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EUTHANASIA IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The paper aims to shed light on the interpretation of mercy killing, i.e., euthanasia, in European Court of Human Rights cases. This controversial phenomenon has a specific legal status. More specifically, due to the complexity of euthanasia, it is impossible to create universally accepted international standards. On the other hand, modern society creates a need to expand the legal boundaries regarding bioethical issues related to the compassionate end-of-life care. The European Court of Human Rights is a unique international organization that interprets universal legal documents, especially the European Convention on Human Rights, in the context of euthanasia. Bearing this in mind, it is important to collect and analyze the information resulting from the specific decision-making process of the European Court of Human Rights. The Court's past and future similar cases will certainly affect the future legal status of euthanasia both internationally and at the level of member states.

Key words: *European Court of Human Rights. – Right to life. – Right to private life. – Active euthanasia. – Passive euthanasia.*

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1. INTRODUCTION

In any consideration of basic human rights, the right to life is at the top of the list. The main reason for this is the fact that the existence of any other human right or freedom would be unthinkable without the right to life. Contrary to its fundamental importance, we encounter difficulties in precisely defining this main human right. Based on legal acts (national constitutions and international instruments) and practice, the right to life is explained by the norms of customary international law.¹ The general norm indicates that it is the most valued human right and any deprivation of this right is impermissible.² So, the logical assumption would be that the right to life is among the most protected rights.³ Nevertheless, it is not an absolutely protected right due to the limitations reflected in the standardized exceptions,⁴ which must be interpreted restrictively (McKinney 2022, 5).

Today, we challenge the various conditions in which the right to life is threatened. Many different specific situations usurp the general legitimate paradigm of respect for the right to human life and cast a shadow on the possibility that human life can and should be protected, so it is expected that we will face more accepted limitations of the right to life. First, nothing can ensure the protection of life under the constant threat of the use of nuclear weapons, which are widespread and ready for use at any time. Second, people are constantly at risk from various forms of natural disasters that can

¹ The main sources of all law on the right to life are the Universal Declaration of Human Rights (Article 3), the International Covenant on Civil and Political Rights (Article 6), the European Convention on Human Rights (Article 2), the American Convention on Human Rights (Article 2) and the African Charter on Human and Peoples' Rights (Article 4). These legal instruments contain specific norms related to respecting and protecting human life as the supreme legal good. The statement of the right is usually framed as *the right to life* (in the Universal Declaration, the International Covenant, and the European Convention), but it could refer to *the right to respect for life* (in the American Convention), or to *respect for life* (in the African Charter). Each of the above indicates that any arbitrary or intentional deprivation of the right to life is prohibited.

Additionally, guarantees of the right to life are also prescribed by the Geneva Convention and Protocols on humanitarian law, and also by the Genocide Convention. See more in Tomuschat, Lagrange, Oeter 2010.

² There are also a few exceptions in which deprivation of the right to life may be permitted, such as the potential death penalty.

³ Such as the prohibition of torture and prohibition of slavery.

⁴ Boyle lists the following exceptions in for which the taking of life is permitted: death penalty, self-defense, murder during lawful arrest or to prevent escape, i.e. to prevent execution of a criminal act in the course of riot prevention. See more in Boyle 1985.

cause loss of life. Third, there are many systemic and structural problems within countries that result in poor living conditions for millions of human beings, leading to loss of life.⁵ Fourth, there are issues related to social policy such as euthanasia,⁶ abortion, and other, predominantly bioethical issues (Tönnies 2002).

Bioethical interpretations of different phenomena point to the increasing societal need to expand the objects of human rights protection to the values highlighted by bioethics research. A long-standing document supporting this is the Council of Europe (CoE) Convention on Human Rights and Biomedicine (the Biomedicine Convention, or Oviedo Convention), a legally binding instrument that entered into force in 1999 (CoE 1997). However, this document does not pay special attention to the ways of purposely ending someone's life. This is an explicit sign that the need for a legal formulation of the method of merciful termination of human life (i.e., euthanasia) was not recognized at the time of the adoption of the Convention. In addition, the fact that it is a controversial phenomenon with numerous moral dilemmas has led to the absence of international documents on this issue at the present. The absence of international documents, and therefore of standards, along with the recently emphasized societal need to regulate this issue, led to states being given wide space to regulate this area according to special *margins of appreciation*,⁷ aligned with national interests and characteristics (Alves 2022).

In parallel with the numerous parliamentary activities related to euthanasia around the world in the past two decades, many cases of ending human life by euthanasia have been brought before the European Court of Human Rights (ECtHR). A detailed analysis of the court cases can determine the specific course of the wider acceptance of euthanasia and the increasingly

⁵ There are even more problems within the internal organization of the state that could lead to loss of human life and it is difficult to name them all.

⁶ The position of many vulnerable groups, such as patients in the terminal stage of disease, often give rise to threats to life. Terminally ill patients who would have an interest in artificially ending their lives are in a position that is usually dominated by those who would prefer to maintain the *status quo*.

⁷ The extent to which the state's field of assessment is respected in matters of euthanasia was shown in the *Gard and Others v. the United Kingdom* case. On 27 June 2017, the ECHR ruled on the appeal of the parents of a baby suffering from a rare and fatal genetic disease against the decision of the domestic authorities to stop the baby's artificial ventilation. The Court, by majority vote, declared the appeal unfounded, considering "the room for maneuver or wide margin of appreciation" in the sphere that concerns the terminally ill and that involves particularly sensitive moral and ethical issues. See more in ECtHR, App. No. 39793/17, 3 July 2017.

flexible interpretation of legal provisions. This contribution will provide an overview of several ECtHR cases involving euthanasia requests, in which the right to life has been interpreted.

2. EUTHANASIA AND RIGHT TO LIFE BEFORE THE ECtHR

The meaning of euthanasia implies a medical context; it refers to a terminally ill patient who suffers from constant and unbearable pain, with no hope of improvement. An important element of euthanasia is voluntary with regard to the expression of the patient's wish to end their life. Also, euthanasia includes situations where patients are unable to express their will, but it is unequivocally assumed. In response to a patient's voluntary and well-considered request for euthanasia (or to such a request given by their legal representative), some doctors are prepared to take the action of ending a patient's life (for example: injecting the patient with a lethal dose of a drug), i.e., active euthanasia, or to withdraw life-sustaining treatment knowing that it leads to death, i.e., passive euthanasia, or to help them take their own life by prescribing a lethal dose of medication, i.e., assisted suicide (Center for Health Ethics).

Both active and passive euthanasia are complex issues that have not yet been offered a single legal answer at the international level. Many complex contradictions, such as the conflict between paternalistic protection of the patient's life and respect for private life and autonomy in the decision-making process, appear specifically in the issue of requested euthanasia. Accordingly, it is highly difficult to constitute universal standards on euthanasia and that is why the margin of appreciation about this topic is given to the states. Considering the lack of unequivocal international legal rules on euthanasia, it is important to bear in mind the interpretation of the European Convention on Human Rights (ECHR, or Convention) within specific ECtHR cases (especially Article 2, which refers to the protection of human life, and Article 8, which refers to the private life) (CoE 2003).

2.1. Article 2 of the ECHR – Right to life

The European Convention on Human Rights has a universal corpus of rights that protects human life. This norm prescribes two of the state's central obligations related to the right to life: the general positive obligation to protect life by law and to take measures for the physical protection of potentially endangered lives, and the negative obligation of the state, which

is reflected in the prohibition of arbitrary deprivation of life. The provisions of the right to life must be strictly interpreted because they relate to one of the fundamental values of the democratic societies that make up the Council of Europe.⁸

Article 2 of the Convention reads:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken the purpose of quelling a riot or insurrection (ECtHR 2018, 6).

From the general point of view of Article 2 of the European Convention on Human Rights, everyone's right to life must be protected by law (ECtHR 2018, 6). Also, there are exceptions to this general norm, meaning that there are only very limited circumstances in which it is acceptable for a state to use force against a person resulting in their death.⁹ The main focus of the interpretation of Article 2 by the European Court must be determined by the need to make its protective measures practical and effective, which is also the main purpose of the Convention as an instrument for the protection of individual human beings. For CoE Member States, this right implies a prohibition (negative obligation) to intentionally take the lives of individuals and a positive obligation for national authorities to take appropriate steps to protect the lives of those under their jurisdiction (ECtHR 2022a, 18–19). At the same time, a dilemma arises between the positive obligation of the state to protect human life and the positive obligation of the state to respect the aspect of the right to private life – the individual's decision on how and when to end their life – provided that they are in a position to form their own free will and to act accordingly. Such a dilemma was considered in the *Haas v. Switzerland* case.

⁸ Interpreting Article 2 of the Convention in this way implies considering it together with Article 3 – Prohibition of Torture. Article 3 implies that no one may be subjected to torture or to inhuman or degrading treatment or punishment, which further means that everyone has the absolute right not to be tortured or subjected to treatment or punishment that is inhuman or degrading. See more in Fontalis, Prousalis, Kulkarni 2018.

⁹ Such as giving the ability to police officers to use reasonable force to defend themselves or other people.

2.2. *Haas v. Switzerland*¹⁰

A Swiss¹¹ citizen, Ernst G. Haas, suffered from bipolar affective disorder for decades. During this long period, he made several suicide attempts aimed at overcoming the painful symptoms of the disorder. The attempts were futile because he needed a prescription for a lethal dose of medication, which none of the psychiatrists he consulted for that purpose would prescribe.¹² Because of these circumstances, he decided to obtain permission from the judicial authorities to get a lethal dose of the drug without an official medical prescription. After several rejected requests by lower state authorities,¹³ Haas filed an appeal with the Federal Court, which was rejected. The judgment of the Federal Court, from 6 November 2006, focused on the explanation that it is necessary to distinguish between the right of a person to decide on his death and the right of a person to commit suicide with the help of the state or a third party. Based on complaints against Switzerland¹⁴ that the positive obligation to create conditions for the execution of suicide without the risk of potential failure and in a painless manner (which derives from Article 8 of the Convention – the right to respect for private and family life), was not fulfilled, Haas appealed to the ECtHR. Therefore, the crucial matter in the *Haas v. Switzerland* case was the consideration of whether Article 8 imposes a “positive obligation” on the State to enable its citizens to obtain a medicament that would enable them to end their life.

The Court’s judgment on the non-existence of such an obligation of the state in this particular case is based on several points. One point is that although assisted suicide has been decriminalized (at least partially) in certain CoE Member States, the vast majority of States seem to place more weight on protecting an individual’s life than on their right to end it. Also, the Court found that Swiss law’s requirement for a prescription for sodium pentobarbital had a legitimate aim – to protect people from making

¹⁰ ECtHR, App. No. 31322/07, 20 January 2011.

¹¹ Since 1942, Switzerland has allowed assisted suicide as long as the motives are not selfish. See more in Bosshard, Fischer, Bär 2002.

¹² According to the applicant’s statement, he wrote to more than 150 psychiatrists, with an explanation of the problem and a request for help in procuring the necessary medication.

¹³ The state bodies were: the Federal Department of Justice and the Department of Health of the Canton of Zurich, the Federal Department of the Interior, and the Zurich Administrative Court.

¹⁴ According to the Criminal Code of Switzerland, incitement to commit or assist in suicide is only punishable when such acts are committed for selfish reasons.

hasty decisions and preventing abuse, the risks of which must not be underestimated in a system that has allowed for assisted suicide. The Court pointed out that the right to life requires states to establish a procedure that can ensure that a person's decision to end their life actually reflects their free will, which is in accordance with the requirement of a detailed psychiatric assessment that would precede the issuance of a prescription. Additionally, a key point of the trial was to emphasize that the applicant had effective access to a medical assessment that could enable him to receive pentobarbital sodium (if not, his right to choose when and how to die would be theoretical and illusory) (ECtHR 2011). Based on all of the above and the discretion enjoyed by national authorities in this sphere, the Court considered that the Swiss authorities did not breach the positive obligation to take measures to enable a dignified suicide in the case of the applicant.¹⁵

3. PRIVATE LIFE AND PERSONAL AUTONOMY

A very specific characteristic of euthanasia cases is that they mostly involve consideration of the protection of the right to life versus the protection of private life and personal autonomy. Private life is a broad term that cannot be clearly defined as a term that covers a person's physical and psychological integrity and may include aspects of a person's identity. Article 8 of the ECHR – the right to private and family life includes the protection of personal development in terms of personality and personal autonomy which is an important principle, but it doesn't mean exclusion from the outside world and living a personal life in any chosen way.

Article 8 (1) of the ECHR begins by asserting that:

Everyone has the right to respect for his private and family life, his home and his correspondence.

Then Article 8 (2) prescribes:

¹⁵ Although the position of the ECHR in the *Haas* case was that the abuse and widespread use of the right to assisted suicide should be prevented, the *Gross v. Switzerland* case points to the fact that the Swiss law is not sufficiently clear and precise. In 2013, the ECtHR ruled that Article 8 and the right to personal autonomy of women who did not suffer from a clinical illness and who were denied a request for assisted suicide in Switzerland were violated. See more in ECtHR, 67810/10, 30 September 2014. (Although the judgment subsequently became legally invalid, due to additional circumstances not established in time, it is significant for the analysis of the ECtHR's position.)

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (ECtHR 2018, 11).

The primary purpose of Article 8 is protection against arbitrary interference by public authorities in private and family life. In addition to this negative obligation, which compels the Member States to refrain from such interference, they also have positive obligations in the form of measures to ensure that the rights in Article 8 are respected even between private parties. Inter alia, it includes matters concerning consent to treatment,¹⁶ autonomy, and dignity (Griffith 2021). This further means that among other values (such as wellbeing and dignity, physical and psychological integrity, relationships with other human beings, aspects of social identity, etc.) this right includes self-determination, which can be related to deciding on end-of-life issues. The applicant on euthanasia matters before the European Court often indicates a violation of Article 8 of the Convention. Generally, if the decisions of the courts were made solely by looking at the provisions that the petitioners refer to, then most likely the outcome of the judgments would be much different than what is most common. Specifically, the position of the ECtHR is that the Convention, regardless of the potentially violated article, must be viewed as a whole. Given such a position, the necessity to respect Article 2 on the right to life is most often cited as a “counterweight” to the violation of Article 8 in the interpretation of the Convention as a group of indivisible elements.

Article 8 is most often cited before the ECtHR in the context of the prohibition of assisted suicide. Many countries prohibit assisted suicide in order to protect vulnerable people from being pressured by unscrupulous family members or friends to end their lives. On the other hand, the same provisions prevent people who cannot take their own lives, because of a debilitating condition, from being helped to do so. One such case is the *Pretty v. the United Kingdom* case.

¹⁶ With the absence of validly given consent of the patient to euthanasia or life support by means of artificial devices, the issue of potential violation of Article 3 of the Convention (freedom from torture and inhuman or degrading treatment) can be additionally raised.

3.1. *Pretty v. the United Kingdom*¹⁷

Diane Pretty was a patient who suffered from motor neural disease, a paralyzing, degenerative, and incurable illness. The neurodegenerative disease had progressively weakened her muscles to the point where death occurs from the inability to breathe or swallow. She was paralyzed from the neck down, unable to speak, and was tube fed. Given the overall condition, caused by the disease that would lead her to death in a distressing manner, Mrs. Pretty wanted to end her life and die with dignity. She was not able to commit suicide, nor to administer the lethal dose of medicine that, hypothetically, a doctor could have prescribed to her. The only option available to the patient for avoiding suffering was to undergo passive euthanasia.¹⁸ Applying passive euthanasia would mean that she would not automatically end her life by stopping medical treatment, instead, she would have to go through a painful period of starvation after the tube was removed. The only dignified solution from the patient's point of view was to allow the implementation of active euthanasia by judicial authorities.¹⁹ Thus, 43-year-old patient Diane Pretty asked the Director of Public Prosecution for permission for her husband to administer a lethal dose of a drug with the intent to end her life, without his subsequent criminal responsibility for the crime committed. After such a request was refused, she sought justice before the ECtHR on the grounds that an earlier decision by a UK court against allowing her husband to assist her in ending her own life contravened certain articles²⁰ of the European Convention on Human Rights (ECtHR 2002).

¹⁷ ECtHR, App. No. 2346/02, 29 April 2002.

¹⁸ Passive euthanasia refers to the interruption or refusal of medical treatment. More specifically, it refers to intentionally allowing a patient to die by withholding artificial life support, such as a ventilator or feeding tube. Unlike active direct euthanasia, the patient's death in the case of passive euthanasia does not necessarily occur immediately. A delayed effect of the undertaken activities is possible. See more in Rachels 1975.

¹⁹ In addition, for patients who are in such a situation, there is the possibility of going to a country that allows assisted suicide for foreigners, such as Switzerland. Considering the frequency of such services being rendered to foreigners, they are increasingly being referred to as a specific type of tourism. In 2015, such a solution was implemented by a patient who was a quadriplegic, after he could not get approval from the local authorities in Germany to carry out assisted suicide. The *Koch v. Germany* case ended up in the European Court, filed by the husband, after the patient committed assisted suicide in Switzerland, claiming violation of Article 8 by the German state. See more in ECtHR, App. No. 497/09, 19 July 2012.

²⁰ More precisely, it concerns Article 2 – Right to life; Article 3 – Prohibition of torture; Article 8 – Right to respect for private and family life; Article 9 – Freedom of thought, conscience, and religion; Article 14 – Prohibition of discrimination. See

The ECtHR rejected this application, emphasizing that in all previous similar cases it was the state's obligation to protect life (Singer 2002, 234–235). Even though the case highlighted the importance of personal autonomy, it also emphasized the impossibility of the right to life to be interpreted as a framework for the derivation of a new right such as the right to die, or as a basis for self-determination in the context of choosing the way of ending one's life. Consequently, no right to death – whether at the hands of a third person or with the aid of a public authority – can be derived from Article 2. While considering paragraph 1 of Article 8, the Court emphasized several aspects of interpretation. The Court pointed out that personal autonomy can include the ability to lead a life according to one's own choice, which can also include the ability to perform activities that are considered to be physically or morally harmful or dangerous to the individual. The extent to which the state can use coercive powers or criminal law to protect people from the consequences of their chosen lifestyle can therefore turn into an infringement of private and personal life. In the sphere of medical treatment, the refusal to accept a certain life-sustaining treatment could inevitably lead to a fatal outcome, but the imposition of medical treatment would interfere with the physical integrity of the patient (ECtHR 2002).

Interference with the state's exercise of rights from Article 8 must be in accordance with the law. In this case, the state's paternalistic encroachment on the right to private life is reflected in the limitation of the patient's options. It must be proportionate to the higher legitimate goal pursued, which is the prevention of wider potential abuse that could occur in the legalization of euthanasia. However, on an individual level, such inflexibility of the law means that the patient is forced to suffer the consequences of their incurable and excruciating illness, at a very high personal cost. Regardless of the above argumentation, the Court concluded that states have the right to specifically regulate general actions that are harmful to human life and, consequently, to limit autonomy in making decisions about the intentional and merciful termination of life. Respecting such freedom of regulation of internal state legislation, the Court unanimously concluded that there was no violation of the abovementioned article or any other article of the Convention.²¹

more in ECtHR 2018.

²¹ There was no violation of Article 3– prohibition of torture, because it is beyond dispute that the respondent country has not inflicted any ill-treatment on the applicant, nor is there any complaint that the applicant is not receiving adequate care from the state medical authorities.

The *Pretty* case was the first case before the ECtHR to consider personal autonomy in the context of healthcare. At the same time, it can be said that due to the nature of the elements included in the case, this was the first case related to euthanasia and similar institutes (ECtHR 2002). Therefore, it is not surprising that the European Court did not make significant exceptions in the interpretation of the case.

4. ACTIVE EUTHANASIA AND THE ECtHR

The ECtHR does not have an instrument whose provisions would be consulted when making decisions on cases concerning the artificial termination of human life by a third party or authority, either at the express or presumed request of the person in question. The two most interesting documents are the Convention on Human Rights and Biomedicine²² (ETS No. 164, 1997) and the *Guide on the decision-making process regarding medical treatment in end-of-life situations*²³, which was drawn up by the Council of Europe Committee on Bioethics (DH-BIO) in the course of its work on patient's rights, with the intention of facilitating the implementation of the principles enshrined in the Convention on Human Rights and Biomedicine. Both documents are fundamentally related to the issue of euthanasia, but they do not directly touch on its foundations.

Therefore, the judgements in such cases before the ECtHR has so far depended on the Court's interpretation of Article 2 of the European Convention. The position of the ECtHR so far has been that there is no right to die, nor is there any reason to derive such a right from the Convention. Contrary to this interpretation of Article 2 of the Convention, the European Court respects the discretionary right of the state to decide on the regulation of euthanasia in national law. For example, the Netherlands, Belgium,

There was no violation of Article 9 – freedom of thought, belief, and religion – considering the fact that the views of the petitioner that reflected a commitment to the principle of personal autonomy cannot be an opinion or belief in the sense of this provision.

There was no violation of Article 14 – the prohibition of discrimination, due to the complexity of the issue and the possibility of seriously endangering the protection of life proclaimed by law there are no compelling reasons not to demand a distinction between persons who are physically capable of committing suicide and those who are not. See more in ECtHR 2002.

²² The ECtHR does not refer to the provisions of this Convention in any case of euthanasia. To see more on the Convention CoE 1997.

²³ See more in CoE 2014.

Luxembourg and, more recently, Spain allow active euthanasia. Considering that the CoE Member States have the freedom to regulate this issue through their internal legislation, it is clear that the cases that appear before the ECtHR and which originate from the such countries can in principle refer to the conformity of the activity and the legislation with the Convention (ECtHR 2022a). One such case of active euthanasia that was recently recorded before the ECtHR is the *Mortier v. Belgium* case.

4.1. *Mortier v. Belgium*²⁴

The applicant in the *Mortier* case was the son of a patient who complained that he and his sister were not aware that their mother had initiated euthanasia proceedings. The complaint also referred to the assumption that the Belgian state did not protect their mother's life because the necessary procedure was not properly implemented and a detailed and effective investigation was lacking. Considering the specificity of the case, the ECtHR was able to assess the compatibility of the planned activities with Articles 2 and 8 of the Convention. Due to the fact that Belgium had legalized active euthanasia, this case did not concern the question of whether there was a right to euthanasia, but rather the conformity of the act of euthanasia carried out in the given case with the Convention. The ECtHR found that there was no violation of Article 2 of the Convention when it comes to ensuring respect for the right to life within the framework of compliance with the Belgian legislative framework that regulates acts and procedures prior to euthanasia. Also, it was established that the conditions under which the act in question was performed were in accordance with the law. Article 2 was violated only in respect of the non-observed procedural positive obligation of the state on account of the post-euthanasia review procedure, specifically the lack of independence of the Federal Board for the Review and Assessment of Euthanasia and the length of the criminal investigation in the case (ADF International 2022).

The Court established that there was no violation of Article 8, given that the doctor in charge had acted in accordance with the law (taking into account the confidentiality of data and professional secrecy while respecting all ethical guidelines). The Belgian Act on Euthanasia requires doctors to discuss a patient's request for euthanasia with their relatives only if that was the patient's wish. In the given case, the patient did not want to have

²⁴ ECtHR, App. No. 78017/17, 4 October 2022.

contact with her children, even though the doctors involved had suggested to the patient to maintain contact with her children. The Court ruled that the doctors had done everything within reason, in accordance with the law, and reiterated that respect for the confidential nature of medical information was an essential principle of the legal systems of all the contracting parties to the Convention. In order to achieve a fair balance between the various interests involved in the case, the Court finally concluded that there had been no violation of Article 8 of the Convention. The right of an individual to decide under what conditions their life should end is one aspect of the right to respect for private life. The decriminalization of euthanasia gave individuals a free choice to avoid ending a life that might be undignified in their opinion. Perhaps it was not possible to derive a right to die from the right to life, but the right to life could not be interpreted as *per se* prohibiting the conditional decriminalization of euthanasia (ECtHR 2022a).

5. PASSIVE EUTHANASIA AND THE ECtHR

In the official document of the ECtHR, *Guide on Article 2 of the Convention on Human Rights – Right to life*, euthanasia is a separate issue from the issue of termination of artificial maintenance (ECtHR 2022a). It can be concluded that according to the view of the ECtHR, the termination of artificial life support is not considered a way of euthanasia in a passive form.

Given the discretionary right of the Council of Europe member states to regulate passive euthanasia through their internal legislation, the Court based its decisions on the specific case and the country of origin. Activities involving passive euthanasia are most often approved in the CoE member countries, but predominantly under the auspices of the patient's rights. Regardless, it would be most accurate to say that a large number of CoE member states allow the patient the right to refuse medical treatment (including the right of refusal of life-sustaining treatment). Even though there are no universally accepted views on the issue of terminating human life in this way, it is typically sufficiently addressed at the level of national legislation. The field becomes more complex with the introduction of consideration of the patient's will. There are almost no legal rules that would adequately regulate the field of termination of human life in this way with guidelines concerning the presence or absence of a clearly expressed will of the patient. Therefore, in each specific case where the issue of the patient's will is disputed, the right to autonomy is interpreted separately, as are the right to private life and the right to life (ECtHR 2022a).

Respecting the wishes of the patient in this area has its limitations. The limiting effects of respecting the patients will directly affect the respect for the personal autonomy, which they are part of. Therefore, it is the task of the ECtHR to define the relationship between respect for the patient's autonomy and how the state's obligations, arising from Article 2 of the Convention, are to be fulfilled in court cases dealing with the issue of the termination of artificial maintenance of human life. To make valid decisions in the field of interruption of medical treatment maintaining human life at the international level, it is necessary to consider several aspects:

1. the state of legal regulation of this issue in the case's country of origin;
2. the presence of a validly expressed will of the patient or their legal representative;
3. the analysis of the patient's comprehensive medical condition, which is reflected in the opinion of the competent medical staff (ECtHR 2022).

Based on this, it is possible to establish what further activities can be undertaken in the patient's best interest.

5.1. *Lambert and Others v. France*²⁵

Vincent Lambert, the 42-year-old former nurse, had sustained severe brain damage in a car accident in 2008. The consequence of the resulting head injury was tetraplegia and complete dependence on other people's care and help. He had been living in an irreversible vegetative state and had been on artificial nutrition and hydration through a gastric tube for many years. Considering the patient's condition, the decision to stop the medical treatment was made by the doctor in charge. This decision, which initiated the collective procedure provided by the Leonetti Act (the law on patients' rights and end-of-life issues, dated 22 April 2005), came into effect in April 2013. A month after, the applicants turned to the emergency judge of the Administrative Court to protect fundamental freedom and sought an injunction against the hospital. The urgent-application judge granted their requests (this decision was based on the fact that there were no advance directives by Vincent Lambert and that his parents had not been informed about the decision). After that, the doctor in charge consulted doctors

²⁵ ECtHR, App. No. 46043/14, 5 June 2015.

of various specialties on several occasions about the case and met with family members several times. In late 2013, he called a meeting of all the doctors and the care team members. Almost everyone present, including the patient's wife and six of his eight siblings, was in favor of withdrawing treatment. In early 2014, the doctor explained his repeated decision to the Administrative Court. It was pointed out that the decision was made based on the established futility of the treatment and on the assumption that the patient would have agreed with such a decision had he been able to express it. The patient's parents and some family members appealed to the same Court to prevent the implementation of the doctor's decision. The Administrative Court suspended the decision primarily because of the lack of the formal expression of the patient's wish and because of the fact that as long as the treatment did not cause any stress or suffering, it could not be characterized as futile or disproportionate. In three applications Rachel Lambert, François Lambert, and the Reims University Hospital appealed that ruling to the judge for emergency applications of the Conseil d'État. The Conseil d'État overturned the judgment of the Administrative Court and dismissed the applicants' claims primarily based on medical reports.

The patient's parents, half-brother, and sister submitted a request to the European Court against the verdict of the local authorities, pronounced on 24 June 2014. The essence of the appeal was based on the assumption that the verdict declaring the doctor's decision to be legal violated Article 2 of the European Convention. On 5 June 2015, the ECtHR (Grand Chamber judgment) found that there was no violation of Article 2 in the given case. The Court's position was that the judgment of the national authorities was adequately made, based on several conclusions. One of them was the possibility previously given to Member States to regulate such issues concerning the end-of-life at their discretion. In addition, the ECtHR found that the legal framework of the state (specifically, the 2005 law based on which the decision was made) was clear and precisely regulated, which created an adequate basis for the local authorities to determine whether the decision was made in accordance with the law. The ECtHR also pointed out the fact that the legally stipulated process of making medical and judicial decisions predicted was compatible with the articles of the European Convention. Consequently, there was no violation of Article 2 of the Convention (ECtHR 2015).²⁶

²⁶ A similar case before the ECtHR was *Afiri and Biddarri v. France*. The case related to the doctor's decision to end the futile life support, assisted by medical devices, of a fourteen-year-old patient, with which the parents did not agree. In the appeal, it was stated that the parents should be involved in the decision-making process, in line with the concept of parental responsibility. The ECtHR dismissed the appeal on

6. CONCLUSIONS

Since 2002, the European Court of Human Rights has issued a large number of judgments and decisions in cases involving the intentional termination of human life. Conclusions about a certain shift in the direction of consideration of euthanasia cases before the ECtHR, concerning the right to life, could be reached by comparing the presented Court cases. In the *Pretty* case, the ECtHR did not conclude that preventing the patient from carrying out the activities that she considered a way to avoid suffering related to an inhumane and undignified life constituted an interference with the patient's right to respect for private and personal life, as prescribed by Article 8 of the European Convention on Human Rights. Subsequently, the ECtHR allowed for certain exceptions to be made in these cases. The conclusions presented in the *Haas v. Switzerland* case focused on the need for a holistic approach to the Convention. The potential threat to Article 8 was therefore inevitably linked to the items from Article 2. However, in the *Lambert and Others v. France* case, the position of the ECtHR shows that the reverse situation is possible and desirable. This further means that a potential violation of Article 2 would lead to the consideration of Article 8 and the right to personal autonomy that accompanies it.

Today, the focus of medical ethics and patient rights is directed towards individualism in which the patient's will is of primary importance. The logical consequence of this point of view is visible in only a few countries where all forms of euthanasia and similar legal institutions exist, including assisted suicide. Passive euthanasia is more widely present, under the umbrella of other permissible human rights. Paradoxically, this situation is the result of limiting personal autonomy regarding euthanasia. The Council of Europe Member States are allowed wide discretion to decide on the manner of internal regulation on the issue of euthanasia and similar legal institutes. The consequence of the abovementioned is the diversity of legal solutions to these issues.²⁷ It cannot be expected that the European Court will radically change its position and prohibit legal solutions and practices that allow such measures. The current situation reflects the sovereign position of national legislation on euthanasia, which the opinion of the ECtHR is subject to. With

the grounds of the violation of Article 2 of the Convention, finding that, despite the parents' disagreement with the decision, all conditions were met in the process of its adoption. See more in ECtHR, 1828/18, 25 January 2018.

²⁷ Some European states have legalized euthanasia and physician-assisted dying (e.g., the Netherlands, Belgium, Luxembourg) and many of them allow individuals to refuse medical treatment, or to order a lethal drug and to shorten their life (Germany, France, Switzerland). See more in *Euronews* (Hurst, Bello 2022).

the increasing occurrences of Court cases and the development of legal rules on euthanasia, this area will produce a certain body of standards. The future legal formulation of euthanasia will certainly require less freedom of the states in this domain, which will create a suitable ground for wider decriminalization or legalization of certain forms of action related to the artificial termination of human life.

REFERENCES

- [1] ADF International. 2022. Europe's top human rights court rules: Belgium violated right to life in euthanasia case. <https://adfinternational.org/tom-mortier-ruling/>, last visited 21 February 2023.
- [2] Alves, Ana Isabel Calejo. 2022. *The margin of appreciation doctrine and the right to life: the article 2 of the ECHR*. Database: RCAAP.
- [3] Bosshard, Georg, Susanne Fischer, Walter Bär. 2002. Open regulation and practice in assisted dying: How Switzerland compares with the Netherlands and Oregon. *Swiss Medical Weekly* 132.37-38: 527-534.
- [4] Boyle, Kevin. 1985. The concept of arbitrary deprivation of life. *The right to life in international law*. Brill Nijhoff, 221-244.
- [5] Center for Health Ethics. n.d. Euthanasia. <https://medicine.missouri.edu/centers-institutes-labs/health-ethics/faq/euthanasia>, last visited 15 February 2023.
- [6] Council of Europe. 1997. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. <https://rm.coe.int/168007cf98>, last visited 10 January 2023.
- [7] Council of Europe. 2003. Euthanasia. <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10255&lang=EN>, last visited 26 February 2023.
- [8] Council of Europe. 2014. Guide on the decision-making process regarding medical treatment in end-of-life situations. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168039e8c5>, last visited 23 February 2023.
- [9] European Court of Human Rights. 2022. End of life and the European Convention on Human Rights. https://www.echr.coe.int/documents/fs_euthanasia_eng.pdf, last visited 27 February 2023.

- [10] European Court of Human Rights. 2018. European Convention on Human Rights. https://www.echr.coe.int/documents/convention_eng.pdf, last visited 5 April 2023.
- [11] European Court of Human Rights. 2022a. Guide on Article 2 of the European Convention on Human Rights – Right to life. https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf, last visited 22 February 2023.
- [12] Fontalis, Andreas, Efthymia Prousalis, Kunal Kulkarni. 2018. Euthanasia and assisted dying: what is the current position and what are the key arguments informing the debate?. *Journal of the Royal Society of Medicine* 111.11: 407–413.
- [13] Griffith, Richard. 2021. Article 8 of the European Convention on Human Rights and assisted dying. *BJN-LEGAL* Vol.30. Issue 15.
- [14] Hurst, Luke, Camille Bello 2022. Euthanasia in Europe: Where is assisted dying legal? *Euronews*, 10 December.
- [15] McKinney, Allyson. 2022. The right to life as an essential human right. *Christian Century*. Vol. 139 Issue 18, 68–72.
- [16] Rachels, James. 1975. Active and passive euthanasia. *Bioethics: An Introduction to the History, Methods, and Practice*, 77–82.
- [17] Singer, Peter. 2002. Ms B and Diane Pretty: a commentary. *Journal of Medical Ethics* 28(4): 234–235.
- [18] Tomuschat, Christian, Evelyne Lagrange, Stefan Oeter. 2010. *The Right to Life*. Leiden: Brill Nijhoff.
- [19] Tönnies, Monika. 2002. Is there and absolute right to life? Comprehension and bioethics. *Pflege aktuell / DBfK-Verlag*, 217–9.

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