateb: Human Dignity, Belknap Press, Cambridge, 2011

Gerd Brudermüller & Wolfgang Marx & Konrad Schüttauf: Suizid und Sterbehilfe, Schriften des Instituts für angewandte Ethik E.V, Band 4, Königshausen & Neumann GmbH, Würzburg 2003

Jacobs & White: The European Convention on Human Rights, Oxford, 2006, p. 52-54;  
Radu Chiriță –Convenția europeană a drepturilor omului, CH Beck, Bucharest, 2007

James Nickel: Human Rights, In: Stanford Encyclopedia of Philosophy, 2013, available  
at <http://plato.stanford.edu/entries/rights-human/>

J. Lucy Pridgeon: Euthanasia Legislation in the European Union: Is a universal Law  
possible?, in: Hanse Law Review, 2006, available at  
<http://www.hanselawreview.org/pdf3/Vol2No1Art04.pdf>

Koen de Feyter: Sites of rights resistance, In: The Local Relevance of Human Rights,  
Cambridge University Press 2011

Lachlan Dunjey: Liberty of Conscience in Medicine, Melbourne 2009, available at  
<http://www.conscienceinmedicine.net.au/why-this-declaration/>

Le Corps Médical: Bulletin d'information et organe officiel de l'association des  
médecins et médecins-dentistes du Grand-Duché de Luxembourg, December 2007,  
Luxembourg

Luc Ferry & Axel Kahn : Faut-il légaliser l'euthanasie ?, Odile Jacob, Paris 2010

Margaret Somerville: Defining human dignity, Montreal Gazette (Canada), 22  
November 2009, available at  
<http://www.catholiceducation.org/articles/euthanasia/eu0058.htm>

Ministère de la Santé & Ministère de la Sécurité Sociale : Sterbehilfe und assistierter  
Suizid, Gesetz vom 16. März 2009, 25 Fragen 25 Antworten, Luxembourg 2009

N. Moreham: The Right to respect for private life in the European Convention on  
Human Rights: a re-examination, EHRLR, 2008

Nicola Jacob: Aktive Sterbehilfe im Rechtsvergleich und unter der Europäischen  
Menschenrechtskonvention, Tectum Verlag, Berlin 2013

Paolo Vargiu and Ikhtisad Ahmed: Our Lives are Ours to Take: the Right to Die under  
Article 2 of the European Convention on Human Rights, 2009

Peter Tyson: The Hippocratic Oath Today, 2001, available at  
<http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>

Philip Alston & Ryan Goodman: International Human Rights, The Successor of  
International Human Rights in Context, Oxford University Press 2013

Rosalind English, One Crown Office Row: Pretty, In: Human Rights & Public Law  
Update:

Sandy Gandhi: International Human Rights Documents, 8<sup>th</sup> edition, Oxford University  
Press 2012

Stijn Smet: Haas v. Switzerland and assisted suicide, in: Strasbourg observes, 2011,  
available at <http://strasbourgobservers.com/2011/01/27/haas-v-switzerland-and-assisted-suicide/>

Suicide Act 1961, In: The National Archives, available at  
<http://www.legislation.gov.uk/ukpga/Eliz2/9-10/60>

The right to die with dignity – euthanasia, In: Ethical Rights, available at  
<http://www.ethicalrights.com/submissions/human-rights/83-the-right-to-die-with-dignity-euthanasia.html>

Thomas Christiano: Two Conceptions of the Dignity of Persons, in Jahrbuch für Recht und Ethik [Annual Review of Law and Ethics] ed. B. Sharon Byrd and Jan C. Joerden, Verlag Duncker and Humblot, Berlin 2008

UNESCO: 2010, année internationale du rapprochement des cultures, In: Dépliant de l'année, 2010, available at <http://www.unesco.org/fr/rapprochement-des-cultures>

Wesley J. Smith: Continent Death: Euthanasia in Europe, in: Common Sense Issues, Inc., 2008, available at <http://www.commonsenseissues.com/continent-death-euthanasia-in-europe/>

<http://assembly.coe.int/main.asp?link=/Documents/AdoptedText/ta99/EREC1418.htm>

Definitions of Individualism and Collectivism:  
<http://freedomkeys.com/collectivism.htm>

[www.debate.org](http://www.debate.org)

[http://www.1cor.com/1315/?form\\_1155.replyids=299](http://www.1cor.com/1315/?form_1155.replyids=299)





















