MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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Choosing How and When to Die in Accordance with the European Convention on Human Rights

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As technology becomes more advanced so does our capacity to sustain life artificially. We are now able to stay alive in situations that would have led to death in the past. This had led to debates on the topic of assisted dying both within ethics and law. While some countries have legalized assisted suicide and/or active voluntary euthanasia, most European countries have not. Debates over the differences between active and passive euthanasia persist as well, and some countries authorize different forms of passive euthanasia despite criminalizing active forms of assisted dying.

The first case regarding assisted suicide was brought to the European Court of Human Rights (the ECtHR or the Court) by Mrs. Diane Pretty, who wished to commit suicide by the help of her husband. Assisted suicide is criminalized in the United Kingdom, which resulted in Mrs. Pretty complaining to the ECtHR under several articles of the European Convention on Human Rights (the Convention). No violations of any articles were found in the case; however, it was the first case where the ECtHR mentioned the possibility of the existence of a right to choose how and when to die under article 8 of the Convention.

Since the *Pretty* case there have been several assisted dying cases brought before the ECtHR and the existence of a right to choose how and when to die has been established. This thesis examines the extent an individual can choose how and when to die in accordance with the Convention by examining the case-law of the ECtHR and writings of scholars, as well as exploring questions that have yet to be addressed by the Court. While the ECtHR addresses the extent of the right to choose how and when to die in a rather vague language, with a seeming reluctance to address the substantive issues regarding the right, some conclusions can be drawn. The conflict between the right to life and the autonomy of the individual has been addressed in many end-of-life cases, demonstrating that States are only obliged to prevent suicide in a limited amount of circumstances.

Due to the wide margin of appreciation enjoyed by the States in end-of-life issues, States are rather free in their choice on how to regulate assisted dying. The emphasis on the importance of an autonomous decision and a legitimate consent is however emphasised throughout the case-law. Therefore, if States choose to authorize different forms of assisted dying, they must ensure that the individual wishing to die has decision-making-capacity and has given their legitimate consent to the practice. States that authorize assisted dying must ensure the protection of the vulnerable, but whether States can set blanket prohibitions on assisted dying remains debated, as this may be discriminatory towards disabled individuals. When it comes to passive euthanasia, the previous wishes of the patient are to be crucial in the decision-making process, whether those wishes were made orally or in written form. The wishes of parents may also play a role when the patient is a minor, but doctors may not be obliged to act in accordance with those wishes as the best interests of the child may take priority.

Key words: European Convention on Human Rights, assisted dying, refusing life-sustaining treatment, right to life, autonomy, withdrawing life-sustaining treatment

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List of abbreviations

ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
PACE	The Parliamentary Assembly of the Council of Europe
DPP	The Director of Public Prosecutions
ANH	Artificial nutrition and hydration
LST	Life-sustaining treatment

1. Introduction

1.1. Background

Euthanasia and assisted suicide are topics that are frequently debated within ethics and law. The Netherlands was the first Western country to authorize some forms of assisted suicide and euthanasia.[1] Since then, more Western countries have authorized some forms of assisted dying, among which are Belgium, Luxemburg and Switzerland.[2] In 2001, the first case regarding assisted suicide was examined by the European Court of Human Rights (ECtHR or "the Court").[3] Since then the ECtHR has decided on several other end-of-life cases.[4] On the one hand it has been established that Member States of the Council of Europe have an obligation to protect the right to life,[5] but on the other hand the ECtHR has recognized that a right to decide how and when to die is an aspect the scope of article 8 in the European Convention on Human Rights (the ECHR or the Convention).[6]

1.2. Research aim and research questions

The aim of this thesis is to examine to what extent individuals can to choose the time and manner of their deaths in accordance with the ECHR. In order to answer this, the following questions will have to be examined; What are the competing rights and interests under the ECHR in relation to assisted dying? How have relevant articles of the Convention been interpreted by the ECtHR in end-of-life cases? Are States obliged to provide equal opportunity to commit suicide for all individuals? What is the role of consent in the decision-making process in end-of-life situations?

1.3. Methodology, sources and limitations

End-of-life subjects included in this thesis will be different forms of euthanasia and assisted suicide, while, in the interest of space, the topic of palliative care will be included only to a limited extent. The ECHR will be the basis for this thesis. Additional protocols to the Convention will be

[1] Paterson, Craig, *Assisted Suicide and Euthanasia: A Natural Law Ethics Approach*, 1st edn, Hamphshire, Ashgate, 2008, p. 1
[2] Pareek, KK, Narsimulu, G, *Medicine Update & Progress in Medicine 2019*, New Delhi, Jaypee Brothers Medical Publisher, 2019, p. 1336
[3] *Pretty v. the United Kingdom,* no. 2346/02, § 88, ECHR 2002-III
[4] See 'European Court of Human Rights, End of Life and the European Convention on Human Rights', https://www.echr.coe.int/Documents/FS_Euthanasia_ENG.pdf, January 2018, (End of life and the ECHR Factsheet), accessed 16 December 2019
[5] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, (ECHR), article 2
[6] *Haas v. Switzerland,* no. 31322/07, § 51, ECHR 2011

excluded, as relevant case law is based on provisions in the original treaty. The interpretations of the Convention in relation to the research questions of this thesis will be examined. The focus will be largely on case-law, namely on how the ECtHR has decided on the end-of-life issues that have been brought to the Court. Studying the case law of the ECtHR will give guidance as to which articles are relevant and how to interpret them with regards to assisted suicide and euthanasia. Some national cases will be included as well as opinions of legal scholars in order to further analyse alternatives in interpretation with regards to relevant articles as well as to questions that have not yet been addressed by the ECtHR. Some soft law instruments will also be included, as they can influence the practice of the organs of the Council of Europe and the member states, despite not being binding law.[7]

Besides the judgements of the ECtHR, the thesis will be to a great extent based on writings of scholars such as Elizabeth Wicks, Gregor Puppinck and Claire de la Hougue. The most significant influence from scholars in the thesis will be the writings of Wicks, as her research is largely focused on human rights and health care law. She has written numerous books and articles on the topic, many of which are focused on end-of-life situations.[8] There have been new cases in the end-of-life sphere since many of Wick's analyses. Some areas within the end-of-life sphere have been analysed in depth in more recent years. An example of this is Black's analyses on refusing life-prolonging treatment,[9] which will be discussed in this thesis. A broader scope of end-of-life situations will be exammined in this thesis, including forms of passive euthanasia as well as active forms of assisted dying. This will allow comparisons to be made between the rights related to different forms of assisted dying and refusals to life-sustaining treatment (LST).

1.4. Terminology

It is challenging to find consistent definitions of terms related to end-of-life situations, as different terms are often used interchangeably by some, while others make a clear distinction between them. With the purpose of giving a general overview of the key terms that will be used in this thesis; definitions will be given below to the most reoccurring to the terms.

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[7] Grabenwarter, Christoph, 'The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights', (2014), 1, Elte Law Journal, 101, p. 114

[8] See University of Leicester, 'Elizabeth Wicks', (*University of Leicester*) <https://www2.le.ac.uk/departments/law/people/elizabeth-wicks>, accessed 28 January 2020

[9] Black, Isra, 'Refusing Life-Prolonging Medical Treatment and the ECHR', (2018), 38 (2), Oxford Journal of Legal Studies, 299, p. 317

In this thesis *active euthanasia* refers to the physician or another individual administering the lethal substance to the patient.[10]

Physician-assisted suicide, sometimes referred simply as *assisted suicide*[11] can be described as a physician providing the patient with the means to commit suicide while it is the patient themselves who will ultimately use it to commit suicide. [12] Alternative terms excluding the word suicide, such as *physician-assisted death*, are also advocated by those who deem the word "suicide" to be biased and too emotionally charged.[13] Some include assisted suicide under active euthanasia,[14] while others argue that it should be differentiated from euthanasia as it does not involve another person directly killing the patient.[15] The distinction between assisted suicide and euthanasia is not always clear in legislation either, as Switzerland is the only European country to clearly differentiate the two acts in its legislation.[16]

Passive euthanasia is the withdrawing or withholding of LST.[17]

The two types of euthanasia, active and passive, can further be divided into voluntary, involuntary and nonvoluntary forms of it.

Voluntary euthanasia is when euthanasia is performed on a patient who requests it. [18]

Involuntary euthanasia is when euthanasia is performed on a patient who opposes it.[19]

[10] Amresh, Shrivastava, Kimbrell, Megan, Lester, David, *Suicide From a Global Perspective: Vulnerable Populations and Controversies*, 2nd edn, New York, Nova Science Publishers, Inc, 2012, p. 152
[11] While researching for this thesis it became clear that assisted suicide and physician-assisted suicide are often used interchangeably, see for example Lo, Bernard, *Resolving Ethical Dilemmas A Guide for Clinicians*, 4th edn, Philadelphia, Wolters Kluwer/Lippinicot Williams & Wilkins, 2009, p. 151-152
[12] Pareek, KK, Narsimulu, G, *Medicine Update & Progress in Medicine 2019*, New Delhi, Jaypee Brothers Medical Publisher, 2019, p. 1336
[13] Lo, (n 11), p. 152
[14] See Caldwell Stanford, Carla, Connor, Valarie J., *Applied Law and Ethics for Health Professionals*, 2nd edn, Burlington, Jones & Bartlett Learning, 2019, p. 129
[15] Sperling, Daniel, *Suicide Tourism*, 1st edn, Oxford, Oxford University Press, 2019, p.15
[16] Puppinck, Gregor, de la Hougue, Claire, 'The Right to Assisted Suicide in the Case Law of the European Court of Human Rights', (2014), 18 (7-8), *The International Journal of Human Rights*, p. 736
[17] Pozgar, George D., *Legal and Ethical Issues for Health Professionals*, 5th edn, Burlington, Jones & Bartlett Learning, 2019, p. 102
[18] Lo, (n 11), p. 151
[19] Ibid

Nonvoluntary euthanasia is when euthanasia is performed on a patient lacking decision-making capacity.[20]

Assisted dying will be used in this thesis to describe any of the forms of assisted suicide or euthanasia described above.

The following is the definition of *palliative care* used the World Health Organization:

> Palliative care is an approach that improves the quality of life of patients and their families facing the problem associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual[21]

2. Relevant rights and interests of the ECHR

2.1. Introduction to the ECHR

The ECHR, which entered into force in 1953, was the first comprehensive human rights treaty formed after the Second World War.[22] The Convention protects mainly civil and political rights.[23] The original treaty contains 59 articles[24], but it has been complemented by protocols, six out of which contain substantial rights.[25] As stated above, additional protocols will not be addressed in this thesis as the end-of-life case law has regarded provisions in the original treaty.

Individuals of State Parties of the ECHR have the right under article 34 in the Convention to lodge a complaint to the ECtHR when they claim their rights have been violated by the State.[26] In the case of *Handyside v. the United Kingdom* [27] the Court established the principle of the margin of appreciation. This margin of appreciation is connected to the principle of subsidiarity,[28] means that national authorities have a primary task of ensuring the rights and liberties protected by the Convention. [29] When addressing article 10 in the case the Court stated that States do not have "an

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[20] Ibid
[21] World Health Organization, 'WHO definition of palliative care',(28 January 2012 *World Health Organization*), <https://www.who.int/cancer/palliative/definition/en/>, accessed 23 December 2019
[22] Schabas, William A., *The European Convention on Human Rights: A Commentary*, 1st edn, Oxford, Oxford University Press, 2015, p. 1
[23] Bernadette, Rainey, Wicks, Elizabeth, Ovey, Clare, *Jacobs, White, and Ovey: The European Convention on Human Rights,* 7th edn, Oxford University Press, Oxford, 2017, p. 7 and 9
[24] ECHR, (n 5)
[25] Schabas, (n 22), p. 11
[26] ECHR, article 34, (n 5)
[27] *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24
[28] Brems, Eva, 'Positive Subsidiarity and Its Implications for the Margin of Appreciation Doctrine', (2019), 37(3), Netherlands Quarterly of Human Rights, 210, p. 210-211
[29] *Handyside*, para. 48, (n 27)

unlimited power of appreciation"[30] and that the Court, together with the Commission, "is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10"[31]

2.2. The right to life

2.2.1. Generally about the right to life under the Convention

The right to life, found in article 2 in the Convention,[32] has been described by the ECtHR as "one of the most fundamental provisions in the Convention".[33] It is nonetheless not an absolute right.[34] The article states that:

> 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) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.[35]

Derogations from the Convention during times of emergency are addressed in article 15, where it is stated that the Convention allows "[n]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war [...]".[36]

The right to life under the ECHR includes both negative and positive obligations on States. Negative obligations require States to refrain from a specific type of action, while positive obligations require States to take measures to ensure a certain outcome.[37] The Court has interpreted article 2 (1) to mean that States have an obligation "not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction".[38] This can include in some circumstances a positive obligation to take measures to

[30] Ibid, para. 49
[31] Ibid
[32] ECHR, article 2, (n 5)
[33] *McCann and Others v. the United Kingdom,* 27 September 1995, § 147, Series A no. 324
[34] Park, Ian, *The Right to Life in Armed Conflict*, 1st edn, Oxford, Oxford University Press, 2018, p. 32
[35] ECHR, article 2, (n 5)
[36] Ibid, article 15 (2)
[37] Akandji-Kombe, Jean-François, Council of Europe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*, January 2007, Human rights handbooks, No. 7, p. 11
[38] *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, Reports of Judgments and Decisions 1998-III

protect the right to life of an individual from life-threatening criminal actions of another individual.[39] The Court has stated that "not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing".[40] The requirements the Court has set up for State authorities regarding the positive obligations to protect the right to life are that they "knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[41] The Court has also affirmed that States' positive obligations under article 2 includes the requirement to

> make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable.[42]

2.2.2. The difficulty of defining life and death

Due to advances in medical technology the question of when life ends no longer has a clear-cut answer. In the past a person has normally been considered dead once they stop breathing or when their heart stops beating. Death can no longer be defined that simply, as a patient in that state can now be revived with the help of modern medical technology. The traditional definition of death may thus be outdated.[43] Many different suggestions have been proposed on what criteria must be fulfilled in modern times to determine that a person has died. These suggestions have included for example cessation of all activity of the whole brain, cessation of activities of the higher brain and brain stem death.[44] The definition of death can depend on several different factors such as culture and religious beliefs.[45]

Article 2 in the Convention states that "[e]veryone's right to life shall be protected by law"[46] , but when life begins, or ends, is not defined in the ECHR. Neither the former European Commission of Human Rights (the Commission), nor the Court has given a clear definition on life.[47] The

[39] *Osman v. the United Kingdom*, 28 October 1998, § 115, Reports of Judgments and Decisions 1998-VIII
[40] Ibid, § 116
[41] Opuz v. Turkey, no. 33401/02, § 129, ECHR 2009
[42] *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I
[43] Wicks, Elizabeth, *The Right to Life and Conflicting Interests*, 1st edn, Oxford, Oxford University Press, 2010, p. 9
[44] Ibid, p. 9-11
[45] Ibid, p. 13-14
[46] ECHR, (n 5), article 2
[47] Korff, Douwe, Council of Europe, *The right to life: A guide to the implementation of Article 2 of the European Convention on Human Rights*, November 2006, Human rights handbooks, No. 8, p. 8

Court's reluctance to define the term "life" is evident in *Vo v. France*, a case regarding an unborn child. It held that determining whether an unborn child has the right to life fell within the margin of appreciation of States.[48]

2.2.3. Application of article 2 at the end of life

One might argue that when a person is approaching the end of their life, the right to life is not important to protect compared to an individual whose life is further away from ending. Wicks, however, argues that the length of the life expectation does not affect the protection of the right to life. On the contrary, she argues that when an individual's life is nearing the end the right to life becomes more important, as this may be the most valued days of that individual's life. It is also at the end of one's life when the right to life is often the most threatened. This is especially true when life is coming to an end due to illness or injury, both of which in and of themselves cause a threat to life, but also due to the vulnerable position the patient is in and the added medical treatment.[49]

Wicks presents two main arguments for why a person who will die does not have a weaker protection of the right to life. The first argument is the difficulty of assessing the certitude of a coming death. The second argument she brings forward concerns the question of why a person approaching death would be less entitled to protection of life than someone who is not. All humans will die at some point and any decision of a certain point in time where a person is no longer entitled to enjoy human rights is inevitably an arbitrary one.[50]

Another relevant issue is the situation of patients who are unconscious, mentally incapacitated or lack self-awareness. Wicks argues that such patients enjoy the protection of the right to life as well. She describes the right to life as starting the moment an individual is considered a viable human being,[51] and as prevailing until the moment of brain death. Nonetheless, this does not mean that life will always be preserved regardless of the circumstances.[52]

[48] *Vo v. France [GC],* no. 53924/00, § 82, ECHR 2004-V
[49] Wicks, Elizabeth, 'Challenging some myths about the right to life at the end of life. 1: Not an absolute right', (2011), 6 (4), Clinical Ethics, 167, p. 167
[50] Wicks, Elizabeth, 'Challenging some myths about the right to life at the end of life. 2: Reinstating the Ethically Excluded', (2012), 7(1), Clinical Ethics, 24, p. 26
[51] The issue regarding when life begins will only be mentioned briefly in this paper, as it is not relevant to the discussion of the paper.
[52] Wicks, (n 49), p. 167-168

2.2.4. Circumstances that give rise to a positive obligation to prevent suicide

The positive obligation of States to protect the right to life under article 2 in the Convention can extend to a positive obligation to prevent suicide in certain situations. This obligation applies when an individual is under the control of a State, for example when they are a prisoner. What is expected from authorities in such a situation is that, if they know or ought to know that an individual is at a risk of suicide, they do everything that can reasonably be expected of them in order to prevent it.[53]

The case of *Keenan v. the United Kingdom*[54] concerned the issue of suicide committed by a schizophrenic individual who was detained.[55] The Court found no violation of article 2 in the case, as it held that the authorities had not acted negligently with regard to the suicide risk of the prisoner.[56] Daniel Rietiker interprets the case as establishing that the obligation to prevent suicide is restricted and dependent on the circumstances of the case. He argues furthermore that even if not completely apparent in the case, the national authorities were forced to consider other rights besides the right to life that the prisoner had under the Convention. According to Rietiker, they had to consider for example rights under article 8, as they could have violated the prisoner's rights had they organised a permanent supervision of the prisoner.[57] The obligation for States to prevent suicide when an individual is under its control has also applied in situations beyond prisons,[58] such as during a compulsory military service.[59]

Wicks argues that the obligation on States to prevent suicides of detained individuals is due to the restricted autonomy of such individuals, in addition to detention often generating depression and suicidal thoughts. The prisoner's lives are at a greater risk compared to those not detained. [60] In the *Keenan* case the Court stated that

> The prison authorities, similarly, must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing on personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case.[61]

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[53] Wicks, (n 43), p. 189
[54] *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-II
[55] Ibid, para. 10-14
[56] Ibid, para. 98
[57] Rietiker, Daniel, 'From Prevention to Facilitation - Suicide in the Jurisprudence of the ECtHR in the light of the Recent Haas v. Switzerland Judgment', (2012), 25, Harvard Human Rights Journal, 85, p. 101
[58] Wicks, (n 43), p. 190
[59] *Abdullah Yılmaz v. Turkey*, no. 21899/02, 17 June 2008
[60] Wicks, (n 43), p. 191
[61] *Keenan*, (n 54), para. 92

According to Wicks' interpretation of this paragraph, this is a clear indication that it is necessary and reasonable in some situations to infringe on a suicidal prisoner's personal autonomy to save their life.[62] Even so, Wicks argues that autonomy is not completely irrelevant. Despite the cases where the Court has found a violation when a State has failed to prevent suicide, Wicks argues that if an individual who is mentally competent makes the decision to end their life, States are under no obligation to prevent that individual from committing suicide. This is, according to her, because the positive obligation to protect the right to life does not apply when there is a substantial conflicting interest, such as an autonomous decision to commit suicide.[63] The topic of autonomy as a conflicting interest to the right to life in end-of-life cases will be addressed further in chapter 3.3.

2.2.5. The Parliamentary Assembly of the Council of Europe on assisted dying

The Parliamentary Assembly of the Council of Europe (PACE) has commented on the topic of euthanasia on a few occasions. In 1976 the PACE stated in Recommendation 779 (1976) that a doctor "has no right, even in cases which appear to him to be desperate, intentionally to hasten the natural course of death".[64] In 1999 the PACE stated in paragraph 9 of Recommendation 1418 that it upholds "the prohibition against intentionally taking the life of terminally ill or dying persons".[65] It also acknowledged that the right to life of terminally ill and dying individuals is guaranteed under article 2[66] and that the wish of the patient to die does not constitute "any legal claim to die at the hand of another person" [67] and that it "cannot of itself constitute a legal justification to carry out actions intended to bring about death".[68] Later, in 2012, the PACE stated in Resolution 1859 which regarded the protection of human rights and dignity that "[e]thanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited."[69]

[62] Wicks, (n 43), p. 191
[63] Ibid, p.193-194
[64] Parliamentary Assembly Origin - Assembly debate on 28 January 1976 (23rd Sitting) (see Doc. 3699, report of the Committee on Social and Health Questions). Text adopted by the Assembly on 29 January 1976 (24th Sitting), para.
[65] The Parliamentary Assembly of Council of Europe, Recommendation 1418 Protection of the human rights and dignity of the terminally ill the dying, adopted by the Assembly on 25 June 1999 (24th Sitting), para. 9 (c)
[66] Ibid, para. 9.3.1.
[67] Ibid, para. 9.3.2.
[68] Ibid, para. 9.3.3.
[69] The Parliamentary Assembly of Council of Europe, Resolution 1859 Protecting human rights and dignity by taking into account previously expressed wished of patients, adopted by the Assembly on 25 January 2012 (6th Sitting)

2.2.6. Active versus passive euthanasia regarding article 2

One question that arises about a State's obligation to protect life in end-of-life situations, is whether there is a difference between killing and letting die. From a philosophical perspective, one might argue that there is a difference. Hugh V. Mclachlan takes this position. He argues that omission cannot cause something to happen. He argues that an omission by a doctor to for example prescribe antibiotics to a patient may indirectly lead to death, and can be immoral, but is not active killing.[70] He compares it to a situation with a drowning child. He argues that everyone has both a moral and a legal responsibility not to drown a child, but we do not have the same type of responsibility to save a drowning child. To drown a child would be considered murder, while not saving a drowning child is not, albeit the person who failed to save the child may be guilty of failing to comply his duty of care. He argues that killing and letting die are different both from a moral and a legal presentative and thus active and passive euthanasia should be differentiated.[71]

The opposing opinion is that omissions do cause death. E. Gerald and S. Wilkinson argue that the omission to save a drowning child and the omission of a doctor to prescribe antibiotics to a patient who needs them in order to stay alive does cause death. They argue that both permissible and impermissible omissions cause death. To illustrate their argument, they take as an example a scenario where 10 patients are receiving LST. If it is in the best interest for three of them to die, while for the other patients it is not, then switching off the treatment is nevertheless the cause of death for all patients. They also address the argument that in passive euthanasia of a terminally ill patient it is the disease that kills the patient rather than an action. They dismiss the argument by holding that this argument would have to apply to active euthanasia as well, since in the case of a terminally ill patient who requests active euthanasia, the underlying cause is the disease. It does not therefore address the issue of how passive euthanasia supposedly does not cause death.[72]

The ECtHR has addressed this issue to some extent in the case of *Lambert and others v. France*,[73] which concerned the withdrawal of LST of a patient. [74] This case of passive euthanasia which will be presented in more detail in chapter 4.1.1. It stated that it "stresses that the issue before it in the

[70] McLachlan, Hugh V., The ethics of killing and letting die: active and passive euthanasia, (2008), 34, Journal of Medical Ethics, 636, p. 637
[71] Ibid, p. 637-638
[72] Garrard, E., Wilkinson, S., 'Passive euthanasia', (2005), 31(2), Journal of Medical Ethics, 64, p. 66
[73] *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015 (extracts)
[74] Ibid, para. 3

present case is not that of euthanasia, but rather the withdrawal of life-sustaining treatment".[75] This can be perceived as the Court wanting to draw a clear distinction between the withdrawing of LST, i.e. letting the patient die from his condition, and providing a patient with the means to end their own life, i.e. ending the life of the patient in a more direct way. The majority in the case therefore seems to have taken a similar approach as Mclachlan.

The partly dissenting judges in the case disagreed on the fact that the withdrawal of LST from the patient would not be one of euthanasia. The partly dissenting judges state the following:

> We agree that, conceptually, there is a legitimate distinction between euthanasia and assisted suicide on the one hand, and therapeutic abstention on the other. However, because of the manner in which domestic law has been interpreted and the way it has been applied to the facts of the case under examination, we strongly disagree with what is stated in paragraph 141 of the present judgment. The case before this Court is one of euthanasia, even if under a different name.[76]

The partly dissenting judges seem to take an approach similar to Gerald and Wilkinson, as they hold that withdrawing the LST "results in precipitating death *which would not otherwise occur in the foreseeable future".*[77] They emphasize that the treatment in the case was of ordinary care and that in lack of the consequence will inevitably be his death. They add that

> [o]ne may not will the death of the subject in question, but by willing the act or omission which one knows will in all likelihood lead to that death, one actually intends to kill that subject nonetheless. This is, after all, the whole notion of positive *indirect* intent as one of the two limbs of the notion of *dolus* in criminal law.[78]

The partly dissenting judges in the *Lambert* case therefore disagreed with the definition of euthanasia implied by the majority.

In analysing a domestic case from the United Kingdom concerning the withdrawal of artificial nutrition and hydration (ANH) from a patient in a permanent vegetative state, Emily Jackson notes that the domestic law seemingly recognizes that sometimes it is not in the patient's best interests to be kept alive in a permanent vegetative state. She raises an important question, namely why the law allows for the slow death by dehydration and starvation of a patient, while condemning directly killing a patient in a faster manner through a lethal injection.[79] The same question could be posed regarding the French law, as the direct killing of Vincent Lambert would

[75] Ibid, para. 141
[76] *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015 (extracts), Joint Partly Dissenting Opinion of Judges Hajiyev, Šikuta, Tsotsoria, de Gaetano and Griţco, para. 9
[77] Ibid, para. 3
[78] Ibid, para. 10
[79] Jackson, Emily, Keown, John, *Debating Euthanasia,* 1st edn, Oxford, Hart Publishing Ltd, 2011, p. 36-37

have been against the domestic law, while starving and dehydrating him to death was authorized.[80] The majority of the Court agreed with the French government, separating cases of direct killing and withdrawing LST.

Jackson addresses a possible counter argument to the view that withdrawing LST should not be separated from direct killing. The counter argument is that withdrawing the LST does not kill the patient, but it is rather the underlying condition that ends up killing the patient. Jackson is not convinced by this argument, as that would mean that doctors may stand back and watch a patient die from an easily treatable condition, which is normally not acceptable behaviour from doctors. She takes the example of a patient entering a hospital severely dehydrated and doctors deciding not to help despite there being a simple solution to the condition. Could the doctors really justify their actions by saying that it was the underlying condition, namely severe dehydration, that killed the patient rather than their omission to act? [81] As Jackson argues, withholding or withdrawing LST can only be acceptable when letting the patient die is acceptable. In other words, it is not the act of withdrawing LST in itself that is an acceptable way of killing someone, but it is rather the circumstances the patient is in that makes it acceptable to let them die.[82]

Jackson is in general critical of the distinction between killing and letting die. While she recognizes that there are some differences between withdrawing LST and injecting a lethal substance into a patient, she does not hold them to be significant enough to justify the bearing of "the moral weight that is placed upon them by law".[83] If taking a terminal cancer patient who no longer benefits from chemotherapy as an example, the alternative of withdrawing treatment instead of a lethal injection is a slower and perhaps more painful and distressful death. Jackson poses the question of why withdrawing the treatment would be the preferable solution when the end result in both scenarios is the same, death.[84]

As seen above, one argument for the alternative of withdrawal of treatment is that the underlying condition is what causes the death, whereas in the case of a lethal injection it is the injection that causes the death of the patient. However, as Jackson explains, this is not necessarily the case. If a

[80] See footnote 472
[81] Jackson, Keown, (n 79), p. 36-37
[82] Ibid, p. 37-38
[83] Ibid, p. 39
[84] Ibid

terminally ill cancer patient receives ANH, and this treatment is withdrawn, its it is not the cancer that kills the patient, but rather starvation and dehydration.[85]

Another possible argument could be that the difference lies on the moral distinction in taking a positive action to cause harm versus failing to prevent harm from happening. As Jackson notes, this may indeed be a valid argument in some cases. A person who does not donate to an organization that helps save lives could hardly be accused of murder, while someone poisoning a baby's milk and thereby causing that baby's death could reasonably be held morally accountable for the death of the baby. Jackson argues however that this would not be the case in the terminally ill cancer patient. The alternatives of a lethal injection versus withdrawing ANH are not the same as in the previously expressed example. She is not convinced that there is any moral difference between a doctor injecting the patient with a lethal injection versus the doctor withdrawing the treatment. Again, it is not the way that the doctor causes the death that is acceptable, but rather the death of the patient due to circumstances that must be acceptable. Jackson holds that the way the patient is allowed to die should promote dignity as well as reflect the values held by the patient during his or her lifetime.[86]

When considering the argument presented by Jackson, it could be seen as rather odd how the Court, as well as the French law, seem to separate assisted suicide and active euthanasia on the one hand and withdrawing LST on the other hand. An alternative possibility could be that due to positive obligations States have under article 2, omissions that lead to death can breach the article and therefore the distinction between active and passive euthanasia would be irrelevant under the article. Such a view has been taken by Wicks, who argues that under article 2 of the ECHR, it is of little relevance whether a person is killed by an act or an omission. As States have a duty to take reasonable steps to preserve life, she deems it self-evident that an omission can infringe the obligation.[87] However, if the Court holds the same view as Wicks, it would seem slightly contradictory that it wanted to emphasize that the *Lambert* case was not one of euthanasia. Nonetheless, judging by the *Lambert* case, it seems rather clear that the Court does not consider withdrawing LST from a patient in a persistent vegetative state to be a breach of the right to life,

[85] Ibid
[86] Ibid, p. 42
[87] Wicks, Elizabeth, 'When is life not in our own best interests: The best interests test as an unsatisfactory exception to the right to life in the context of permanent vegetative state cases', (2013), 13(1), Medical Law International, 75, p.87

at least as long as it is done with respect to the previous wishes of the patient. This does not seem to differ considerably from how the Court has interpreted the article in relation to assisted suicide, where the requirement of an autonomous decision of the patient has been emphasized. Perhaps the most obvious difference between assisted suicide cases and the *Lambert* case is the lack of emphasis on the protection of the vulnerable in the *Lambert* case. This was also noted by the partly dissenting judges in the *Lambert* case. They stated that "[w]e find that conclusion not only frightening but – and we very much regret having to say this – tantamount to a retrograde step in the degree of protection which the Convention and the Court have hitherto afforded to vulnerable people."[88]

2.3. The prohibition of torture, inhumane and degrading treatment

Another article in the Convention that may be relevant in cases of assisted dying is article 3, which states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".[89] The argument concerning the applicability article 3 assisted dying is that denying someone the chance to end their unbearable suffering through assisted dying could amount to inhumane and degrading treatment.[90] Article 3 includes the positive obligation to protect individuals from ill-treatment, whether from public or private parties.[91] The Court has considered article 3 to be an absolute prohibition and has stated that it "enshrines one of the fundamental values of the democratic societies making up the Council of Europe".[92] No exceptions are listed under the article[93] and derogations from it are not allowed under article 15.[94] Therefore, if a prohibition of assisted dying was to be deemed to be in breach of article 3, the prohibition could not be justified.

The absolute nature of article 3 has been demonstrated by the Court in cases such as *Chahal v. the United Kingdom*[95] and *Saadi v. Italy*.[96] In the *Chahal* case the Court held that deporting the applicant to India, where he would be at risk of being subject to ill-treatment within the meaning

[88] *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015 (extracts), Joint Partly Dissenting Opinion of Judges Hajiyev, Šikuta, Tsotsoria, de Gaetano and Griţco, para. 1
[89] ECHR article 3, (n 5)
[90] Hans-Georg, Ziebertz (ed.), Francesco, Zaccaria (ed.), *Euthanasia, Abortion, Death Penalty and Religion - The Right to Life and its Limitations: International Empirical Research*, 1st edn, Springer, Cham, 2019, p. 141
[91] *Moldovan and Others v. Romania* (no. 2), nos. 41138/98 and 64320/01, § 98, ECHR 2005-VII (extracts)
[92] *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161
[93] The European Convention on Human Rights, 1950, art. 3
[94] Ibid, art. 15
[95] *Chahal v. the United Kingdom*, 15 November 1996, Reports of Judgments and Decisions 1996-V
[96] *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008

of article 3, would be in violation of the article,[97] despite reason behind the potential deportation was to protect national security.[98] In the *Saadi* case the Court held that holding a higher standard of proof regarding the potential risk of ill-treatment when deporting an individual would be contrary to the absolute nature of article 3, even if the individual in question poses a threat to national security.[99] Suffering caused by an illness can fall within the scope of article 3, if a State's actions cause it to aggravate. Such was the case in *D v. the United Kingdom*[100] where the State would have breached article 3, had the State deported the applicant who suffered from AIDS to St Kitts, where he would have died without the medical and palliative care he needed.[101]

In *Ireland v. the United Kingdom*[102] the Court noted that for ill-treatment to fall within the scope of article 3 it must "attain a minimum level of severity".[103] This standard must be met regardless of the type of conduct in question. Therefore, even illegal conduct must meet this criterion in order to fall within the scope of article 3.[104] In the case of *Jalloh v. Germany*,[105] the Court commented on the assessment of the minimum level of severity, stating that "it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim".[106] For a prohibition of assisted dying to breach article 3, it would therefore have to reach this minimum level of severity.

In the *Ireland v. the United Kingdom* case the Court described degrading treatment as arousing "feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[107] In assessing whether treatment has been degrading the Court had taken into consideration whether it had the object to "humiliate and debase the person concerned".[108] However, an intention to humiliate need not necessarily be present, as was shown for example in the *Peers v. Greece* case,[109] where the Court held that despite the lack of such intent

[97] *Chahal v. the United Kingdom*, 15 November 1996, §107, Reports of Judgments and Decisions 1996-V
[98] Ibid, para. 25
[99] *Saadi v. Italy* [GC], no. 37201/06, §140, ECHR 2008
[100] D. v. the United Kingdom, 2 May 1997, Reports of Judgments and Decisions 1997-III
[101] Ibid, para. 16 and 53-54
[102] *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25
[103] Ibid, para. 160
[104] Bernadette, Wicks, Ovey, (n 23), p. 185
[105] *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX
[106] Ibid, para. 67
[107] *Ireland v. the United Kingdom*, no. 5310/71, § 167, 20 March 2018
[108] *Raninen v. Finland*, 16 December 1997, § 55, Reports of Judgments and Decisions 1997-VIII
[109] *Peers v. Greece*, no. 28524/95, ECHR 2001-III

in the case, the possibility of a violation of article 3 still existed.[110] In *V v. the United Kingdom*[111] the Court noted that the suffering and humiliation caused by an inhumane or degrading treatment or punishment must "go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment".[112] When it comes to medical treatment, the Court has stated that generally "a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading".[113]

In the inadmissibility decision *X v. Germany*,[114] the applicant was a German man under arrest, during which he went on a hunger strike, which resulted in him being force-fed. He complained that he had been subject to inhumane and degrading treatment by being force-fed and that his rights under article 3 in the Convention had therefore been breached. The European Commission of Human Rights "forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by Art. 3 in the Convention"[115] but held that it is:

> […]satisfied that the authorities acted solely in the best interest of the applicant when choosing between either respect for the applicant's will not to accept nourishment of any kind and thereby incur the risk that he might be subject to lasting injuries or even die, or to take action with a view to securing his survival although such action might infringe the applicant's human dignity[116]

2.4. The right to private life

The right to respect for private and family life is found under article 8[117] in the ECHR and states that:

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

2. 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.[118]

Article 8 in the Convention becomes relevant through the argument that individuals have a right to end their own life based on the principle of personal autonomy.[119] The Court has established

[110] Ibid, para. 74
[111] *T. v. the United Kingdom* [GC], no. 24724/94, 16 December 1999
[112] Ibid, para. 69
[113] *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244
[114] *X v. Germany*, no. 10565/83, admissibility decision of 9 May 1984
[115] Ibid
[116] Ibid
[117] ECHR, article 8, (n 5)
[118] Ibid
[119] Wicks, (n 43), p. 194

that " 'private life' is a broad term encompassing the sphere of personal autonomy within which everyone can freely pursue the development and fulfilment of his or her personality and to establish and develop relationships with other persons and the outside world".[120] PACE stated in Resolution 428 (1970) that the right to private life "consists essentially in the right to live one's own life with a minimum of interference".[121] States are not obliged under the Convention to provide citizens a specific level of medical care,[122] but the Court has stated that "private life includes a person's physical and psychological integrity"[123] and that "health, together with physical and moral integrity, falls within the realm of private life".[124]

The seconds paragraph of article 8 lists justifications for state interference with the exercise of the rights listed in the first paragraph. The rights protected under the article are thus not absolute. The Court has described the object of article 8 as being "essentially that of protecting an individual against an arbitrary interference by the public authorities".[125] In addition to negative obligations, States have positive obligations under the article as well. This was underlined by the Court for example in the of *Dickson v. the United Kingdom*[126] where it stated that:

> In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. [127]

When two rights are at conflict with each other, a balancing must be made between those rights, which means that sometimes an interference with article 8 is permitted in order to protect another right, as long as the interference is proportionate to the aim it pursues.[128] Accordingly, if assisted dying is protected by article 8, it does not automatically mean that a State cannot justify such a prohibition under the article, as the prohibition may be justified under article 8(2).

The margin of appreciation under article 8 will be restricted "[w]here a particularly important facet of an individual's existence or identity is at stake",[129] while it will be wider where "there

[120] *Jehovah's Witnesses of Moscow and Others v. Russia*, no. 302/02, § 117, 10 June 2010
[121] Parliamentary Assembly, Resolution 428 (1970), Declaration on mass communication media and Human Rights, C (16)
[122] *Tysiąc v. Poland,* no. 5410/03, § 107, ECHR 2007-I
[123] Ibid
[124] *Nada v. Switzerland* [GC], no. 10593/08, § 151, ECHR 2012
[125] *Lozovyye v. Russia*, no. 4587/09, § 36, 24 April 2018
[126] *Dickson v. the United Kingdom [GC],* no. 44362/04, ECHR 2007-V
[127] Ibid, para. 70
[128] *Fernández Martínez v. Spain* [GC], no. 56030/07, § 123, ECHR 2014 (extracts)
[129] *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I

is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues".[130]

What is meant with "in accordance with law" under article 8 (2) is that the interference with the article must be a recognized in the national law, including statutory law and judge made law.[131] Moreover, the law must be adequately foreseeable and accessible.[132] The assessment of a legitimate aim under article 8 (2) is often rather insignificant, as the list under the article covers a large amount of government activity. The Court has also often allowed the terms to be applied in a somewhat broad and liberal manner.[133] What the Court usually focuses on the most is the requirement that the interference is "necessary in a democratic society".[134] This entails that fair balance must be struck between the interests of the individual and the interests of the community as a whole.[135] The interference must therefore be proportionate, which furthermore entails that if the measure the State has taken could have been achieved with a smaller burden on the individual, it may not pass the proportionality test.[136]

2.5. The freedom of thought, conscience and religion

The freedom of thought, conscience and religion is protected under article 9[137] in the Convention. The article states that:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[138]

The freedom to believe and to worship may be a vital part of an individual's personality. This is especially true to individuals with religious beliefs.[139] The Court has nevertheless noted that the

[130] Ibid
[131] *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 88, ECHR 2005-XI
[132] *The Sunday Times v. the United Kingdom (no. 1),* 26 April 1979, § 49, Series A no. 30
[133] Schabas, (n 22), p.404
[134] Ibid, p. 406
[135] *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290
[136] Schabas, (n 22), p. 406
[137] ECHR, article 9, (n 5)
[138] Ibid
[139] Bernadette, Wicks, Ovey, (n 23), p. 456

freedom "is also a precious asset for atheists, agnostics, sceptics and the unconcerned".[140] One argument concerning article 9 and assisted dying is that assisted dying as a manifestation of belief protected by article 9. [141] Another argument is the that assisted dying could be protected by article 9, if it is performed as a conscious objection by someone who does not believe death needs to be natural. [142]

The right to believe and to change one's beliefs is an absolute right, whereas the right to manifest such beliefs is subject to limitations under article 9 (2), as this can affect others.[143] Jim Murdoch has interpreted the scope of article 9 to be rather narrow in practice, despite the terms "thought, conscious and religion" suggesting a potentially wide scope. He mentions that a "belief" is not the same as an "opinion".[144] A personal beliefs must "attain a certain level of cogency, seriousness, cohesion and importance"[145] and that it must be considered to be compatible with respect for human dignity.[146] The possible obligations States have under article 9 was put forward by the Court in the case of *Otto-Preminger Institute v. Austria*, where the Court stated that States must "ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines".[147]

The permissible limitations under article 9 (2) are similar to those listed under article 8 (2), while containing some differences.[148] Similarly to article 8 (2), the interference must be in accordance with national law,[149] as well as accessible and foreseeable.[150] Interferences with the article must have a legitimate aim, which must be interpreted narrowly.[151] Unlike article 8 (2), article 9 (2) does not list "national security" as legitimate aim. The Court has commented on the subject stating that

[140] *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A
[141] Wicks, Elizabeth, 'Dying with Conscience: The Potential Application of Article 9 ECHR to Assisted Dying', (2014), University of Leicester School of Law Research Paper No. 14-26, p.2
[142] Wicks, (n 141), p.32
[143] Bernadette, Wicks, Elizabeth, Ovey, Clare, (n 23), p. 457
[144] Murdoch, Jim, Council of Europe Human Rights Handbook, Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights, Strasburg, 2012, p. 14
[145] *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 36, Series A no. 48
[146] Murdoch, 2012, p. 14
[147] Otto-Preminger-Institut v. Austria, 20 September 1994, § 47, Series A no. 295-A
[148] Schabas, (n 22), p. 435
[149] *Leyla Şahin v. Turkey [GC],* no. 44774/98, § 88, ECHR 2005-XI
[150] *Hasan and Chaush v. Bulgaria [GC],* no. 30985/96, § 84, ECHR 2000-XI
[151] *Nolan and K. v. Russia*, no. 2512/04, § 73, 12 February 2009

> Far from being an accidental omission, the non-inclusion of that particular ground for limitations in Article 9 reflects the primordial importance of religious pluralism as "one of the foundations of a 'democratic society' within the meaning of the Convention" and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs[152]

The interference must also be "necessary in a democratic society", meaning that, again like under article 8 (2), it the individual's interests must be balanced against the community's interests.[153]

2.6. The prohibition of discrimination

An argument regarding equality is occasionally used in support of assisted suicide. It is claimed that a prohibition of assisted suicide leads to inequality between those who are physically able to commit suicide and those who are unable to do so due to their physical limitations.[154] Article 14 in the Convention concerns discrimination and states that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As the grounds in the article includes "other status", it is possible for discrimination to be based on another status than those listed in the article.[155] There are two lines of case law when it comes to the scope of the "other status"; one which suggests a narrow interpretation of other status, encompassing only personal characteristics as a basis of comparison and a wider interpretation, which can include any situation.[156] An example of a narrow interpretation can be found in *Budak and Others v. Turkey* where the Court stated that it "reiterates that Article 14 is not concerned with all differences of treatment but only with differences having as their basis or reason a personal characteristic ("status") by which persons or group of persons are distinguishable from each other".[157] A wider interpretation of what can be included under "other status" is found for example in *Engel and Others v. the Netherlands,* where the Court emphasized that the grounds listed under the article were illustrative rather than exhaustive.[158] Disability has been found to fall within the "other status" of article 14.[159] Rainey, Wicks and Ovey argue nevertheless that if the ground for

[152] Ibid
[153] *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290
[154] Bertrand, Mathieu, *The Right to Life in European Constitutional and International case-law*, Strasbourg, Council of Europe Publishing, 2006, p. 77
[155] Bernadette, Wicks, Elizabeth, Ovey, Clare, (n 23), p. 635
[156] Ibid
[157] *Budak and Others v. Turkey*, no. 57345/00, § 4, 10 January 2006
[158] *Engel and Others v. the Netherlands*, 8 June 1976, § 72, Series A no. 22
[159] *Glor v. Switzerland*, no. 13444/04, § 80, ECHR 2009

differentiation is a personal characteristic it is more likely that it will be considered to be encompassed by article 14.[160] What differentiates article 14 in the Convention from other articles treated in this thesis is that claims made under this article must be in conjunction to a substantive right under the Convention, meaning that one cannot invoke the article alone.[161] A breach of a substantive provision is nevertheless not required in order to find a breach of article 14.[162]

Discrimination can be either direct or indirect. The Court has described direct discrimination as a "difference in the treatment of persons in analogous, or relevantly similar, situations".[163] However, direct discrimination can also arise when a State treats people who are in vastly different situations the same.[164] The assessment of when and what factors may justify a differential treatment of individuals in similar situations falls within the margin of appreciation of States.[165] In the case of *Thlimmenos v. Greece*[166] the State was found to have violated article 14 as it failed to treat persons in different situations differently.[167] The complaint was made in conjunction with article 9. [168] The applicant was a Jehovah's Witness who was convicted for subordination, as he refused to wear a military uniform.[169] The applicant was not appointed to a post of chartered accountant due to him refusing to do military service because of his religious beliefs. This decision was made without differentiating the applicant from other persons convicted of a serious crime, despite the applicant committing the crime because he was exercising his religious freedom.[170]

The Court has also described indirect discrimination[171] by stating that a "difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group".[172] When it comes to positive

[160] Bernadette, Wicks, Elizabeth, Ovey, Clare, (n 23), p. 636
[161] Gerards, Janneke, 'The Discrimination Grounds of article 14 of the European Convention on Human Rights', (2013), 13(1), Human Rights Law Review, 99, p. 100
[162] Bernadette, Wicks, Ovey, (n 23), p. 633
[163] *Biao v. Denmark* [GC], no. 38590/10, § 89, 24 May 2016
[164] *Pretty*, (n 3), para. 88
[165] *Sommerfeld v. Germany* [GC], no. 31871/96, § 92, ECHR 2003-VIII (extracts)
[166] *Thlimmenos v. Greece [GC],* no. 34369/97, ECHR 2000-IV
[167] Ibid para. 47 and 49
[168] Ibid, para. 33
[169] Ibid, para. 7
[170] Ibid, para. 34
[171] Council of Europe: the European Court of Human Rights, Handbook on European non-discrimination law, Luxembourg, Publications Office of the European Union, February 2018, p.53
[172] Ibid, para. 103

obligations under article 14, the Court has stated that a violation can occur either by "positive action on the part of the State or by a failure to ensure non-discrimination […]".[173]

Not all forms of inequalities will be in breach of article 14.[174] In the Belgian linguistics case[175] the Court stated that it

> […] holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[176]

The idea behind such an approach on discrimination is that the grounds stated in the article are not in and of themselves a justification to treat individuals or groups differently, but that such a differential treatment may be acceptable due to the aim of the measure taken.[177]

In order to determine whether a disadvantageous treatment is due to one of the grounds listed under article 14, the Court may examine whether the individual claiming to be a victim of a violation of the article can be properly compared to a group of individuals who are being treated more advantageously. This test requires that the applicant and the group of individuals they are being compared to are in an analogous situation in all material respects.[178] The Court has examined for example whether a woman who was transgender was in a similar situation as someone who is cisgender or an unmarried transgender when it came to the obtaining of a female identity number.[179] As Bernadette et al. note,[180] when it comes to a State's argument that a differential treatment has a legitimate aim in accordance with article 8 (2), it is not enough to show that such an aim exists, but also that the action taken by the State aids in fulfilling that aim.[181]

Another important issue to consider under the article is proportionality. When a fundamental right of an individual is at stake, the means used by the State to achieve an aim must not be of a

[173] *Posti and Rahko v. Finland,* no. 27824/95, § 83, ECHR 2002-VII
[174] Bernadette, Wicks, Ovey, (n 23), p. 634
[175] Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), 23 July 1968, Series A no. 6
[176] Ibid, p. 30, para. 10
[177] Bernadette, Wicks, Ovey, (n 23), p. 635
[178] Ibid, p. 644
[179] *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014
[180] Bernadette, Wicks, Ovey, (n 23), p. 646
[181] *Larkos v. Cyprus* [GC], no. 29515/95, § 31, ECHR 1999-I

disproportionate nature. In other words, the means are proportionate if the aim could not be achieved by means that would interfere less with the individual's rights.[182] States are granted a margin of appreciation, which varies in extent, with regard to the assessment of prohibited differential treatment. Whether or not differential treatment can be justified may also change in time, as conditions can change, as well as the prevailing consensus among Member States. [183] Whether or not there is common ground on an issue among Member States affects the permissibility of differential treatment.[184]

3. Assisted Suicide and Euthanasia under the ECHR

3.1. A right to die within the right to life?

Pretty v. the United Kingdom was the first case where the Court had to decide on whether article 2 in the Convention also contains a right to die.[185] There was one inadmissibility decision before the *Pretty* case, namely the case of *Sanles Sanles v. Spain*[186]. The applicant in the case was the heir legally appointed by a man named Mr. Sampedro who has been tetraplegic for 30 years after an accident and wanted a dignified death. By the time the case was brought to the Court Mr. Sampedro had already committed suicide with the help of a third party and the case was declared inadmissible since the applicant could not claim to be a victim of the articles her complaint was based on.[187]

The *Pretty* case concerned a citizen of the United Kingdom named Diane Pretty, a 43-year-old woman who suffered from a motor neuron disease and was paralyzed from the neck down due to the disease. She was also not able to speak properly and was fed through a tube. The disease had developed to an advanced stage and the applicant was expected to die within months. The usual way of dying for patients suffering from the disease is through respiratory failure and pneumonia. The disease did not affect the applicant's intellect or capacity to make decisions. The applicant wanted to avoid the suffering and indignity that was awaiting her if she died naturally through the progression of the disease and wished to be able to control the way she would die.[188]

[182] *Glor v. Switzerland*, no. 13444/04, § 94, ECHR 2009
[183] Schabas, (n 22), p. 567
[184] *Glor v. Switzerland*, no. 13444/04, § 75, ECHR 2009
[185] Wada, Emily, 'A Pretty Picture: The Margin of Appreciation and the Right to Assisted Suicide', (2005), 27 (275), Loyola of Los Angeles International Law & Comparative Law Review, 275, p.278
[186] *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI
[187] Ibid
[188] *Pretty*, (n 3), paras. 7-8

Since the applicant was not able to commit suicide on her own, she wished for her husband to assist her, which was illegal under domestic law.[189] The applicant had asked the Director of Public Prosecutions (DPP) for an undertaking not to prosecute her husband if he assisted in her suicide, but the DPP refused.[190] The applicant appealed to domestic courts without the success to have the decision of the DPP dismissed or showing that the domestic law was incompatible with the Convention.[191] The articles the applicant invoked before the Court were articles 2, 3, 8, 9 and 14.[192]

The applicant's claim under article 2 of the Convention was that if the Court did not find a violation of article 2 when her husband is not permitted to assist in his wife's suicide, it would mean that the States that do permit assisted suicide are in violation of the article. The applicant also claimed that article 2 includes a right to choose whether one wants to continue living. She claimed that article 2 was only meant to protect individuals from intervention to the right to life from third parties, not the individual themselves.[193]

The Court held that States have an obligation to protect life and that despite some articles in the Convention, such as article 11, containing a negative aspect to them, article 2 cannot be interpreted as containing a negative aspect to it. It held that the article is "unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life".[194] The Court clarified that the article "cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."[195] Rietiker interprets this statement made by the Court as an indication of the Court's reluctance to apply what he calls a "dynamic" or "evolutive" interpretation of the Convention[196] and stresses that it is established in the Court's case law that the Court "should not depart, without cogent reason, from precedents laid

[189] Ibid, para. 8-9
[190] Ibid, para. 10-11
[191] Ibid, para. 13-14
[192] Ibid, para. 3
[193] Ibid, para. 35
[194] Ibid, para, 39
[195] Ibid
[196] Rietiker, (n 57), p. 116

down in previous cases".[197] He agrees however with the Court's statement, concluding that to interpret article 2 as containing implicitly a right to die would indeed be far-fetched.[198]

Rietiker also notes that as such a fundamental right as the right to life is at play, it is unlikely that the Court would interpret other Convention rights to be superior to it when they are in conflict with the fundamental right, even when the Convention is interpreted "as a whole". As he notes, the findings under article 2 did indeed dominate the findings of the other claims that the applicant presented before the Court in *Pretty*. He argues that this judgement gives States a basis for criminalizing assistance in suicide by obliging States to investigate all deaths. As he notes however, assisted suicide is an area that automatically includes complex moral and ethical considerations. Assisted suicide is therefore more controversial than situations where States clearly have an obligation to prevent suicide and other forms of self-harm, namely in cases such as prisoners which was addressed above.[199] States therefore enjoy a wider margin of appreciation as well regarding assisted suicide.[200]

As to the applicants claim that if the Court does not find a violation of article 2 in her case it would mean that States that do permit assistance in a person's suicide, the Court held that " [i]t is not for the Court in this case to attempt to assess whether or not the state of law in any other country fails to protect the right to life"[201] and that

> even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 of the Convention, that would not assist the applicant in this case, where the very different proposition – that the United Kingdom would be in breach of its obligations under Article 2 if it did not allow assisted suicide – has not been established.[202]

Mathieu Bertrand argues that it is indisputable that authorizing euthanasia is a breach of article 2 in the Convention, since it is executed either directly by the public authorities or under the supervision of them. He also argues that the patient consenting to the killing does not affect a State's obligation under article 2, which, as he mentions, includes no specified exception regarding euthanasia.[203] He adds, however, that despite the fact that many constitutional court judgements

[197] *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 104, 17 September 2009
[198] Rietiker, (n 57), p. 116
[199] Ibid, p. 117
[200] Ibid, p. 118
[201] *Pretty*, (n 3), para. 41
[202] Ibid
[203] See footnote 36

have on the basis of the prohibition on deliberate killings supported euthanasia bans, the ECtHR has started to develop a different approach on the issue. He supposes that it is due to the development of national laws in Europe regarding euthanasia.[204] When he talks more generally about the nature of the right to life (not only the right to life under the ECHR), he argues that the right to life is a right, not a freedom, and that it only includes the right to protection of life, not a right for individuals to decide what they want to do with their lives. He argues that suicide is a personal freedom but not a right and that States are under no obligation to help individuals in committing suicide.[205] Panos Merkouris argues that despite the positive obligation of States to take measures to protect life, other rights under the Convention, such as the right to privacy, have to be considered when fulfilling that obligation.[206]

So far, the ECtHR has addressed a situation in which a person has been actively euthanized or has received aid in committing suicide against the wishes, or in the absence of knowledge, of a loved one. There is a pending application, *Mortier v. Belgium*, which concerns this exact situation. The applicant's mother, who suffered from chronic depression, was euthanatized in Belgium without the knowledge of the applicant and his sister. The applicant claims that article 2 was violated as the State failed to protect his mother's life, as he held that the domestic law concerning euthanasia were not respected in his mother's case. He also complains that his right to mental integrity and family life under article 8 were breached.[207] Whether the Court finds a violation of any of the Convention articles remains to be seen.

3.2. Prohibition of assisted suicide and euthanasia as degrading treatment

The applicant in the *Pretty* case argued that the suffering she was forced to undergo if she was forced to die naturally constituted a degrading treatment under article 3 of the Convention. The applicant did not argue that the State was responsible for causing the suffering she was facing, but instead based her argument on State's positive obligations. She argued that State's had, according to the case law, a positive obligation to protect its citizens from degrading treatment. The applicant claimed that her State was obliged to protect her from the suffering she was facing.[208]

[204] Bertrand, (154), p. 70-71
[205] Ibid, p. 14
[206] Merkouris, Panos, 'Assisted Suicide in the Jurisprudence of the European Court of Human Rights: a Matter of Life and Death' in Negri, 2012, p.112
[207] *Mortier v. Belgium*, no. 78017/17, 6 November 2017 (pending application)
[208] *Pretty*, (n 3), para. 44

The applicant argued that the State could not justify the blanket ban, which according to her violated her rights under article 3, because the rights under the article are absolute. A balance had been struck despite this, according to the applicant, and the individual facts of her case had not been taken into consideration when balancing the rights under article 3 against other rights.[209] She argued that there should be an exception in the blanket ban for people like her, who were mentally capable and were not in the need of protection.[210]

The Court agreed with the applicant about the absolute nature of article 3,[211] but held that treatments listed under article 3 has mostly applied in situations where an individual has been at a risk of a State agent or a public authority intentionally inflicting that individual with such treatment.[212] The Court also noted that a positive obligation under article 3 had been found in some cases.[213] The Court held nevertheless that in the case in question it was clear that the State did not inflict any ill-treatment on the applicant, nor was it argued that the State failed to provide the applicant with appropriate medical care.[214] The Court held that the applicant's perception of a States obligations under article 3 "places a new and extended construction on the concept of treatment, which, as found by the House of Lords, goes beyond the ordinary meaning of the word".[215] The Court also noted that article 3 "must be construed in harmony with Article 2".[216] The Court Stated that an obligation to terminate life cannot be derived from article 3, despite the Court being sympathetic for the distressing death the applicant was facing.[217] The Court held that the State had not violated article 3 in the Convention.[218]

Paul Tiensuu notes that in the *Pretty* case the applicant is clearly mentally competent, contrary the *Keenan* case, where the individual was suffering from schizophrenia[219] and *X v. Germany*, where a prisoner went on a hunger strike.[220] He argues that the Court therefore confirmed in the *Pretty*

[209] Ibid para. 45
[210] Ibid, para. 46
[211] Ibid, para. 49
[212] Ibid, para. 50
[213] Ibid, para. 51
[214] Ibid, para. 53
[215] Ibid, para. 54
[216] Ibid
[217] Ibid, para. 55
[218] Ibid, para. 56
[219] See footnote 55
[220] See footnote 114

case that even when an individual is evidently mentally competent article 2 can be raised against a complaint regarding quality of life based on article 3.[221]

When assessing whether unbearable suffering (such as what the applicant in the *Pretty* case was facing if she was to die from the disease) can breach article 3, Jozef Dorscheidt notes that support for such a view is hard to find in the case law of the ECtHR or the drafting history of the provision. He notes furthermore, based on the Court's case law, that it is difficult to show that medical treatment has been intentionally used to cause intensive physical and mental suffering.[222] A violation of article 3 has however been found for example by the Commission with regard to forced feeding and medication, as well as retainment of a patient to a bed in the case of *Herczegfalvy v. Austria*,[223] but the Court disagreed.[224] If it were established that a medical practitioner had intentionally caused such suffering, another question would have to be answered, namely whether they were acting as a private person or a State official. When considering the margin of appreciation that States enjoy in sensitive medical-ethical issues,[225] in addition to the aforementioned factors, Dorscheidt concludes that it remains unlikely that a criminalization of assisted suicide or euthanasia would breach article 3, albeit it may depend on the facts of the case.[226]

A scenario where Dorscheidt argues a breach of article 3 regarding end-of-life treatment may occur is if the medical professionals were to intentionally humiliate a severely suffering patient wishing to die[227] or if the medical treatment in such a scenario were to be found to be genuinely

[221] Tiensuu, Paul, 'Whose Right to What Life: Assisted Suicide and the Right to Life as a Fundamental Right', (2015), 15 (2), *Human Rights Law Review,* p. 257
[222] Dorscheidt, Jozef , 'Children's Health Rights in a European Legal Context', in H.H.M Dorscheidt, Jozef (ed.) and Doek, Jaap E. (ed.) , *Children's Right to Health Care*, Brill Nijhoff, Leiden, 2018, p. 238-238
[223] *Herczegfalvy v. Austria*, 24 September 1992, § 80, Series A no. 244
[224] Ibid, para. 84
[225] Dorscheidt references the case of *Vo v. France* as a basis for concluding that States enjoy a margin of appreciation in such matters. See footnote 48
[226] Dorscheidt, (n 222), p. 239
[227] An example of a case that Dorscheidt references in support of this argument is *R.R. v. Poland*, no. 27617/04, ECHR 2011 (extracts), where the Court found a violation of article 3 due to the treatment of a pregnant woman by medical practitioners. The applicant had been informed that the fetus is likely to have a genetic disorder and wished to do genetic tests on the fetus in order to terminate the pregnancy in the case of such a disorder, which was not provided for her despite her being legally entitled to it. The denial of a genetic test along with other forms of treatment she was subjected to by the medical practitioners lead the Court to hold that the applicant had been humiliated by the treatment.

appalling.[228] Dorscheidt argues however that if there is a risk of a breach of the right to life it would be illogical to allow the possibility of such a breach only to ensure that article 3 is not breached.[229]

3.3. Autonomy and death with dignity

The applicant in the *Pretty* case argued that the right to self-determination was guaranteed under article 8 in the Convention and that this right encompassed the right to decide about one's own body. This included, according to the applicant, a right to decide when and how to die. Her rights under article 8 (1) had therefore according to her been interfered with.[230]

The Court held that the term "private life" was not "susceptible to exhaustive definition" and that despite a right to self-determination not being established under article 8, personal autonomy is "an important principle underlying the interpretation of its guarantees".[231] The Court noted that when the private conduct of an individual has been interfered with through compulsory or criminal measures, it has been considered to be an interference in that individuals private life within the meaning of article 8 (1), even when the conduct has been potentially harmful to that individual, or perhaps even when it is of life threatening nature. This type of interference requires therefore a justification according to the second paragraph of the article.[232] The Court noted that rights under article 8 (1) may be engaged if a patient who refuses to take medicine is forced to take it against their own will, even in cases where the medicine would prolong the patient's life.[233]

The Court stated that human dignity and human freedom are the very essence of the Convention and that "[i]n an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity."[234] The Court held that the applicant's right to private life may have been interfered with, by stating that it "not prepared to exclude that this constitutes an interference with her right to respect for private life".[235] Grégor Puppinck and Claire de la Hougue argue that the

[228] As an example that Dorscheidt gives of a case where the Court found treatment by medical practitioners to be appalling is Mehmet Şentürk and Bekir Şentürk v. Turkey, no. 13423/09, ECHR 2013.
[229] Dorscheidt, (n 222), p.240
[230] *Pretty*, (n 3), para 58
[231] Ibid, para. 61
[232] Ibid, para. 62
[233] Ibid, para. 63
[234] Ibid, para. 64
[235] Ibid, para. 67

Court may have already "admitted" by this statement that the choice to die is within the scope of the article. They argue that if that is the case, States must be able to justify any restriction to the choice.[236]

The Court decided to consider whether there was a justification in accordance with article 8 (2).[237] When assessing whether the prohibition on assisted suicide was justified under article 8 (2) the Court considered the margin of appreciation that States enjoy. It held that although the margin of appreciation had been found to be narrow regarding an individual's sexual life, the Court held that the case in question was of different nature.[238] The applicant argued that blanket ban on assisted suicide was disproportionate.[239] The Court held that the applicant was not in the category of vulnerable that the domestic law was intended to protect but noted that as the state of terminally ill individuals varies, and some of them will fall under this category.[240] It held that "[i]t is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created"[241] The Court found neither the blank prohibition on assisted suicide nor the refusal of the DPP to give an undertaking to be disproportionate.[242] The Court held therefore that the interference was justified under article 8 (2) and article 8 was not breached.[243]

Complaints regarding the United Kingdom laws on assisted suicide were again addressed by the Court in the inadmissibility decision of *Nicklinson and Lamb v. the United Kingdom*.[244] The first applicant in the case was the late wife of Tony Nicklinson, a man who suffered from locked in syndrome.[245] Mr. Nicklinson wished to end his life through suicide but was unable to do so himself. His only legal option under the domestic law was to starve himself to death. In 2007 he made a living will stating that he wishes for all treatment except for pain relief to be ended and no longer took any medication that would prolong his life. As such a death would be painful for his loved

[236] Puppinck, Gregor, de la Hougue, Claire, 'The Right to Assisted Suicide in the Case Law of the European Court of Human Rights', (2014), 18 (7-8), The International Journal of Human Rights, 735, p. 738
[237] *Pretty*, (n 3), para. 67
[238] Ibid, para. 71
[239] Ibid, para. 72
[240] Ibid, para. 73-74
[241] Ibid, para. 74
[242] Ibid, para. 77
[243] Ibid, para. 78
[244] *Nicklinson and Lamb v. the United Kingdom* (dec.), nos. 2478/15 and 1787/15, 23 June 2015
[245] Ibid, para. 4-5

ones to watch, he wished to be killed through an injection of a lethal drug, which was illegal.[246] After the High Court dismissed his claims that assistance in his suicide should be allowed legally, he started to refuse nutrition and hydration, as well as refusing medical treatment. He died in August 2012.[247] The first applicant's appeal to the Court of Appeals was unsuccessful,[248] as well as her appeal to the Supreme Court.[249]

The first applicant's claims before the ECtHR was based on article 8. She claimed that both her and her late husband's rights under article 8 had been breached, as she held that the domestic courts did not assess whether the domestic law was compatible with her rights under article 8.[250] The Court held that the procedural protections of article 8 could not be extend to a State being obliged to examine the merits of a challenge of primary law.[251] The Court held that as the Supreme Court held that the applicant had failed to show that developments after the *Pretty* case meant that the blanket ban was disproportionate, it had assessed the compatibility of the law in relation to article 8.[252] The Court found the application of the first applicant to be manifestly ill-founded.[253]

The second applicant in the case was irreversibly paralyzed due to a car accident[254] and wished to end his life as he could no longer enjoy it. Due to being almost fully paralyzed this would however require a lethal injection, in other words active voluntary euthanasia.[255] The second applicant complained in front of the Court on the basis of articles 6, 8, 13 and 14, claiming that these articles were breached as the State did not provide the possibility for him to seek the authority of the court to allow a third person to give him a lethal injection.[256] The second applicant's application was however deemed as inadmissible before the Court as the applicant had failed to exhaust all domestic remedies.[257]

[246] Ibid, para. 6
[247] Ibid, para. 9-15
[248] Ibid, para. 19
[249] Ibid, para. 25
[250] Ibid, para. 79
[251] Ibid, para. 84
[252] Ibid, para. 85
[253] Ibid, para. 86
[254] Ibid, para. 7
[255] Ibid. para. 8
[256] Ibid, para. 77
[257] Ibid. para. 95

A case from 2011, *Haas v. Switzerland*,[258] focused largely on article 8 regarding assisted suicide. The applicant in the case suffered from a serious bipolar affective disorder and had during his 20 years of suffering from the disorder tried to commit suicide twice and had stayed in a psychiatric hospital several times.[259] While euthanasia is prohibited in Switzerland, assisted suicide is legal.[260] However, article 15 of the Swiss Penal Code prohibits assisting someone in suicide if they do it for selfish reasons.[261] There is an association in Switzerland called "Dignitas" which has as one of its objectives to assure death with dignity for its members.[262] The applicant in the *Haas* case became a member of the association and asked the for assistance in his suicide. He was denied several times the lethal substance that he asked for.[263]

After several failed attempts of the applicant to obtain the lethal sustenance[264] and after taking the matter to the domestic courts, which held that article 8 does not impose States with an obligation to provide the applicant with the lethal substance he asked for,[265] the applicant took the matter to the ECtHR. The applicant complained about the conditions required to obtain the lethal subsidence, basing his complaint on article 8. He claimed that he had a right under the article to choose the time and manner of his death and that the State is obliged to provide a person in a situation such as his with the medical products required to commit suicide.[266]

The Court considered that deciding how and when to die is an aspect of the right to private life within the meaning of article 8, with the condition that the individual can freely come to the decision.[267] The Court noted that the case in question differed from the *Pretty* case in a few ways. The applicant in the case was not terminally ill, he was not unable to commit suicide due to his condition and he alleged that the State was obliged to provide him with a lethal sustenance in order

[258] *Haas*, (n 6)
[259] Ibid, para. 7
[260] Dierickx, Sigrid, Onwuteaka-Philipsen, Bregje, Penders, Yolanda, *et al,* 'Commonalities and differences in legal euthanasia and physicianassisted suicide in three countries: a population-level comparison', (2019), 65, International Journal of Public Health, 65, p. 65
[261] Swiss Criminal Code of December 21, 1937, article 115, (status as of 1 March 2018)
[262] DIGNITAS, 'Who is Dignitas?', (*DIGNITAS*), <http://www.dignitas.ch/index.php?option=com_content&view=article&id=4&Itemid=44&lang=en>, accessed 2 December 2019
[263] *Haas*, (n 6), para. 7
[264] Ibid, para. 8-11 and 17-18
[265] Ibid, para. 11, 14-16
[266] Ibid, para.
[267] Ibid, para. 51

to avoid an undignified suicide, as opposed to the *Pretty* case that concerned the freedom to die.[268] The Court decided to examine the case "from the perspective of a positive obligation on the State to take the necessary measures to permit a dignified suicide".[269]

The Court noted again that as the Convention must be interpreted as a whole, the obligation to protect the lives of the vulnerable under article 2 must be considered. The authorities of a State must protect the vulnerable from actions that threaten their lives, even when they are at the risk of taking their own life. The decision to commit suicide must be taken "freely and with full understanding of what is involved".[270]

The Court held that States enjoy a wide margin of appreciation regarding end of life decisions, as there is no consensus among European countries regarding the issue.[271] The Court held that Swiss authorities had a legitimate aim to restrict the availability of lethal substances to patients with prescriptions, namely, to protect individuals from hasty decisions and to prevent abuse. The aim was also ensuring that only mentally capable individuals could obtain lethal doses of such substances.[272] The Court found such restrictions to be especially important in States that do allow assisted suicide in order to prevent abuse.[273] It held that the law in Switzerland that required a prescription in order to obtain a lethal dose of a substance functioned as a way to ensure that the decision is taken with free will.[274] The Court concluded by stating that "even assuming that the States have a positive obligation to adopt measures to facilitate the act of suicide with dignity, the Swiss authorities have not failed to comply with this obligation in the instant case."[275]

As Rietiker mentions, the *Haas* case differs from the *Pretty* case in a considerable way, as the case concerned a State's possible positive obligation to facilitate suicide, rather than a negative obligation to abstain from interference with a right, as was the case in *Pretty*.[276] He criticized the Court's vague, and perhaps even contradictory language regarding the possible obligation to in certain situations facilitate suicide. On the one hand the Court seems to indicate that such an

[268] Ibid, para. 52
[269] Ibid, para. 53
[270] Ibid, para. 54
[271] Ibid, para. 55
[272] Ibid, para. 56
[273] Ibid, para. 57
[274] Ibid, para 58
[275] Ibid, para. 61
[276] Rietiker, (n 57), p. 86

obligation exists by stating that it "considers that it is appropriate to examine the applicant's request to obtain access to sodium pentobarbital without a medical prescription from the perspective of a positive obligation on the State to take the necessary measures to permit a dignified suicide"[277] while on the other hand it held that "even assuming that the States have a positive obligation to adopt measures to facilitate the act of suicide with dignity […]",[278] thereby leaving the question open.[279] Rietker identifies a few positive aspects in the *Haas* case. The case is the first one to confirm that article 8 protects the right to choose how and when to die. The Court also established in the case that a requirement of an expert opinion in order to access a lethal substance is a suitable procedure to be taken to prevent abuse in a State where assisted suicide is authorized. He also held that the case was examined by the Court to a great extent without bypassing the claims made by the applicant.[280]

Although the Court did not confirm a positive obligation to facilitate suicide in the *Haas* case, it has been argued that the case recognizes the right for an individual to end their own life.[281] As rights under article 8 are not absolute, and these rights can be restricted if the restrictions comply with article 8 (2), also the right to choose how and when to die can be restricted. As Wicks notes, arguing for the legalization of assisted suicide can be problematic, as the rights of others in the society need to be considered. She emphasizes the need to protect the vulnerable by stating that "the danger that vulnerable persons, especially the elderly or those suffering from a terminal illness, might be bullied into ending their lives provides a restraint upon the law's ability to protect autonomous choices to die in this context".[282] The issue concerning the protection of vulnerable individuals will be discussed further below.[283]

Negri argues that due to the margin of appreciation that States enjoy regarding assisted suicide, the Court implied in the *Haas* case that the Swiss law was indeed compatible with the

[277] *Haas*, (n 6), para. 53
[278] Ibid, para. 61
[279] Rietiker, (n 57), p. 123
[280] Ibid
[281] See Thoonen, Evenline, *Death in State custody: Obligations to prevent premature death of detainees and to investigate deaths of detainees pursuant to the European Convention on Human Rights*, 1st edn, Antwerp, Maklu, 2017, p. 149 and Sullivan, G R, 'Deciding to die and help with dying: What can and cannot be done in England and Wales' in Reed, Alan (ed.), Bohlander, Michael (ed.), Wake, Nicola (ed.) and Smith, Emma (ed.), Consent: Domestic and Comparative Perspectives, 1st edn, New York, Routledge, 2017, p. 158
[282] Wicks, (n 49), p. 168
[283] See section 5.3.2.

Convention.[284] She also interpreted the Courts decision in the case to mean that States have no positive obligation to ensure that individuals can die with dignity.[285] An opposing view has however also been proposed. Puppinck and de la Hougue argue that the *Haas* case shows a development from a liberty to a right regarding assisted suicide.[286] They note that the Court moved away from its original wording used in the *Pretty* case, namely that that suicide rather than natural death is an exercise of choice,[287] to referring to "right to decide by what means and at what point his or her life will end" in the *Haas* case.[288] G R Sullivan argues that the *Haas* case recognized a right to die under article 8 (1),[289] but that it is not an unqualified right, since it is restricted to those who are free to make the choice.[290]

Black calls the judgement in the *Haas* case a "hesitant recognition […] of a positive obligation on the State to adopt measures facilitating 'dignified' suicide".[291] She argues that States that have blanket prohibitions on assisted suicide will struggle more justifying such a position compared to States like Switzerland that allow assisted suicide, as it will be more difficult to show that such a prohibition is proportionate to a legitimate aim under article 8 (2). She holds justifications of a blanket prohibitions such as the one in England to be at first glance difficult to justify, as she deems it to contradict the principle that rights must be practical and effective, which has been established in the ECtHR's case law.[292] Nonetheless, as she explains, due to the wide margin of appreciation that States enjoy regarding end-of-life situations such a blanket prohibition may be justified.[293] However, Black seems somewhat convinced of the existence of a positive obligation to facilitate suicide, as she analyses whether the law in the United Kingdom can comply with the obligation.[294]

[284] Negri, Stefania 'The Right to Informed Consent and Convergence of International Biolaw and International Human Rights Law' in Negri, Stefania (ed.), *Self-Determination, Dignity and End-Of-Life Care: Regulating Advance Directives in International and Comparative Perspective*, Leiden, BRILL, 2012
[285] Ibid, p. 68
[286] Puppinck and de La Hougue, (n 236), p. 740
[287] *Pretty*, (n 3), para. 67
[288] *Haas*, (n 6), para. 51
[289] He also mentions that this right was acknowledged later in cases of *Koch* and *Gross*, which will be discussed below.
[290] G R Sullivan, Deciding to die and help with dying: What can and cannot be done in England and Wales in Reed, Alan (ed.), Bohlander, Michael (ed.), Wake, Nicola (ed.) and Smith, Emma (ed.), *Consent: Domestic and Comparative Approaches*, 2017, p. 158-159
[291] Black, Isra,'Suicide Assistance for Mentally Disordered Individuals in Switzerland and the State's Positive Obligation to Facilitate Suicide', (2012), 20 (1), Medical Law Review, 157, p. 165
[292] *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37
[293] Black, (n 291), p. 166
[294] See Ibid, p. 166

The right to choose how and when to die in the *Haas* case has been argued based on the case to extend to individuals suffering from psychiatric disabilities.[295]

When analysing the Swiss law on assisted suicide after the *Haas* case, Black notes that clarifying that assisted suicide is authorized also for individuals with psychiatric disorders, rather than solely for individuals who are terminally ill or whose suffering is of somatic nature, clarifies for physicians the boundaries of legal assisted suicide. This may be beneficial for physicians as they can act with more certainty when prescribing lethal substances, but according to Black it may not benefit the individuals seeking assisted suicide. Patients suffering from psychiatric disabilities in Switzerland still have it more difficult when it comes to receiving a prescription for a lethal substance. Black speculates that the requirements imposed on individuals suffering from psychiatric disorders are placed because it is harder to recognize suffering originating form a non-somatic source.[296]

The following year of the *Haas* case there was another end of life case where the applicant relied on article 8 in the Convention, namely the case of *Koch v. Germany*.[297] In this case the applicant was not an individual wanting to commit suicide, but rather the husband of a late wife. His late wife had fallen in front of her doorstep and was almost completely paralyzed due to it. She required artificial ventilation and constant care and suffered from spasms. She was expected to live at least 15 more years. She wished to commit suicide with the help of her husband as she did not want to live a life that she felt was undignified.[298] She tried to obtain a prescription to a lethal dose of a substance in order to commit suicide at home but was refused it based on the domestic law in Germany, which criminalized assisted suicide.[299]

The applicant and his late wife took the matter to the Federal Court in Germany, which held that due to article 2 in the Convention a State cannot have an obligation to assist someone in committing suicide.[300] The applicant's late wife committed suicide with the help of Dignitas in Switzerland in February 2005,[301] after which the applicant continued lodging complaints to the domestic courts

[295] Sefan, Susan, *Rational Suicide Irrational Laws: Examining Current Approaches to Suicide in Policy and Law*, 1st edn, New York, Oxford University Press, 2016, p. 185
[296] Black, (n 291), p. 164
[297] *Koch v. Germany*, no. 497/09, 19 July 2012
[298] Ibid, para. 8
[299] Ibid, para. 9-10 and 23
[300] Ibid, para. 13
[301] Ibid, para. 12

without success.[302] The Cologne Administrative Court declared the applicant's complaint as inadmissible, as it held that the applicant could not claim that his own rights had been violated.[303] The North-Rhine Westphalia Administrative Court of Appeal dismissed the applicant's request for appeal and the Federal Constitutional Court also found declared his complaints inadmissible.[304]

The applicant based his arguments in front of the ECtHR on article 8 in the Convention, that is to say that his rights had been breached.[305] He based the claims on that he had a personal interest that his wife's wish be respected, and that the refusal of the authorities to authorize her assisted suicide "had immediate repercussions on his own state of health."[306] Similarly to previous assisted suicide cases, the applicant claimed that article 8 contained the right to choose how and when to die.[307]

The Court held that the case in question had to be differentiated from cases where an individual is complaining on behalf of a diseased individual, as in this case the applicant claimed that his own rights had been breached.[308] The Court held that the applicant had an exceptionally close relationship to the diseased person and that he could claim to have been directly affected by the refusal for authorities to authorize his late wife's assisted suicide.[309] The Court noted that even if a substantive right under the Convention had not yet been established, it may still be possible for a right to judicial review to exists under article 8.[310] Considering these factors and previous case law regarding assisted dying, the Court held that the applicant's right to respect for private life under article 8 (1) had been interfered with, as the domestic courts had refused to examine the merits in the case.[311] As the Court examined whether the interference could be justified under article 8 (2), it held that the applicant's procedural rights had been breached, as it did not find that the State was justified not to examine the merits in his case.[312] The Court decided not to rule on the merits of the claims due to the principle of subsidiarity.[313]

[302] Ibid, para. 14-20
[303] Ibid, para. 16
[304] Ibid, para. 19-20
[305] Ibid, para. 27, 35
[306] Ibid, para. 35
[307] Ibid, para. 39
[308] Ibid, para. 43
[309] Ibid, para. 50
[310] Ibid, para. 53
[311] Ibid para.51-52 and 54
[312] Ibid, para. 67-68
[313] Ibid, para. 71

The finding that the husband could be a victim of a violation in this situation differed completely from the previously established concept of a victim. Puppinck and de La Hougue question the Courts decision, as they note that the Court did not clarify how the applicant's rights were involved. As they note, it is easy to see how his feelings were involved, but it is more challenging to determine how his rights were involved. They propose two possibilities as to how his rights could have been involved; either through a right to his wife's death or that he has a right that concerns the conditions of her death.[314] They criticize the Court for perhaps not considering the issue of the victim status from a strict legal rationality viewpoint, but rather from the viewpoint of the applicant's feelings. A third option they propose to the establishing of the applicant's victim status is that as the assistant in the suicide "both provides the means by which the individual desiring suicide can actualise their right to take their life while also benefitting from the personal right of the suicidal person".[315]

Gross v. Switzerland[316] was a case that was declared inadmissible after it came to the knowledge of the Court that the applicant had already committed suicide before the Chamber had adopted its decision on the case.[317] The case concerned an elderly woman who wished to end her life as her physical and mental faculties declined with time.[318] She was denied a prescription to a lethal sustenance in order to commit suicide and claimed that this breached her right under article 8 in the Convention to decide by what means and when she would die.[319] In May 2013 the Chamber delivered a judgement in which it held that there had been a violation of article 8, but at that time the Court was not aware of the fact that the applicant was already dead.[320] In that judgement the Swiss law was found to be in breach of article 8 because it was found not to be sufficiently clear as it did not give clear guidelines on under which circumstances someone should be able to obtain a lethal dose of a substance in order to commit suicide.[321] Much like in previous case-law, the

[314] Puppinck and de La Hougue, (n 236), p.741
[315] Ibid
[316] *Gross v. Switzerland* [GC], no. 67810/10, ECHR 2014
[317] Ibid, para. 30
[318] Ibid, para. 10
[319] Ibid, para. 3
[320] Ibid, para. 29
[321] Ibid, § 69

Court only assessed the case through procedural standards, while not ruling on the substantive issues.[322]

Tiensuu argues that the judgement in *Gross* indicates that States can have a positive obligation under article 8 to specify when citizens are free from prosecution when assisting someone in committing suicide and to assure that citizens are not denied assistance in suicide because of a groundless fear of criminal charges.[323] He argues that in cases where States do accept assisted suicide, it has to be clear when such assistance is accepted.[324]

Dorscheidt proposes, based on the case law of the ECtHR in end-of-life situations, that the relevant question has moved from being the question about the legal status of the freedom to choose to end one's life to being what the limitations of such as right can be.[325] However, as Rainey *et al* note, when examining the case law relating to assisted suicide and active euthanasia, the Court remains rather silent on the substantive standards, and is more willing to address the procedural standards. Rainey *et al* argue that it is clear that seeking to die with dignity through suicide does fall within the protection of article 8, but they are not convinced that the article yet encompasses a right to a specific means of death. This is because of conflicting obligations under article 2 and the wide margin of appreciation that States enjoy on the subject.[326]

Puppinck and de la Hougue argue that the Court's establishment of violations of procedural rights relating to assisted suicide suggests that substantive rights relating to assisted suicide exist. They base their argument on the inherent nature of a procedural obligation, as an "accessory to the principal material right".[327] In other words, in order to have a procedural obligation, a material obligation must exist first. This can be an autonomous conventional obligation or a material obligation in the domestic law that falls within the scope of the Convention. A third, and most common situation, is that it is both.[328] They base their analysis on the procedural rights that the Court has developed in relation to assisted suicide on the *Haas* case, the *Koch* case and the *Gross*

[322] Puppinck and de La Hougue, (n 236), p.742
[323] Tiensuu, (n 221), p. 257
[324] Ibid, p. 258
[325] Dorscheidt, (n 222), p. 245
[326] Bernadette, Wicks, Elizabeth, Ovey, Clare, (n 23), p. 447
[327] Puppinck and de La Hougue, (n 236), p. 743-744
[328] Ibid, p. 744

case.[329] It is notable that when the article was published the *Gross* case had not yet been deemed inadmissible.[330]

When assessing whether the underlying substantial right to assisted suicide is an independent conventional right or not, Pupponck and de la Houge note that while in the *Haas* case (and the *Gross* case) the domestic law authorized assisted suicide in some cases, while in the *Koch* case it was criminalized. They reason that in situations such as the *Koch* case, where the domestic law prohibits assisted suicide the substantive right that is behind the procedural right could be argued to be an independent conventional right and therefore binding to all member States.[331] The Court did not conclude that in the *Koch* case, however.[332]

Puppinck and de la Hougue note that the Court has not in its case law regarding assisted dying dismissed the possible existence of an independent conventional right to assisted dying. They criticize the Court's statement however in the *Koch* case that article 8 "may encompass a right to judicial review even in a case in which the substantive right in question had yet to be established".[333] This statement was made based on a previous case where the right to substantive right already existed in the domestic law,[334] therefore differing from the *Koch* case where the substantive right did not exist in domestic law. Consequently, they hold this argument to be insufficient.[335] They argue that "the legal basis on which the court is building a right to assisted suicide is dubious".[336]

Puppnck and de la Hougue note that while assisted suicide is a clear attack on life, the Court has in its case law increasingly disregarded article 2, along with article 17, which prohibits the abuse of rights under the Convention. They argue that a conventional right to assisted suicide and euthanasia should not be possible due to article 17 and yet the Court has established that article 8 encompasses a right to decide how and when to die. The way they interpret the judgement of the Court in the *Haas* case, is that in cases where a State allows assisted suicide or euthanasia article 2 only places positive procedural obligations on the State to ensure that the suicide is autonomous.

[329] Ibid
[330] The Gross case was deemed inadmissible in 30 September 2014, see footnote 317
[331] Puppinck and de La Hougue, (n 236), p.744
[332] See footnote 313
[333] *Koch v. Germany*, no. 497/09, § 53, 19 July 2012
[334] *Schneider v. Germany*, no. 17080/07, 15 September 2011
[335] Puppinck and de La Hougue, (n 236), p. 745
[336] Ibid

Therefore, they interpret autonomy to be the source and the condition of the right to suicide. They argue based on the *Haas* case that autonomy has replaced the right to life in hierarchy as the highest-ranking human right.[337]

In the *Koch* case and the *Gross* case, the Court does not mention article 2 in its judgement. The statement by the Court that "[w]ithout in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance", which was first stated in the *Pretty* case,[338] was again stated in the *Koch*[339] case and in the *Gross* case.[340] Puppnck and de la Hougue interpret this as the Court moving away from an objective right to life and putting more value on the quality of life instead, which is more of a subjective conception.[341]

3.4. Assisted suicide as a belief

As noted by Wicks, little attention has been given to the potential applicability of article 9 in end-of-life cases.[342] So far rights under article 9 have only been assessed by the ECtHR in one case of assisted suicide/active euthanasia.[343] The applicant in the *Pretty* case claimed that her rights under article 9 in the Convention had been violated because she believed in the notion of assisted suicide.[344] The Court assessed the claims in the case under article 9 shortly, stating that "not all opinions or convictions constitute beliefs in the sense protected by Article 9 § 1 of the Convention"[345] and that "[h]er claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance[…]"[346] The Court found no violation of article 9.[347] Since the *Pretty* case article 9 has not been invoked in other cases regarding assisted dying.

Despite the ECtHR holding that there was no violation of article 9 in the *Pretty* case, Wicks has analysed whether the article might still be relevant in assisted suicide in her thesis *Dying with*

[337] ECHR article 17, (n 5)
[338] *Pretty*, para. 65
[339] *Koch*, para. 51
[340] *Gross*, para. 58
[341] Puppinck and de La Hougue, (n 236), p. 746-747
[342] Wicks, (n 141), p. 17. Wick's theories on how article 9 may be applicable in refusal of treatment and in withdrawing or upholding a life-sustaining treatment will be presented below with regard to passive euthanasia
[343] See End of life and the ECHR Factsheet, (accessed 20 December 2019), (n 4)
[344] *Pretty*, para 80, (n 3)
[345] Ibid, para. 82
[346] Ibid
[347] Ibid, para. 83

Conscience: The Potential Application of Article 9 ECHR to Assisted Dying.[348] In the thesis she argues that the Court has changed its approach on what constitutes a manifestation of a belief.[349] She notes that the scope of article 9 reaches beyond simply the right not to hold religious beliefs, as it has been shown to encompass the right to hold some specific secular beliefs such as pacifism.[350]

Mark Campbell presents some reasons why article 9 (1) may not be deemed to be engaged. One of them is if the belief is not genuinely held. Another one is if the belief is not one that qualifies under the article, as not all beliefs do. Also, even if article 9 (1) protects the belief in questions, the expression of such a belief may be justly restricted.[351] In the case of *Eweida and Others v. the United Kingdom*,[352] the Court held that the rights under article 9 encompass "views that attain a certain level of cogency, seriousness, cohesion and importance".[353] Wicks notes that these standards may be easier met by some beliefs compared to others, taking beliefs form mainstream religion as an example of beliefs that may pass the test easier. She also acknowledges that well-established schools of thought outside of religion may pass the test rather easily, as opposed to a single-issue belief.[354] In *X v Federal Republic of Germany*[355] the applicant did not want to be buried in a cemetery with Christian symbols after he dies but preferred instead to be buried on his own land. The Commission held that the applicant's wish could not be "considered as a manifestation of his belief by a 'practice'".[356] Wicks argues that the standard set out by the Commission for the term "belief" "arguably presupposes a quasi-religious approach to belief systems",[357] as the Commission stated that the applicant's wish in the case was not a "manifestation of any belief in the sense that some coherent view on fundamental problems can be seen as being expressed thereby".[358]

[348] Wicks, (n 141), p. 27
[349] Ibid, p. 27
[350] *Arrowsmith v. the United Kingdom*, no. 7050/75, Commission decision of 16 May 1977
[351] Campbell, Mark, Conscientious objection, health care and article of the European convention on human rights, (2011), 11 (4), Medical Law International, 284, p. 287
[352] *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, ECHR 2013 (extracts)
[353] Ibid, para. 81
[354] Wicks, (n 141), p. 6
[355] *X v Federal Republic of Germany*, no. 8741/79, Commission decision of 10 March 1981
[356]Ibid, p. 137
[357] Wicks, (n 141), p. 7
[358] *X v Federal Republic of Germany*, no. 8741/79, Commission decision of 10 March 1981, p. 138

According to Wicks, a personal belief may be more likely to fall within the scope of article 9 if there is a "formation of an association which will imply a level of formality".[359] She also argues that non-religious beliefs are at a disadvantage compared to religious beliefs when it comes to assessing whether they amount to a belief within the scope of article 9. According to her, this is because "establishing that a belief is sufficiently serious and presents a coherent view on fundamental problems is a much harder task in the absence of a widely respected body of opinion which presents an agreed solution to transcendental issues".[360]

As is stated in article 9 in the Convention, manifestation of a belief can be in the form of "worship, teaching, practice and observance".[361] Wicks argues that non-religious beliefs are again at a disadvantage, as the display of non-religious beliefs may resemble more social or political action.[362] She argues however that the Court has taken a new approach in its requirements regarding a manifestation of a belief and focuses largely on the *Eweida* case to demonstrate this.[363] Two of the applicants in the case claimed that their rights to manifest their beliefs had been breached as their employers did not allow them to visibly wear a cross necklace.[364] Wicks argues that the Court adapted a broad approach on manifestation of belief,[365] as the Court stated that:

> In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.[366]

As Wicks notes, this broader interpretation means that a manifestation within the meaning of article 9 does not need to be considered as appropriate by a specific religion or belief, but rather has to be assessed in context and the act must be sufficiently closely linked to the belief.[367] This development might make it possible for article 9 to be relevant in assisted dying according to

[359] Wicks, (n 141), p. 7
[360] Ibid, p. 9
[361] ECHR, article 9 (1), (n 5)
[362] Wicks, (n 141), p. 11
[363] Ibid, p. 15-17
[364] *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, §3, ECHR 2013 (extracts)
[365] Wicks, (n 141), p. 15-16
[366] *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, §82, ECHR 2013 (extracts)
[367] Wicks, (n 141), p.16

Wicks, but even if assisted dying constituted a belief under article 9, the possibility of a restriction on such a belief being justified under article 9(2) still exists.[368]

The challenge with engaging article 9 in cases of assisted dying is the disadvantage of non-religious beliefs according to Wicks,[369] despite her believing that the wish of dying with dignity satisfies most of the requirements set out by the Court in the *Eweida* case.[370] The challenging part is the question of whether wanting to die with dignity "presents a coherent and cogent view on the fundamental problem of dying".[371] There is no consensus on assisted dying being the most dignified way to hasten death as opposed to palliative care.[372]

Wicks argues that after the *Eweida* case, the most significant difficulty would likely not be to find a close link between dying with dignity and a manifestation of the belief, but rather elevating it to a belief within the meaning of article 9.[373] Elevating an individualistic belief in dying with dignity to what would be considered a belief under article 9 remains unlikely, according to Wicks, due to the difficulties she presented in her paper.[374]

There is a limited exception to legal obligations based on conscience that has been recognized in the case law of the ECtHR.[375] Wicks therefore considers the possibility of assisted dying being protected under article 9 through a conscientious objection as well.[376] In *Bayatyan v. Armenia*[377] the Court held that article 9 was applicable, despite the article not specifically referring to a right to conscientious objection, as the applicant was a Jehovah's Witness and was objecting to military service due to his religion.[378] The Court found that there had been an interference in the applicant's rights under article 9 and that they were not justified under article 9 (2).[379] Wicks argues that despite the applicant in the case relying on a mainstream religion as a reason to conscientious objection, the reasoning should withstand without it. Dying with

[368] Ibid, p. 2-3 and 27
[369] Wicks, (n 141), p. 28
[370] See footnote 352
[371] Wicks, (n 141), p. 30
[372] Ibid
[373] Ibid, p. 31
[374] Ibid, p. 36
[375] Hurford, James E, '"I shall drink … to Conscience first, and to the Pope afterwards": Does Ladele v UK Herald a New Approach to Conscientious Objection under Article 9 ECHR?', (2018), 23 (3), Judicial Review, 151, p. 152
[376] Ibid, p. 32
[377] *Bayatyan v. Armenia [GC],* no. 23459/03, ECHR 2011
[378] Ibid, para. 110 and 111
[379] Ibid, para. 112 and 128

dignity may meet the standards set out in the case,[380] namely that a prohibition of assisted dying is in "serious and insurmountable conflict" with a "person's conscience or his deeply and genuinely held religious or other beliefs".[381]

Another view has been presented by James E. Hurford, who suggests that conscious objections to military service is an exception and would not be applicable regarding other issues. He argues that if a general obligation is applied neutrally it is unlikely to breach article 9. His interpretation of article 9 is that it does not appear to entail a duty on States to provide a general exemption from legal duties through conscientious objections. He interprets military service as being merely an exception.[382]

Although Hurford is not convinced that there is a general right to conscientious objection, based on the partly dissenting opinion of judges Vučinić and Gaetano in the *Eweida* case, he hypothesizes the possibility that if a genuinely held objection entails sufficient "cogency, seriousness, cohesion and importance"[383] rights under article 9 may have been interfered with. The partly dissenting judges used the following definition of conscience:

> Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and to avoid evil. In essence it is a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. This rational judgment on what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and people with no particular religious beliefs or affiliations make such judgments constantly in their daily lives.[384]

The partly dissenting opinion in the case was that prescriptions of conscience must be separated from religious prescriptions, such as not eating certain foods or wearing religious clothing. According to the partly dissenting judges, the former cannot be justified under article 9 (2) while the latter can. They held that when there is a genuine and serious conscientious objection, a State has both positive and negative obligations to respect it based on the freedom of conscience.[385] Hurford argues that manifesting conscience is fundamentally different from

[380] Wicks, (n 141), p. 33
[381] Bayatyan v. Armenia [GC], no. 23459/03, §110 and 111 ECHR 2011
[382] Hurford, (375), p. 153
[383] See footnote 145
[384] *Eweida and Others v. the United Kingdom,* nos. 48420/10 and 3 others, ECHR 2013 (extracts), Joint Partly Dissenting Opinion of Judges Vučinić and Gaetano, para. 2
[385] Ibid, para. 3

manifesting belief. When manifesting conscience, one must act on what he calls "inward perceived and held moral and ethical precepts", while manifesting belief is about "outward obligations" that a person follows due to their beliefs. Hurford holds that there ought to be a difference between restrictions imposed on how one presents one's beliefs and obliging an individual to act in contrast with their conscience.[386]

Furthermore, if such an interference on the right under article 9 cannot be justified under the second provision of the article, a State may be obliged to allow individuals to object to an act if it violates their fundamentally held values. He also notes that even if the dissenting opinion is not correct, an argument for a conscientious objection could be made based on article 14 in conjunction with article 9, and that a breach of the Convention may be found that way.[387]

Wicks argues that applying conscious objections to prohibitions of assisted dying would allow States to abide by the positive obligations of States to protect the right to life and to respect the principle of the sanctity of life, while still allowing an exemption for a minority whose conscience does not oppose to an "unnatural" death. She furthermore suggests that this might even be a preferable option to arguing for the right to assisted suicide through rights under article 8 in the Convention. Her reasoning is that arguments based on autonomy under article 8 may open doors to anyone who decides to die through assisted dying, while "Article 9 would only protect those whose conscience genuinely requires a limited exemption from the usual legal rules".[388] She goes on to explain her reasoning by stating that:

> In western societies where the generally applicable law is frequently founded upon, and sometimes still developed upon, Judaeo-Christian values, a limited exemption for those whose belief systems have different priorities (human dignity over sanctity of life, for example) could serve a vital role in ensuring that we can all live freely, guided by our own consciences in relation to the dying process.[389]

Article 9 has also been used as an argument to support the notion that medical practitioners have a right to assist individuals in committing suicide. After all, when it comes to States where assisted suicide is criminalized it is the person who assists in the suicide who suffers the consequences of the criminalization.[390] John Adenitire presents arguments for why such

[386] Hurford, (375), p. 55
[387] Ibid, p. 155-156
[388] Wicks, (n 141), p. 34
[389] Ibid
[390] Adenitire, John, 'A consequence-based human right to be 'Doctor Death'', (2016), 4, Public Law, 613, p. 614

a right may exist based on article 9, despite the Court finding no violation of article 9 in the *Pretty* case. In the *Pretty* case, the applicant stated that she "believed in and supported the notion of assisted suicide for herself".[391] Adenitire therefore argues that she presented her argument relying on autonomy rather than a value of conscience. He argues that this is less likely to be an issue when it comes to a medical practitioner. It is hardly for the practitioner's autonomy or personal benefit that they choose to aid someone in committing suicide. Adenitire finds it convincing that a medical practitioner may be acting on what they deem to be a moral obligation in certain circumstances to help someone who requests it commit suicide. He believes if such a medical practitioner, who is acting out of sympathy, were to invoke article 9 with a different outcome than in the *Pretty* case.[392]

Another argument Adenitire presents is that a medical practitioner could, based on a conscientious objection, invoke article 9, as he argues it is possible that it meets the requirements in the *Bayatyan* case. The medical practitioner feels that he must help the patient wishing to die. He must choose to act either on his conscience or the law. The conflict is serious as he may be criminally sanctioned if he acts on his conscience. Adenitire believes many medical practitioners would be able to show that the belief is cogent, serious, coherent and important.[393]

Adenitire emphasizes that conscientious objections need not be refusals to do something. He bases the argument on the wording in article 9, as the article protects the right "to manifest his religion or belief, in worship, teaching, practice and observance"[394] and that the article protects positive acts as well as negative ones. He argues that this is clear from the *Eweida* case.[395]

When it comes to the protection of the vulnerable as a justification under article 9, Adenitire uses the arguments made by the court in a Canadian case, *Carter v. Canada*.[396] To

[391] *Pretty*, (n 3), para 80
[392] Adentire, 2016, p. 615-616
[393] Ibid, p. 617
[394] See footnote 138
[395] Adentire, 2016, p. 617
[396] *Carter v. Canada* (Attorney General), 2012 BCSC 886 (CanLII)

summarize the arguments he presented from the Canadian case for why a blanket prohibition on assisted dying is not necessary:

1. Doctors can asses the legitimacy of a request of assisted dying and that they can use already existing investigations related to other end-of-life medical decisions[397]
2. Risks related to a permissive assisted dying law can be controlled "through a carefully designed and monitored system of safeguard"[398]
3. "A theoretical or speculative fear cannot justify an absolute prohibition"[399]
4. It should not be assumed that regulatory framework or criminal sanctions will function defectively and that a slippery slope into involuntary euthanasia will occur as a result[400]

One last question to address regarding conscientious objections is the potential conscientious objection against assisted dying by medical practitioners. The Court has rejected claims regarding conscientious objections for example in the case of *Pichon and Sajous v. France*,[401] where two pharmacists refused to sell contraceptives to three women. The pharmacists complained in front of the Court that they had a right to refuse selling the contraceptives based on article 9. The Court however held that since contraceptives were legal and were only sold in pharmacies "the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere."[402] As Campbell notes, based on this case it may seem like conscientious objections within healthcare are simply not protected by article 9. This is, however, not necessarily the case, as Campbell notes that it was an inadmissibility decision that lacked any in depth reasoning by the Court. It may be the case that the conscientious objection in the case did not amount to a manifestation of the belief they had. He furthermore emphasizes the factual context in the case. The pharmacists had acted in contradiction to a criminal law. Lastly, he

[397] *Carter*, (n 396), paras. 115-116
[398] Ibid, para. 117
[399] Ibid, para. 119
[400] Ibid, para. 120
[401] *Pichon and Sajous v. France (dec.), no. 49853/99, ECHR 2001-X*
[402] Ibid

emphasizes the wide margin of appreciation regarding restrictions of article 9 that States generally enjoy.[403]

3.5. An exception to a blanket prohibition of assisted suicide for physically disabled people?

3.5.1. The slippery slope and the risk of abuse

An argument used against the authorization of euthanasia is the slippery slope argument. Slippery slope arguments entail that if a specific action is authorized, then it will lead to something else which is morally wrong being authorized too. In the case of euthanasia this would mean moving from a restrictive authorization of voluntary euthanasia to a more permissive authorization of euthanasia. To support such an argument, one could take the Netherlands as an example. The law in the Netherlands has moved from allowing euthanasia and assisted suicide exclusively for the terminally ill, to authorizing assisted dying for others too, including the chronically ill, those suffering from psychological pain and incompetent patients.[404] Another slippery slope argument against the authorization of euthanasia is moving from active voluntary euthanasia as practised solely in cases of immense suffering in terminally ill patients, to accepting the practice in less severe cases of suffering as well.[405] Even if opponents of assisted dying may sometimes accept that there are cases in which assisted dying would be acceptable, they might still oppose the authorization of assisted dying in order to prevent the unintended deaths from happening.[406]

3.5.2. Blanket ban of assisted dying as discrimination

Article 14 was invoked by the applicant in the *Pretty* case[407] and the Court decided to review the claim as it had found rights under article 8 to be engaged in the case.[408] The fact that article 8 was not shown to have been violated does not exclude a possible breach of article 14 in conjunction with article 8, since the article was shown to be engaged.[409] As mentioned earlier, the Court has noted that treating individuals who are in similar situations differently can be discriminatory under certain conditions,[410] but it has equally noted that when States treat individuals who are in vastly

[403] Campbell, (n 351), p. 289-290
[404] Benatar, David, 'A legal right to die: responding to slippery slope and abuse arguments', (2011), 18 (5), Current Oncology, 206, p. 206
[405] Keown, John, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation*, 2nd edn, Cambridge, Cambridge University Press, 2018, p. 67
[406] Jackson, Keown, (n 79), 2011, p. 61
[407] *Pretty*, (n 3), para. 3
[408] Ibid, para. 87
[409] Pedain, Antje, 'The human rights dimension of the Diane Pretty case', (2003), 62 (1), *The* Cambridge Law Journal, 181, p. 196
[410] *Pretty*, (n 3), para. 88

different situations similarly, and no objective and reasonable justification can be found for the similar treatment, the prohibition of discrimination is violated. [411]

In the argument of the applicant it was stated that the applicant was "prevented from exercising a *right* enjoyed by others".[412] Antje Pedain criticizes Mrs. Pretty's counsel's choice to use the term right instead of a liberty to commit suicide when talking about the discrimination of disabled people.[413] The government responded to the applicants claims under article 14 by stating that no discrimination has occurred as under the domestic law no one can be said to have a right to commit suicide.[414] The government also referenced the arguments it made regarding article 3 and 8, namely that allowing disabled people an exception to the blanket prohibition of assisted suicide would risk abuse and eventually lead to the practice of involuntary euthanasia. They also argued that it fell within the margin of appreciation of the State.[415] The Court addressed the argument under the article briefly. It agreed with the government. The Court held that there were sound reasons for not allowing exceptions to the blanket prohibition, as this would introduce a risk of abuse.[416] No violation was found of article 14.[417]

According to Pedain a separate justification for treating disabled individuals the same as able-bodied individuals under article 14 is necessary, as a law that results in disabled individuals not being able to commit suicide contrary to able-bodied individuals, causes discriminatory treatment of disabled people. But as she notes, although a prohibition that leads to inequality in that it affects a particular group of individuals harsher than others seems to be discriminatory at first glance, a decisive answer on whether the law is in fact discriminatory requires a look into whether the burden on the group is placed arbitrarily.[418] In the *Pretty* case the Court held that there was a legitimate aim for prohibiting assisted suicide from all individuals, as it held it to be necessary in order to prevent abuse and to protect the vulnerable.[419] As noted by Pedain, the argument that it is necessary

[411] *Thlimmenos v. Greece* [GC], no.34369/97, § 44, ECHR 2000-IV
[412] Ibid, para. 85, (added cursivation)
[413] Pedain, (n 409), 197
[414] *Pretty*, (n 3), para. 86
[415] Ibid, para. 47-48 and 60
[416] *Pretty*, (n 3), para. 89
[417] Ibid, para. 90
[418] Pedain, (n 409), p. 199-200
[419] *Pretty*, (n 3), para. 89

to prohibit assisted suicide altogether, even if it come at the price that individuals such as Mrs. Pretty have to pay, is a kind of slippery slope argument.[420]

Pedain criticizes the decision made by the Court regarding article 14. According to her the heavier burden placed on disabled people under the domestic law was not justified.[421] After examining the *Pretty* case under articles 8 and 14, she argues that according to the law, non-vulnerable, mentally competent individuals who are physically unable to commit suicide will have to be given an exception from blanket prohibitions. The condition she puts forward for such an exception is that such a law would still effectively protect the vulnerable. She is not convinced that such a law is impossible to legislate and criticizes the lack of examination of such a possibility by the Court.[422] She holds that exceptions to a blanket ban on assisted suicide are possible without risking abuse, as a similar practice already exists with regard to refusal of medical treatment which can in some cases lead to death. She suggests that by requiring courts and doctors to assure that the patient is physically incapable of committing suicide, the exception to the law would not threaten the protection of the vulnerable and able-bodied individuals in general. This would according to her also keep the authorization of euthanasia from moving towards a more permissive law which would eventually allow euthanasia for others as well.[423]

Pedain addresses another concern too, namely the threat of moral corruption in society by making life appear as less valuable and more disposable. In her view this is not the message the exception to a blanket prohibition of assisted suicide would send, as this exception would be based on the principle of personal autonomy and human dignity. She argues that it would coincide with our commitment to treat people equally in the absence of a compelling reason to do otherwise. In reference to Mrs. Pretty she states that "[t]he *reason* why we respect her choice remains the same reason that makes us respect the choice of able-bodied persons to commit suicide: not that it is *the right* choice, but that it is *her* choice."[424]

The argument that allowing assisted dying is risky as it can lead to a lack of protection of the vulnerable is a common argument used against authorization of assisted dying, despite the fact that

[420] Pedain, (n 409), p. 200
[421] Ibid, p. 203
[422] Ibid, p. 201-202
[423] Pedain, (n 409), p. 202
[424] Ibid, p. 203

evidence of it occurring in States that allow it has been argued to be weak.[425] Similar comments have been made by Tiensuu as was made by Pedain. He notes that the argument that a blanket ban on assisted suicide is necessary in order to protect the vulnerable is inherently a slippery slope argument.[426] He is not convinced by this argument. He takes another approach than Pedain, however. He compares assisted suicide to palliative care, which is often proposed as a better option, albeit it is less controlled and reported compared to assisted suicide. Consent is not an issue in assisted suicide according to him, whereas that is not the case for palliative care, which he argues leads to unrequested deaths.[427] The side effect of death that is accepted in palliative care is commonly called "the doctrine of double effect". It entails that when a disease progresses, doctors may administer potentially lethal quantities of a drug such as diamorphine or morphine into a patient in order to relieve pain. The idea behind it is that the doctor's action is not motivated by the potential negative effect of the drug, death, but is instead motivated by the positive effects of it, which is relieving pain. A doctor administering such doses of a drug is therefore according to the doctrine not guilty of murder. Interestingly, many countries that do not authorize assisted suicide or euthanasia still authorize palliative care.[428] Death is not the intended outcome in palliative care, however, as injecting a patient with potentially lethal doses of a drug must happen only in a situation where the risk of death is deemed to be justified in a terminally ill patient as the pain relief it provides is perceived to outweigh the benefit of continued life.[429]

Tiensuu presents two different slippery slope arguments, the first one being that allowing voluntary euthanasia and assisted suicide would lead to cases of involuntary euthanasia and the second one being that allowing these two forms of assisted dying for terminally ill patients would lead to cases of assisted suicide of individuals experiencing nonphysical suffering.[430] He is unconvinced of both arguments. Regarding the first type of slippery slope, he argues that the argument requires support by empirical studies, which he claims is lacking. To the second type of slippery slope argument he replies by stating that if we accept the underlying principles of palliative care and refusal of LST,

[425] Black, (n 9), p. 317
[426] Tiensuu, (n 221), p. 264
[427] Ibid, p. 265
[428] Jackson, Keown, (n 79), p. 24
[429] Ibid, p. 25
[430] Ibid, p. 264

namely beneficence and autonomy, it should be irrelevant whether the suffering is physical or not.[431]

As Tiensuu indicates, those who choose palliative care at the end of their lives need not opt for assisted suicide instead, even when assisted suicide is available. These two forms of medical treatment can coexist. As he states,

> [a] trade-off of interests does not really take place between those who could be helped with palliative care and those who request assisted suicide, because palliative care could be given to those who do not want assisted suicide even if assisted suicide were also available. Rather, the trade-off is between those who could be bullied into unwillingly ending their lives and those who could seek assisted suicide to end their lives with more dignity and less pain[432]

Tiensuu observes that what is at stake is two principles that are in contradiction, namely the right to life and the right to autonomy. He makes the interesting observation that when it comes to withholding LST, the prohibition of intentional killing has not been argued to overrule the right to autonomy, despite the fact that similarly to assisted suicide it will lead to death.[433] He also argues that the act of assisting someone in suicide is no more motivated by desire to kill than is killing someone in self-defence or when it is required in a legal arrest,[434] both of which are exceptions in accordance to article 2 (a) and 2 (b) in the Convention.[435] He also emphasizes the fact that authorizing assisted suicide is not about a choice to end someone's life, but rather about who is allowed to decide by what means and when the patient's life will end. Palliative care contravenes the aim of preserving life and yet it is authorized. This leads Tiensuu to conclude, that what the right to life opposes is the patient being allowed to choose the time and manner of their death, which in turn is a right that individuals have under article 8.[436]

Wicks has also considered that an exception to a blanket prohibition could be possible without risking the protection of the vulnerable. She argues that patients in situations such as Mrs. Pretty's could be given an exception to a law that prohibits assisted suicide when the law overrides the patient's personal autonomy. She suggests that an exception could be limited to situations where the patient's suffering is unbearable, and the patient is unable to commit suicide by themselves.

[431] Ibid, p. 264-265
[432] Ibid, p. 265
[433] Ibid, p. 266
[434] Ibid, p. 262
[435] See footnote 35
[436] Ibid, p. 266

She bases her argument on the principle of autonomy and quality of life considerations, which she argues pose a strong conflicting interest to States' obligations to protect life.[437]

Wicks argues that in addition to vulnerable individuals, there is another group of individuals that needs protection through law, namely the individuals who assist in suicides. She argues that since assisted suicide involves by definition at least two people, the protection of autonomy does not only concern the individual who wishes to die, but also the individual assisting in the suicide. Just as vulnerable individuals may be pressured into committing suicide, individuals may also be pressured into assisting someone in a suicide, which can lead to psychological harm. Wicks argues therefore that if assisted suicide is authorized it is important that the law includes a conscience clause to protect individuals who for religious reasons or otherwise do not want to participate in an assisted suicide.[438] Such a provision exists for example in Belgium, where no one can according to the law be forced to perform or to assist in the performing of euthanasia.[439]

3.6. Euthanasia and assisted suicide for minor patients

When analysing the case-law of the ECtHR regarding assisted dying, it seems apparent that one of the most important criteria for authorizing different forms of assisted dying is the patient consenting to it as well as ensuring that the patient is mentally capable of making an informed decision on it. As seen above, different factors can play a role in whether a State is obliged to prevent an adult from committing suicide. But what if a child is terminally ill and is suffering to the extent that they wish to end their life rather than continuing to live? Can a child consent to assisted dying?

Under Dutch law, euthanasia or assisted suicide is authorized for minors between the age of 12-16 under certain conditions.[440] In 2014 the act that authorized euthanasia in Belgium was amended, resulting in the age restriction of euthanasia to be removed. Consequently, euthanasia is legal for minors in Belgium now under certain conditions.[441] Belgium is the first country in the world to

[437] Wicks, (n 43), p. 197
[438] Wicks, Elizabeth, *The State and the Body: Legal Regulation of Bodily Autonomy*, 1st edn, Portland, Hart Publishing, 2016, p.82
[439] The Belgian Act on Euthanasia 2002, May 28th 2002, Chapter 6, Section 14
[440] Termination of Life on Request and Assisted Suicide Act of April 2001, Chapter 2, Article 2 (4)
[441] Loi modifiant la loi du 28 mai 2002 relative à l'euthanasie, en vue d'étendre l'euthanasie aux mineurs (Law of 28 May 2002 on Euthanasia, amended by the Law of 13 February 2014), www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2014022803, accessed 28 February 2020

authorize euthanasia without an age limit.[442] In both Belgium and the Netherlands one of the requirements for a legitimate consent to euthanasia or assisted suicide is that the minor understand the consequences of it.[443] PACE stated its opinion in a written declaration in 2014 after the Belgian Senate voted for the legalization of euthanasia for children, that it held that the new law "betrays some of the most vulnerable children in Belgium by accepting that their lives may no longer have any inherent value or worth and that they should die".[444]

When it comes to assisted dying regarding minors, there may be different factors that have to be considered compared to assisted dying in adults. Luc Bovens has identified five common moral arguments against authorizing assisted dying to minors.[445] One of the arguments he presents concerns what the ECtHR has emphasized extensively in its end-of-life case law, namely discernment. Bovens focuses his analysis on adolescents since he argues it is evident that young children lack discernment. He describes capacity of discernment and a valid decision in the context as responsive to reason and as being made by the agent themselves rather than giving the responsibility to someone else. Bovens argues that contrary to those who argue that adolescents lack discernment, he does not believe so. He argues that albeit the decision-making style of adolescents may differ from adults, this does not affect the capacity of discernment, as these differences can also be found between age groups among adults while the decision remains equally responsive to reason.[446]

Another argument Bovens addresses is that adolescents lack discernment because of the influence from their parents, as their critical thinking skills have not yet developed fully. Bovens is not convinced by this argument either, as he argues that critical scrutiny is not required for an agent to have authorships over their decisions. He argues that if a minor opposes to euthanasia because of their parents' view on euthanasia, this decision would be respected despite the lack of critical scrutiny. Therefore, Bovens argues that the same respect should be given to minors who request euthanasia because they grow up in a family that does not oppose euthanasia.[447]

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[442] Bovens, Luc, 'Child Euthanasia: Should we just Not Talk about it?' (2015), 41(8), Journal of Medical, 630, p. 630
[443] Mendelson, Danuta, Heywood, Ian, 'Minors' Decision-Making Capacity to Refuse Life-Saving and Life-Sustaining Treatment: Legal and Psychiatric Perspectives', (2014), 21, Journal of Law and Medicine, 762, p.763
[444] The Parliamentary Assembly of Council of Europe, Written Declaration no. 567, 30 January 2014
[445] Bovens, (n 442), p. 630
[446] Ibid, p. 631
[447] Ibid

A third argument Bovens presents is that the minor is being pressured into euthanasia. He argues that the pressure on a minor to request euthanasia is likely no bigger than the pressure older individuals may experience. In fact, he expects pressure on older individuals to be greater for multiple reasons, one of which is that parents often cling to their children's lives harder than adults cling to their parents' lives. [448] Another related argument he presents is that children are more sensitive to pressure when compared to adults and are therefore more vulnerable. While Bovens accepts that children may be more prone to succumb to pressure, he argues that it is still less likely that a child opts for euthanasia due to pressure because of the aforementioned reason, that is to say, that children are typically less pressured to request euthanasia. He also argues that parents typically feel obliged to make things well for their children, while the same may not be true to the same extent when it comes to adults taking care of their parents.[449] The last argument he presents is that there is a better option, namely palliative case. He dismisses this argument by stating that this is an argument against euthanasia in general rather than an argument specifically against euthanasia for minors.[450] The arguments made by Bovens have been criticized,[451] but they give an idea on possible relevant questions regarding assisted dying in children.

There have not yet been any cases brought to the ECtHR regarding active euthanasia or assisted suicide when it comes to minors.[452] Therefore, the aforementioned concerns regarding minor patients' capacity to consent to active euthanasia or assisted suicide have yet to be directly addressed by the Court. The possible outcome of such cases has been hypothesised, however. Dorscheidt seems to consider children as belonging to the group of vulnerable individuals, as based on the Court's statements regarding the protection of the vulnerable in the *Pretty* case, he argues that it could potentially be justified for a State that allows assisted suicide to make restrictions of the practice on children.[453] Passive euthanasia has been addressed by the Court regarding situations involving minors. Perhaps the case law on passive euthanasia on minors can also give some

[448] Ibid
[449] Ibid, p. 631-632
[450] Ibid, p.632
[451] Kaczor, Christopher, 'Against euthanasia for children: a response to Bovens', (2016), 42(1), Journal of Medical Ethics, 57, p. 57-58
[452] See End of life and the ECHR Factsheet, (accessed 3 March 2020), (n 4)
[453] Dorscheidt, (n 222), p. 245

indication to how the Court would address consent of minor patient in active euthanasia or assisted suicide. The issue of passive euthanasia on minor patients will be discussed in chapter 4.2.

4. Passive Euthanasia under the ECHR

4.1. The withdrawal of life-sustaining treatment and the right to life

As mentioned above,[454] individuals who lack consciousness are protected by the right to life. While States have an obligation to take reasonable steps to preserve life, they are not obliged to provide an absolute right to receive medical treatment, including LST.[455] When addressing the argument that individuals who are not conscious have less of a protection of the right to life, Wicks reminds that the view of separating persons from non-persons is both ethically and legally problematic. She emphasizes firstly that respect should be given to the previous wishes of the patient, as a way of respecting the interest of autonomy that individuals has. Secondly, she argues that autonomy is not the only interest that can apply to incapacitated individuals, as many interests and rights, such as human dignity, can still apply when the individual is not conscious. The issue of dignity can be complex with patients in a persistent vegetative state. On the one hand, it can be argued that withdrawing ANH leads to an undignified death, while on the other hand it can be argued that keeping such an individual alive with life prolonging treatment leads to an undignified life.[456]

What is tricky about situations of patients in a vegetative state is that they cannot consent to treatment or alternatively refuse consent to treatment, as they do not, for obvious reasons, possess decision-making capacity at that moment. In this situation the question arises as to how the decision of the continuance/termination of LST must be made. There may be contradicting opinions between for example the family of the patient and the doctors treating the patient. One possible solution is that previous wishes of the patient are considered. These wishes can come in the form of a living will, which is made in advance by an individual who expresses their wishes as to what type of treatment they would like to receive/not to receive in the case that they lack decision making capacity at the point when such an information is needed. This is usually done in written form. Another alternative is the appointing of a healthcare power of attorney. This is a document where an individual appoints someone to make healthcare decisions for them in case they were to

[454] See section 2.2.3.
[455] Wicks, (n 49), p. 168
[456] Wicks, (n 50), p. 26

lose decision making capacity.[457] There is no consensus on the regulation of these advance directives in European countries[458] and of course, not everybody makes an advance directive.

Cases regarding withdrawal of LST has been brought in front of the ECtHR, including such cases where no advance directives were present. The *Lambert* case concerned the withdrawal of ANH from a man named Vincent Lambert.[459] The applicants in the case were his parents as well as his half-brother and his sister.[460] Vincent Lambert was in a chronic vegetative state after a car accident in 2008.[461] At the time of the case Vincent Lambert was in Reims University Hospital where he received ANH.[462] The Coma Science Group at the University of Liège concluded that Vincent Lambert was in a "chronic neuro-vegetative state characterized as 'minimally conscious plus'".[463] Vincent Lambert received several physiotherapy sessions and speech and language therapy sessions that were all unsuccessful.[464]

Dr. Kariger, Vincent Lambert's doctor, announced in January 2014, as a result of a meeting where five out of six doctors agreed on it, to withdraw the treatment.[465] Dr. Kariger was convinced that continuing with the treatment would have been against the patient's wishes.[466] Vincent Lambert had not drawn any advance directives, however. Dr. Kariger's conclusions on the patient's wishes were based on wishes he had expressed to his wife and brother before the accident.[467]

After the Conseil d'État declared that Dr. Kariger's decision on withdrawing the treatment was lawful,[468] the applicants complained to the ECHR, claiming that withdrawing the treatment was in breach of articles 2, 3 and 8 in the Convention.[469] The Court found that the applicants could not complain on behalf of Vincent Lambert but went on to examine the substantive issues on the applicants' own behalf.[470]

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[457] Andorno, Roberto, 'Regulating Advance Directives at the Council of Europe', in Negri, 2012, p. 73
[458] Ibid, p. 74
[459] *Lambert*, para. 3, (n 73)
[460] Ibid, para. 10
[461] Ibid, para.11
[462] Ibid, para. 12
[463] Ibid, para. 13
[464] Ibid
[465] Ibid, para. 21 and 22
[466] Ibid, para. 22
[467] Ibid, para. 27
[468] Ibid, para. 51
[469] Ibid, para. 80
[470] Ibid, para. 112

End of life issues are regulated in France under the so called "Leonetti Act", which, in the Court's words, does not authorize euthanasia or assisted suicide, albeit it allows withdrawal of LST under certain criteria.[471] As with previous end-of-life cases above, the Court again held that States have a certain margin of appreciation regarding end of life issues.[472] Regarding the decision-making process, as in this case there was no advance directives or a designated person of trust, the Court noted that it varies between States. The final decision may be taken either by the doctor, the doctor together with the family, the family alone or by a legal representative or courts.[473]

The Court held that the decision-making process falls within the margin of appreciation of States, and that it was in accordance with article 2 in this case, despite the fact that the family members had differing views on whether or not to end the LST.[474] The Court emphasized the importance of the patient's own wishes, holding that even when the patient is unable to express their wishes his "consent must remain at heart".[475] The Court has previously in the *Pretty* case stated that individuals have the right to refuse life-prolonging treatment and held therefore in the *Lambert* case that Conseil d'État was authorized to take into consideration the wishes he had shared with his wife and brother.[476] The State had fulfilled its positive obligations under article 2 and there was no violation of the article.[477]

The judgement in the *Lambert* case was not a unanimous decision, as there were disagreements on several points in the case. Five partly dissenting judges in the case emphasized that articles 2 and 3 do not contain a negative aspect in that one does not have a right to die under article 2, nor does one have a right to be subjected to ill-treatment under article 3, for example by being "beaten, tortured or starved to death".[478] They were not convinced that Vincent Lambert had clearly expressed a wish not to be kept alive in a situation such as where he in this case found himself to be, as he had not written advance directives or designated a person of trust. They stated that "[e]ven if, for the sake of argument, Vincent Lambert had indeed expressed the view that he would have

[471] Ibid, para. 53
[472] Ibid, para. 148
[473] Ibid, para. 165
[474] *Lambert and Others v. France* [GC], no. 46043/14, § 166, ECHR 2015 (extracts)
[475] Ibid, para. 167
[476] Ibid, para. 180
[477] Ibid, para. 181-182
[478] *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015 (extracts), Joint Partly Dissenting Opinion of Judges Hajiyev, Šikuta, Tsotsoria, de Gaetano and Griţco, para. 2

refused to be kept in a state of great dependency, such a statement does not in our view offer a sufficient degree of certainty regarding his desire to be deprived of food and water."[479] They also did not agree that Vincent Lambert was in an end-of-life situation.[480]

The partly dissenting judges held that there was no question about whether Vincent Lambert was alive, as he was not braindead and was able to breathe on his own as well as digest food, albeit he was, at best, in a minimally conscious state.[481] The partly dissenting judges seem to have chosen a definition of death which includes the cessation of all activity of the brain.[482] They held that the State has an obligation under article 2 to keep providing Vincent Lambert with food and water.[483] As Arend Hendriks notes, when it comes to passive euthanasia, the Court "emphasises the importance of a good and foreseeable decision-making process where all arguments expressed are taken into account".[484]

4.2. Passive euthanasia in cases of minor patients

Unlike active euthanasia and assisted suicide, passive euthanasia cases regarding minor patients have been brought to the ECtHR. In *Glass v. the United Kingdom*, [485] the mother of a minor patient complained about the administering of diamorphine to her son against her will, as well as the placing of a do-not-resuscitate order by a doctor without her consent.[486] The applicants in the case were the mother and her son David, who was severely disabled, both mentally and physically.[487] On one occasion, when David's condition had worsened, he was admitted to a hospital, where doctors suggested the administering of morphine in order to ease David's distress. David's mother opposed it. David's doctor furthermore believed that if David's state was to worsen to the point of his heart stopping, David should not be resuscitated, as he thought that would be against the child's best interests.[488]

[479] Ibid, para. 5
[480] Ibid, para. 6
[481] Ibid, para. 4 and 7
[482] See above chapter 2.2.2
[483] *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015 (extracts), Joint Partly Dissenting Opinion of Judges Hajiyev, Šikuta, Tsotsoria, de Gaetano and Griţco, para. 8
[484] Hendriks, Arend, 'End-of-life decisions. Recent jurisprudence of the European Court of Human Rights', (2019), 19, ERA Forum, 1, p. 569
[485] *Glass v. the United Kingdom*, no. 61827/00, ECHR 2004-II
[486] Ibid, para. 61
[487] Ibid, para. 7
[488] Ibid, para. 12

The decision to administer diamorphine to the applicant was finally taken, against the mother's will, as David's medical team believed he was dying and in need of pain relief. [489] The applicants claimed that the dose of diamorphine that was given was suitable for adults, not for a child.[490] A do-not-resuscitate order was also placed.[491] The belief of the medical team that David was dying turned out to be false, as David's condition improved and he was eventually released from the hospital.[492]

The applicants complained in front of the ECtHR that their rights under article 8, in David's case the right to physical and moral integrity, had been violated. They claimed that the actions taken by the doctors were illegal, as they administered the drug against the mother's will without a court decision being involved.[493] The applicants claimed that in the doctors' conduct they failed to efficiently respect the interests of both applicants.[494] The government held that in exceptional situations of emergency the consent of a parent was not required.[495] Furthermore, the government noted that the doctors were forced to make quick decisions as the patient was in a critical situation. They had to act in the best interests of the child.[496]

The Court decided to examine the case form David's viewpoint, despite the mother also claiming to have been a victim of a violation of article 8.[497] The Court noted that the mother was David's legal proxy and had therefore the authority to act on behalf of David and to defend his best interests in medical decisions. The Court noted that the mother's objections to the administration of diamorphine was overridden, which it considered to be an interference with David's right to physical integrity.[498] The Court held that the actions taken by the doctors were not unlawful and that it was clear that the doctors did not try to hasten David's death, but rather to act in David's best interests.[499]

[489] Ibid, 22
[490] Ibid, para. 25
[491] Ibid, para. 27
[492] Ibid, para. 32
[493] Ibid, para. 61
[494] Ibid, para. 62
[495] Ibid, para. 65
[496] Ibid, para. 66
[497] Ibid, para. 72
[498] Ibid, pra.a 70
[499] Ibid, para. 75 and 77

When assessing the necessity of the doctors actions, the Court held that the hospital could have sought intervention by the High Court before an emergency arose, as the doctors were aware, that she was reluctant to agree with the advice doctors had in case of an emergency.[500] It also noted that a consent to the administering of morphine was given by the mother in a previous discussion, but that it was clear that she had later withdrawn that consent, which the doctors failed to respect.[501] The Court held that there had been a violation of article 8, as the hospital and the doctors had overridden the mother's objection to the treatment.[502]

A breach does not automatically occur when medical staff act in contrast to what the parents of a minor wish. *Gard and others v. the United Kingdom*[503] is an inadmissibility decision concerning the withdrawal of LST of a minor. Charlie Gad was a baby who suffered from a severe mitochondrial disease, which caused him to be dependent of a ventilator for breathing. He suffered from several health issues, including severe epilepsy disorder, absence of signs of normal brain activity and the inability to move his limbs. He was also deaf.[504] Charlie's parents wanted to try a treatment called nucleoside treatment, which had only been used on patients with less severe mitochondrial condition. The American doctor providing this treatment stated that there was a theoretical possibility that the treatment might benefit Charlie,[505] but after Charlie suffered from brain seizures due to his epilepsy, the treating clinicians held that the treatment would be futile.[506]

The hospital where Charlie was applied to the High Court to withdraw the artificial ventilation of Charlie, as they deemed it to be in his best interests. Charlie's parents opposed the withdrawing of his artificial ventilation.[507] The domestic courts deemed it to be in the best interest of Charlie to withdraw his treatment so that his suffering would not continue, rather than taking him to America for the experimental treatment.[508] The parents took the matter to the ECtHR. When the Court addressed the issue regarding article 2, it listed three things to consider in cases of withdrawal of LST based on the *Lambert* case;

[500] Ibid, para. 78-79
[501] Ibid, para. 82
[502] Ibid, para. 83
[503] *Gard and Others v. the United Kingdom* (dec.), no. 39793/17, ECHR 2017
[504] Ibid, para. 4
[505] Ibid, para. 5
[506] Ibid, para. 6
[507] Ibid, para. 7
[508] Ibid, para. 20-23, 27-32 and 37

- the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2;

- whether account had been taken of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel;

- the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests[509]

What makes this case different from the *Lambert* case, is that the patient was a baby, thus did not have any previous wishes. However, an independent guardian was assigned to Charlie by the High Court to protect the patient's best interests,[510] which the Court interpreted as a way to ensure Charlie's wishes were expressed.[511] The guardian was of the opinion that taking Charlie to the USA for the experimental treatment was not in his best interests.[512] Opinions of medical personnel were thoroughly examined; the Court was satisfied with the conduct of the domestic courts and the views of Charlie's parents were considered. The Court held for these reasons that the second element of the list from the *Lambert* case was satisfied.[513] It also found the first and third element to be fulfilled,[514] and noted the margin of appreciation that States enjoy in such issues, therefore concluding that the applicants' claims under article 2 being manifestly ill-founded.[515]

When it came to article 8, the Court reminded it has in previous case law held that treating a child against the wishes of their parents was in violation of the child's rights under the article.[516] The Court also reminded that it has previously considered appropriate in case of a conflict between the wishes of the parents and the opinion of the medical personnel to refer the matter to a domestic court. [517] It also emphasized on the broad consensus regarding the treatment of children, namely that the child's best interest is of primary importance.[518] The Court held that there had been an interference of the rights of the parents under article 8.[519] It found however that the interference was in accordance with the law, that it had the legitimate aim of protecting "integrity and moral"

[509] Ibid, para. 80
[510] Ibid, para. 17
[511] Ibid, para. 92
[512] Ibid, para. 18
[513] Ibid, para. 90-95
[514] Ibid, para. 89, 97
[515] Ibid, para. 98
[516] Ibid, para. 105
[517] Ibid, para. 106
[518] Ibid, para. 108
[519] Ibid, para. 110

and "rights and freedoms" of the child and that the decisions taken were not arbitrary or disproportionate. [520] The application was declared inadmissible.[521]

A similar situation was presented in the inadmissibility decision *Afiri and Biddarri v. France*,[522] which concerned the complaint of the withdrawal of LST of the applicants' 14-year-old daughter who was in a persistent vegetative state due to an acute cardio-respiratory failure.[523] The medical practitioners suggested the withdrawing of the LST, which the parents did not agree with.[524] The doctors tried to explain the situation of their daughter to the applicants and held it was not in the best interest of her to continue the treatment like her parents wished, but the parents refused to agree to the withdrawal of the treatment.[525] The applicants based their complaints before the Court on articles 2 and 8, claiming that their rights under these articles were violated because a decision was made to withdraw the treatment of their daughter based on the doctors' assessments despite the fact that they opposed to it.[526]

Once again the Court emphasized the margin of appreciation which is left to the States when it comes to end-of-life situations, both with regard to the balancing of right to life and the right to private life when it comes to patients, as well as whether or not to allow cessation of LST. It also reminded that this margin of appreciation is not without limits.[527] The applicants in the case claimed that the domestic law was not clear enough on situations where parents oppose to withdrawing a LST from a minor child.[528] However, the Court noted that it had already considered in the *Lambert* case that the law was sufficiently clear. The law had been modified but not to a significant extent. Furthermore, the applicants did not complain about the modifications to the law.[529] Doctors are obliged under the domestic law to try to seek the consent of the parents when withdrawing LST and to make the best interests of the child a priority.[530] The Court held that the

[520] Ibid, para. 112, 113 and 124
[521] Ibid, para. 125
[522] *Afiri and Biddarri v. France* (dec.), no. 1828/18, 23 January 2018
[523] Ibid, para. 3
[524] Ibid, para. 4-5
[525] Ibid, para. 5-12
[526] Ibid, para. 21
[527] Ibid, para. 29
[528] Ibid, para. 30
[529] Ibid, para. 31
[530] Ibid, para. 32

process how the domestic law requires doctors to manage situations where the parents disagree complied with article 2 in the Convention.[531]

The applicants complained about the fact that parents did not share the decision-making power with the medical professionals under the domestic law when it came to minor children.[532] The Court however held that article 2 does not impose any specific procedure to be taken to reach a decision on whether to withdraw LST.[533] The Court also noted that the procedure required by the domestic law was followed in this case, that is to say the medical professionals had consulted the parents of the minor patient and they tried to come to an agreement with them.

The Conseil d'État had found the information on the patient's wishes to be contradictory, which is why it could not be determined with certainty. It had also emphasized the importance of the opinion of the parents in cases where the wishes of the patient as unknown but noted that the parents had indeed been involved in the decision-making process.[534] The Court concluded what it had already stated in the *Lambert* case, namely that the decision-making process in the area falls within the margin of appreciation of States.[535] The Court held that even if the parents do not agree with the decision taken regarding the withdrawing of their daughter's treatment, the procedure applied in the case was enough for article 2 not have been breached.[536] The Court also found that the national authorities had complied with requirements under article 2 and therefore declared the complaints to be manifestly ill-founded.[537]

Based on these cases, it seems that the best interests of the child take priority in situations of treatment withdrawal of minor patients. However, the wishes of the parents are not completely irrelevant either, as was shown in the *Glass* case. Similarly to the *Lambert* case, the Court did not emphasize the need to protect the vulnerable as it has done in assisted suicide cases.

[531] Ibid para. 33
[532] Ibid, para. 34
[533] Ibid, para. 35
[534] Ibid, para. 36 and 37
[535] Ibid, para. 38
[536] Ibid, para. 40
[537] Ibid, para.

4.2. Refusing life-sustaining treatment

4.2.1. Refusing life-sustaining treatment based on personal autonomy

The right to decide how and when to die originated in the *Pretty* case,[538] and was further described in the *Haas* case.[539] Black argues that despite these cases addressing assisted suicide, the applicability of article 8 reaches beyond it and may apply in multiple different end-of-life scenarios, including the right to refuse LST.[540] Black notes that the right to decide how and when to die is "somewhat loose", as interference is permissible in some situations with accordance to the second paragraph of article 8.[541] Black therefore argues that it is a *prima facie* right and therefore suggests that it is preferable to call it a freedom rather than a right.[542]

As Black specifies, because the freedom to refuse LST is connected to personal autonomy, it follows that there are situations where such a refusal is not an expression of that freedom. Therefore, article 8 does not apply to non-autonomous refusals to LST.[543] In the *Pretty* case the Court stated that

> In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention. As recognised in domestic case-law, a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life[544]

Tiensuu interprets the right to refuse LST as a right to be allowed to die. As he notes, however, the House of Lords Selected Committee held that "[t]he right to refuse medical treatment is far removed from the right to request assistance in dying".[545] Tiensuu interprets the Courts judgement in the *Pretty* case as agreeing with this statement. He notes however that this is not a self-evident conclusion, as the opposite interpretation has been taken by the Netherlands, which he argues based its legalization of assisted suicide on the same principles as the right to refuse LST is based on.[546] Tiensuu argues that if palliative care and the right to refuse LST is accepted, then an absolute prohibition on assisted suicide becomes problematic.[547]

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[538] See footnote 235
[539] See footnote 267
[540] Black, (n 9), p. 301
[541] See footnote 118
[542] Black, (n 9), p. 302
[543] Ibid, p. 303
[544] *Pretty*, (n 3), para. 63
[545] House of Lords Select Committee on Medical Ethics, HL Paper 21-1, 1994, para. 236
[546] Tiensuu, (n 221), p. 260-261
[547] Ibid, p. 263

The criteria that the Court mentioned in the *Pretty* case for the consent to be legitimate is that the patient is an adult who is mentally competent. Black argues that these requirements expressed by the Court do not encompass all situations where a patient might make a non-autonomous decision to refuse medication. She argues that situations including coercion and undue influence can also lead to a non-autonomous refusal of medication. She goes on to argue that a wider view of a legitimate consent may be found in the *Haas* case.[548] Black bases her suggestion on paragraph 51 in the case, citing the Court as saying

> the Court considers that the right of an individual to decide how and when to end his life, *provided that said individual is in a position to make up his own mind* in that respect […] is one aspect of the right to respect for private life within the meaning of art.8 of the Convention[549]

Paragraph 51 in *Haas*, however, states that

> […]the Court considers that an individual's right to decide by what means and at what point his or her life will end, *provided he or she is capable of freely reaching a decision* on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention.[550]

Nevertheless, the Court phrases the requirement of a legitimate consent in a different manner compared to the *Pretty* case, perhaps encompassing the broader view Black is suggesting. In Recommendation 1418 the PACE included similar requirements that Black is suggesting for a legitimate refusal, as it stated that States should protect the self-determination of terminally ill patients and taking necessary measures "to ensure that no terminally ill or dying person is treated against his or her will while ensuring that he or she is neither influenced nor pressured by another person. Furthermore, safeguards are to be envisaged to ensure that their wishes are not formed under economic pressure […]"[551]

When it comes to the timing of the refusal to LST, i.e. whether the refusal is made in the current time or in advance, Black argues that it is irrelevant. She argues that if the decision is made for the future by a patient who still has decision-making capacity, it is a valid autonomous decision, even

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[548] Black, (n 9), p. 301

[549] This version of the wording of the Court is also found in sources such as European Center for Law and Justice, 'Case of Haas v. Switzerland – the European Court of Human Rights Denies an Alleged Right to "Assisted Suicide" Opposable to the State', (21 January 2011, *European Center for Law and Justice*) <https://eclj.org/case-of-haas-v-switzerland-the-european-court-of-human-rights-denies-an-alleged-right-to-assisted-suicide-opposable-to-the-state>, accessed 12 April 2019 and DIGNITAS, 'How DIGNITAS works', (*DIGNITAS*), <http://www.dignitas.ch/index.php?%20option=com_content&view=article&id=23&Itemid=84&lang=en>, accessed 12 April 2019

[550] *Haas*, (n 6), para. 51 (emphasis added)

[551] The Parliamentary Assembly of Council of Europe, Recommendation 1418 Protection of the human rights and dignity of the terminally ill the dying, adopted by the Assembly on 25 June 1999 (24th Sitting), para. 9 b (3)

if the patient lacks decision-making capacity when the decision takes effect. The justification for this argument is that both decisions are an attempt to decide how and when to die.[552]

The second paragraph of article 8 opens the possibility to legitimate interferences to the freedom to refuse LST. Black argues that refusals to LST that pose a threat to population health, which has been found to be included under "the protection of health and morals" of article 8 (2),[553] may be the only proportionate restriction of the right to choose how and when to die.[554] Such a scenario could be for example if the patient suffers from an infectious disease and wants to refuse treatment. If the disease poses a threat to the health of other individuals, it may be legitimate to deny the patient the possibility to refuse treatment.[555] In fact, Black argues that if a State were to allow a patient to refuse treatment in such a scenario, the State would violate its obligations by risking public health.[556]

The issue of risking the health of a third party has even been mentioned by the ECtHR in the case of *Jehovah's Witnesses of Moscow and Others v. Russia*,[557] where the Court noted that in many jurisdictions the only exception to the patients' freedom of choice in health care has been when a refusal of treatment threatens the security of a third party, taking mandatory vaccination during an epidemic as an example.[558] Black notes in her thesis however that there may be other ways to eliminate the risks to the health of others were the patient to suffer from an infectious disease, for example through quarantine. She estimates that the limitation to the right to choose how and when to die caused by threats to populations health is likely to be rather limited in scope.[559] Black concludes that the freedom to refuse LST is extensive and argues that if a State intervenes with this freedom, when it is in accordance with the right to decide how and when to die, is incompatible with article 8.[560] Dorscheidt also argues that preventing the spread of contagious diseases is the

[552] Black, (n 9), p. 304
[553] E.g. *Acmanne and others v. Belgium*, 10 December 1984, no. 10435/83
[554] Black, (n 9), p. 321
[555] Ibid, p.318
[556] Ibid, p. 321
[557] *Jehovah's Witnesses of Moscow and Others v. Russia*, no. 302/02, 10 June 2010
[558] Ibid, para. 136
[559] Black, (n 9), p. 318
[560] Ibid, p. 321

only scenario where a State may interfere with the freedom of choice in health care. He argues that in any other case, such an interference would only diminish the value of life.[561]

Black is not convinced by arguments against the authorization of refusals of LST which may at first glance look persuasive.[562] This includes arguments such as loved ones suffering if the patient refuses treatment and the argument that such refusals should be prohibited in order to protect the vulnerable. She argues that individuals having an obligation to make decisions in their lives that favour the interests of their loved ones over their own interests seems to be "a highly unintuitive characterization of the obligations that attach to close personal relationships […]".[563] Black notes that unlike in discussions of assisted dying, the argument regarding the protection of the vulnerable is seldom present in discussions of refusal of treatment. She speculates that this is perhaps because of procedural requirements can ensure that the decision is truly autonomous. She argues that the autonomy of individuals who wish to refuse treatment should not be set aside to ensure the protection of the vulnerable.[564]

4.2.2. Refusing life-sustaining treatment on the basis of a belief

Wicks argues that article 9 in the Convention may be relevant in refusals of LST.[565] She makes her case by studying English law, but the analysis is included in this thesis nevertheless, as it may give ideas on what types of issues may arise if article 9 is used as a justification of a refusal of treatment. As Wicks mentions, perhaps the most well-known example of a situation where a patient may refuse LST due to religious beliefs is a Jehovah's Witness refusing blood transfusion. This might amount to a manifestation of a belief within the meaning of article 9.[566] It seems that a refusal to LST does not need to be based on a rational decision, as the Court stated in the *Jehovah's Witness* case that

> The freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to the principles of self-determination and personal autonomy. A competent adult patient is free to decide, for instance, whether or not to undergo surgery or treatment or, by the same token, to have a blood transfusion. However, for this freedom to be meaningful, patients must have the right to make choices that accord with

[561] Dorscheidt, (n 222), p. 242
[562] To read Black's full arguments for why she argues that the only valid interference is protection of population health see Black, (n 9), p. 308-321
[563] Ibid, p. 316
[564] Ibid, p. 317-318
[565] Wicks, (n 141), p.18
[566] Ibid

> their own views and values, regardless of how irrational, unwise or imprudent such choices may appear to others.[567]

Wicks argues that it is likely that religious beliefs will be accepted easier than secular ones even with regard to refusal of treatment. However, assessing whether the refusal based on a religious conviction truly is an autonomous one might be more problematic, especially if the patient is a child. As Wicks mentions, the patient may be at a risk of indoctrination or they may be pressured by religious family members to refuse the treatment.[568] A case in England, *Re E*, regarded a 15-year-old boy who refused a blood transfusion as he was a Jehovah's Witness. The transfusion was however authorized, as the court held that he was not competent to make the decision.[569] Whether or not the ECtHR would come to the same conclusion can only be speculated, as such a case has not been brought before the Court. Based on its case law regarding medical treatment withdrawal of children, however, it seems that the Court prioritizes the best interests of the child, and therefore one could speculate that the Court would come to the same conclusion as the English court did, namely that in case the medical professionals saw it as necessary for the child to receive blood transfusion they would be authorized to do it.

5. Conclusions

The aim of this thesis was to examine the extent to which individuals can choose how and when to die in accordance with the ECHR. In order to address the question relevant articles in the ECHR were presented. When examining perhaps the most obvious relevant right under the Convention, namely the right to life, it was demonstrated that albeit the right is considered to be one of the most fundamental rights under the Convention, it is not an absolute right lacking any exceptions. Case-law of the ECtHR has demonstrated that States have both positive and negative obligations under article 2. It has also been established in the case-law that States can sometimes have an obligation to prevent individuals form committing suicide, but this has only been established in specific circumstances, such as when an individual is detained. Apart from inadmissibility cases, article 2 in relation to assisted suicide has only been invoked in the *Pretty* case. The Court clearly established that there is no right to die under article 2. The Court held that the blanked ban in the

[567] *Jehovah's Witnesses of Moscow and Others v. Russia*, no. 302/02, § 136, 10 June 2010
[568] Ibid, p. 20
[569] *Re E (a minor) (wardship: medical treatment) [1993] 1 FLR 386*

State did not breach the article. However, it did not state that authorizing assisted suicide would breach article 2 either.

Article 2 has been invoked in passive euthanasia cases. Based on the *Lambert* case, in addition to several inadmissibility cases, it seems rather clear that States do not have an obligation to keep patients who are in a persistent vegetative state alive. Some factors should be considered, however. The previous wishes and beliefs of the individuals are to be considered when making the decision to withdraw treatment. The wishes of loved ones may play a role as well, especially when it comes to parents of a minor patient, but it is more relevant under article 8. If the patient is a young minor who has not had the chance to express previous wishes, it seems, based on the *Gard* case, that a system where a guardian is designated to the child can serve a similar function in the decision-making process. The Court, as well as different governments, do not seem to consider withdrawing or withholding LST as a form of euthanasia. Thus, even States that do not allow assisted suicide or voluntary euthanasia sometimes allow passive euthanasia. The emphasis on protection of the vulnerable is more or less absent in passive euthanasia cases, in contrast to the heavy emphasis placed on it in assisted suicide cases. Nonetheless, the Court has not stated in any of the end-of-life cases that assisted dying in any form, at least as long as there is a legitimate consent and the wishes of the patient are considered, would violate article 2.

Article 3, the prohibition of torture and inhuman and degrading treatment, was shown to be an absolute right with no exceptions, not even when national security is threatened. States have been shown to have positive obligations under the article, meaning that they must protect their citizens from ill-treatment. There are specific standards for when an act can be considered ill-treatment under the article, for example, the act must attain a minimum level of severity. It has been established that suffering resulting from a disease can lead to a breach of article 3, if the State act in a manner that causes it to worsen. However, in the *Pretty* case the Court held that the blanket ban did not breach the applicant's rights under article 3, as it was clear that no ill-treatment had been inflicted on her by public authorities. Furthermore, the applicant was receiving the medical care that she needed. As has been argued, it seems that even when a mentally competent individuals invoke article 3 regarding requests to assisted suicide, States can deny it based on the right to life. In the absence of intentional humiliation by medical personnel inflicted on a suffering patient wishing to die, or alternatively appalling medical treatment imposed on such a patient, it seems

unlikely that any breach of article 3 would be found when States prohibit assisted dying. Therefore, advocating for a right to assisted dying based on article 3 does not seem promising.

The right to private life seems to be one of the most relevant articles when it comes to assisted dying, as all cases assessed by the Court regarding assisted dying have involved claims under article 8. The article has been shown to include the right to self-determination, albeit it is not explicitly listed under the article. The right to autonomy is one of the most often used arguments for assisted dying. Rights under article 8 are nevertheless not absolute, as article 8 (2) allows for some exceptions. Therefore, even if a right under article 8 has been interfered with, it is still possible that the article has not been breached. The *Pretty* case was where the Court first introduced the notion of a right to choose how and when to die. At that point it was worded in a rather uncertain manner. In the *Haas* case, however, it became clearer that the article does indeed entail that right. The *Haas* case has been interpreted in different ways. Some interpret the case as a clear statement that a right to suicide or even a right to assisted suicide exists under article 8, while others are not convinced by that. It is difficult to determine whether such a right exists under article 8, as the Court uses a rather vague language when addressing the issue. It has repeatedly kept to assessing the procedural rights of the applicants rather than the substantive issues, including the *Koch* case where the Court found a violation of article 8.

Controversially, the right to refuse medical treatment seems to be better established compared to the right to assisted suicide, despite the fact that both will have the same end result, death. Arguably, there may be proportionate limitations to that right as well, namely when the refusal of medical treatment can lead to a threat to population health. Another possible exception may be when a child refuses lifesaving treatment, as it may not be regarded as a legitimate autonomous refusal of LST. It has however not been confirmed by the ECtHR as such a case has not yet been brought before it.

It is uncertain whether States are obliged under article 8 to aid a dignified death but based on case law some conclusions on limitations can be drawn. If a State allows for assisted dying it must ensure that vulnerable individuals are protected. An appropriate way seems to be, based on the *Haas* case, requiring a prescription for a lethal substance. The Court hinted of the existence of a positive obligation to facilitate death with dignity but did not expressly state so and it therefore

remains unsettled. The Court has also emphasized the importance of decision-making capacity in assisted dying.

One largely ignored article on the issue of assisted dying, that may nevertheless be relevant, is article 9, the freedom of thought, conscience and religion. It has been invoked in one assisted suicide case; the *Pretty* case, where the Court did not find a violation of the article. The article has been established to protect not only religious beliefs, but also secular beliefs, although arguments have been presented regarding the possible difficulty of invoicing the protection of secular beliefs under the article. A personal belief may be at a disadvantage if it is a secular one, but since the *Eweida* case, it could be argued that death with dignity can amount to a belief under article 9. Regardless, this does not mean that a State would necessarily breach the article even if death with dignity was recognized as a belief within the meaning of the article, as States may be able to justify a restriction based on article 9 (2). The other possibility under article 9 is that individuals may invoke the article by basing their argument on a conscientious objection. It may be possible for death with dignity to fulfil the requirements in the *Eweida* case. However, it has also been argued that conscientious obligation against military service is simply an exception and does not necessarily apply in other situations.

As article 8 was shown to be engaged in the *Pretty* case, the Court examined the possible breach of article 14 in conjunction with article 8. In the *Pretty* case the applicant claimed that the blanket prohibition on assisted suicide was discriminatory as the State failed to treat people who are unable to commit suicide on their own differently from people who are able to do it. The Court disagreed with the applicant and took the view of the government, namely focusing the argument on a type of slippery slope argument.

The slippery slope argument presented by the government and agreed on by the Court in the *Pretty* case has been criticized heavily and could indeed have been better constructed in the case. The article was addressed in a brief manner in the case and the Court failed to consider the possibilities for exceptions to a blanket prohibition. No argument was made either by the government nor by the Court on why the restrictions applied to rejection of medical treatment would not be sufficient to protect the vulnerable against non-voluntary assisted dying. Furthermore, arguments presented by Tiensuu indicate that even if assisted suicide was authorized, it would not automatically lead to patients opting for it rather than other alternatives such as palliative care. Patients who are at the

end of their lives could therefore still choose to die naturally. Nonetheless, it remains uncertain whether the Court would ever find a breach of article 14 regarding a blanket prohibition of assisted dying.

In conclusion, article 2 does not seem to impose States any general obligations to prevent suicide, even when the suicide requires the involvement of a third party. At the same time, it is clear that the article itself does not include a right to die. The most promising article regarding an unqualified right to suicide is article 8, as it has already been established that it contains a right to choose how and when to die. Whether or not States are obliged to ensure that everyone has an equal opportunity to end their own life, that is to say both the disables and the able bodied, remains unclear. It is equally unclear if States have an obligation to facilitate assisted suicide for able-bodied individuals. However, when they do allow assisted dying, they must ensure the protection of the vulnerable. States enjoy a wide margin of appreciation in end-of-life matters. Therefore, the Court leaves many decisions regarding assisted dying for the States to decide. Whether States can impose blanket prohibitions on assisted suicide remains debatable despite the Court not finding a violation of the Convention in the *Pretty* case. When it comes to passive euthanasia, where the previous wishes of the patient are considered, it appears unlikely that it would breach article 2.

Swedish summary

Frågor gällande eutanasi och assisterat självmord debatteras intensivt inom etik och juridik. [570] Fyra europeiska länder, Belgien, Nederländerna, Schweiz och Luxemburg, tillåter assisterat självmord eller aktiv eutanasi. [571] Den Europeiska domstolen för de mänskliga rättigheterna (härefter Europadomstolen) dömde det första fallet gällande assisterat självmord, Pretty mot Förenade kungariket, år 2001. [572] Diane Pretty klagade till domstolen över att hennes rättigheter hade blivit kränkta eftersom hennes man enligt engelska lagen möjligtvis skulle bli åtalad ifall han hade hjälpt sin fru att begå självmord. [573] Pretty var nästan helt förlamad p.g.a. den motorneuronsjukdom som hon led av och kunde därför inte begå självmord utan assistans. [574] Domstolen hittade inget brott mot den Europeiska konventionen om mänskliga rättigheter (härefter konventionen) i fallet, men fallet var det första där domstolen nämnde att artikel 8, rätt till skydd för privat- och familjeliv, [575] möjligtvis skyddar rätten till att bestämma när och hur en person avslutar livet. [576] Principen fastställdes i fallet Haas mot Schweiz. [577]

Efter fallet Pretty har flera domar gällande slutet av livet givits av Europadomstolen. Denna avhandling behandlar frågor gällande möjligheter att bestämma när och hur en person avslutar livet enligt konventionen. Syftet är att besvara frågan om hur omfattande rätten är enligt den Europeiska konventionen om mänskliga rättigheter. För att besvara denna fråga kommer följande frågor också att behandlas i denna avhandling: Vilka rättigheter och intressen i konventionen är relevanta i assisterat självmord? Hur har Europadomstolen tolkat artiklar i konventionen gällande dödshjälp? Har staterna en obligation att säkerställa samma möjligheter till självmord för alla? Vilken roll spelar samtycke i beslutsprocessen? För att få svar på frågorna granskas i denna avhandling Europadomstolens tolkningar av artiklarna i konventionen, vetenskapliga texter och till en viss mån icke-bindande rättsliga instrument.

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[570] Paterson, Craig. *Assisted Suicide and Euthanasia: A Natural Law Ethics Approach*, Routledge, 2008, p. 1, tillgänglig: ProQuest Ebook Central, (Hämtad 12.4.2020)
[571] Pareek, KK, Narsimulu, G, *Medicine Update & Progress in Medicine 2019*, New Delhi, Jaypee Brothers Medical Publisher, 2019, p. 1336
[572] Pretty mot Förenade kungariket*,* nr. 2346/02, §32, ECHR 2002-III
[573] Ibid, para. 32
[574] Ibid, para. 7-9
[575] Europarådet, *Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna ändrad genom protokoll nr 11*, november 1950, ETS 5, artikel 8
[576] Ibid, para. 67
[577] Haas mot Schweiz*,* nr. 31322/07, § 7, ECHR 2011

I fallet Pretty konstaterade Europadomstolen klart att artikel 2, rätten till liv, [578] inte innehåller rätten att dö. [579] Domstolen fann ingen kränkning av artiklarna som Pretty klagade över i fallet, d.v.s. artiklarna 2, 3, 8, 9 och 14. [580] Domstolens beslut gällande förbudet mot diskriminering enligt artikel 14 [581] har blivit kritiserat. Domstolen fann att ett totalförbud är berättigat för att skydda sårbara individer. [582] Flera argument har lagts fram gällande problem med domstolens förklaring om varför ett totalförbud mot dödshjälp är berättigat. Ett vanligt motargument är att missbruk av dödshjälp kan förhindras på andra sätt. [583]

Tio år efter fallet Pretty fastställde domstolen i fallet Haas att artikel 8 skyddar rätten att välja när och hur en person avslutar sitt liv. [584] I det fallet fann domstolen att kravet på recept på en dödlig substans inte kränkte den klagandes rättigheter enligt artikel 8, eftersom det var ett sätt att säkerställa skyddet av sårbara individer. [585] Det första fallet där domstolen fann ett brott mot artikel 8 gällande assisterat självmord var fallet Koch mot Tyskland. [586] Fallet handlade om en tysk kvinna som var nästan helt förlamad.[587] Hon ville avsluta sitt liv hemma, men var förhindrad att göra det p.g.a. Tysklands lag som kriminaliserade assisterat självmord. [588] Hon var tvungen att åka till Schweiz där hon tog livet sig själv. [589] Hennes man klagade inför Europadomstolen, som fann att staten hade brutit mot artikel 8 i konventionen. [590] Domstolen granskade dock inte ifall materiella rättigheter enligt artikeln hade brutits, utan fokuserade på granskningen av processuella rättigheter som artikeln skyddar. [591] Domstolen har inte nämnt i ett endaste fall att stater som tillåter dödshjälp skulle bryta mot artikel 2.

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[578] Europarådet, *Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna ändrad genom protokoll nr 11*, november 1950, ETS 5, artikel 2
[579] Pretty mot Förenade kungariket*,* nr. 2346/02, §39, ECHR 2002-III
[580] Ibid, para. 42, 56, 78, 83 och 90
[581] Europarådet, *Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna ändrad genom protokoll nr 11*, november 1950, ETS 5, artikel 14
[582] Pretty mot Förenade kungariket*,* nr. 2346/02, §89, ECHR 2002-III
[583] Se till exempel [583] Pedain, Antje, The human rights dimension of the Diane Pretty case, *The Cambridge Law Journal*, 62 (1), Cambridge University Press, (2003), s. 203 och Tiensuu, Paul, 'Whose Right to What Life: Assisted Suicide and the Right to Life as a Fundamental Right', (2015), 15 (2), Human Rights Law Review, 251, s. 264
[584] Se fotnot 7
[585] Haas mot Schweiz*,* nr. 31322/07, § 58 och 61, ECHR 2011
[586] Koch mot Tyskland, nr. 497/09, 19 juli 2012
[587] Ibid, para. 8
[588] Ibid, para. 9-10 och 23
[589] Ibid, para. 12
[590] Ibid, para. 54
[591] Puppinck, Gregor, de la Hougue, Claire, 'The Right to Assisted Suicide in the Case Law of the European Court of Human Rights', (2014), 18 (7-8), The International Journal of Human Rights, 735, s.742

Artikel 2 och 8 har också åberopats i fall som handlar om passiv eutanasi. I fallet Lambert med flera mot Frankrike [592], som handlade om en fransk man, Vincent Lambert, som efter en bilolycka blev tetraplegisk, [593] fann domstolen att inget brott mot artikel 2 sker ifall det artificiella upprätthållandet av patientens liv skulle avslutas. [594] Domstolen betonade vikten av samtycke även i fall där patienten är medvetslös, och beaktade Vincent Lamberts tidigare uttryckta önskemål om behandlingsmetoder om han någonsin skulle vara i en situation som den han befann sig i efter olyckan. Domstolen ansåg att Vincent Lamberts önskemål kunde beaktas, trotts att de endast hade blivit uttryckta muntligt. [595] Domstolen fann inget brott mot konventionen i beslutet Gard mot Förenade kungariket heller, där det artificiella upprätthållandet av liv för en bebis skulle slutas emot föräldrarnas vilja. [596] Däremot fann domstolen att en minderårigs förälders rättigheter enligt artikel 8 hade kränkts i ett fall där läkarna handlade emot föräldrarnas önskan och gav diacetylmorfin till barnet för att de trodde att barnet skulle dö. [597]

När domstolen har granskat artikel 8 gällande assisterat självmord har den i allmänhet hållit sig till att granska processuella rättigheter, [598] vilket gör att det är svårt att dra exakta slutsatser av innehållet i rätten att välja när och hur en person avslutar livet. Vissa slutsatser kan dock dras. Artikel 2 innehåller inte rätten att dö, men däremot bryter stater knappast mot artikel 2 ifall de tillåter assisterat självmord. Vissa krav kan dock ställas på sådana stater. De måste säkerställa skyddet av sårbara människor. Detta kan ske till exempel genom att kräva recept på dödliga substanser. Ifall ett totalförbud mot dödshjälp kan berättigas är oklart fastän domstolen inte fann något brott mot artikel 14 i fallet Pretty.

Passiv eutanasi verkar inte bryta mot artikel 2. Patientens samtycke är viktigt också ifall där patienten inte kan uttrycka sig. Detta kan ske genom tidigare uttryckta önskemål. Då det gäller passiv eutanasi för minderåriga patienter borde föräldrarnas vilja beaktas. Det betyder dock inte att läkarna alltid måste handla i enlighet med föräldrarnas åsikter, vilket var tydligt i fallet Gard.

[592] Lambert med flera mot Frankrike [GC], nr. 46043/14, ECHR 2015 (extracts)
[593] Ibid, para. 11
[594] Ibid, para. 182
[595] Ibid, para. 176 och 178-180
[596] Gard mot Förenade *kungariket* (besl.), nr. 39793/17, ECHR 2017
[597] Glass mot Förenade kungariket, nr. 61827/00, ECHR 2004-II
[598] Bernadette, Wicks, Ovey, (n 23), p. 447

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