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Assisted dying before the ECtHR: General rules for national regulations

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Introduction
Due to the controversial nature of assisted dying, there is a wide variety of approaches towards this phenomenon in the Member States of the Council of Europe. Many countries maintain an absolute ban or accept only passive forms of assistance in dying (e.g., France), whereas some countries, of which Belgium and the Netherlands are known to be the most liberal, allow the practice of actively assisting patients in terminating their lives for different types of suffering. Countries that have legalised assisted dying give prominence to the autonomy of the individual in avoiding an undignified end to their life, which flows from the right to respect for private life (Article 8 of the European Convention on Human Rights; ECHR). Countries that prohibit assisted dying, by contrast, maintain that the right to life (Article 2 ECHR) is absolute.

This regulatory heterogeneity raises the question as to what human rights principles must be observed by the Member States of the Council of Europe when regulating assisted dying in one way or another. More specific questions that come to mind are: under what conditions can the right to respect for private life take precedence over the right to life? Can an absolute ban on assisted dying be proportionate? And, more in general, what discretion is awarded to the Member States when it comes to regulating assisted dying? These questions, which will be answered throughout this article, will continue to gain importance as more and more countries have introduced (e.g., Spain) or are considering (e.g., Portugal) legislation on assisted dying. Indeed, unlike a decade ago, when the only Member States to allow euthanasia and/or assisted suicide were the Netherlands, Belgium, and Luxembourg, lately assisted dying has been on the political agenda of numerous European countries.¹
Given that all Member States may have their own specific constitutional values and moral standards, the human rights approach to assisted dying within the Council of Europe cannot be one of striving for uniformity. Against this background, the European Court of Human Rights (ECtHR) is entrusted with the task of setting minimum standards of fundamental rights protection. It thus develops general principles determining the minimum level of protection that is required. This article aims at disclosing these general principles with regard to assisted dying, so as to get a better understanding of what is expected of (existing and emerging) national legislation from a human rights perspective. By providing such guidance, this article aspires to serve as an incentive for national authorities to engage in a more informed debate.

Since 2002, the ECtHR has handed down five judgments relating to the ethically controversial issue of assisted dying: Pretty v. UK (2002), Haas v. Switzerland (2011), Koch v. Germany (2012), Gross v. Switzerland (2013), and Lambert and Others v. France (2015 and 2019). Currently, these cases constitute the human rights framework concerning assisted dying. What stands out in this case law is the reluctance of the ECtHR to get involved in end-of-life matters. The Court primarily focuses on the lack of consensus within Europe to justify granting a wide margin of appreciation to the Member States to regulate assisted dying on their own territory. It thus adopts a very cautious approach and uses the margin of appreciation in such a way as to avoid taking a normative stance on the issue of assisted dying. Notwithstanding the large discretion that is left to the Member States, this article emphasises that the aforementioned cases contain a number of human rights principles that are generally applicable to assisted dying cases. As a consequence, Member States are obliged to put in place a legal framework that is compatible with these general principles.

This article first sheds light on the three human rights that come to the fore in assisted dying cases: the right to life, the prohibition of torture (or inhuman or degrading treatment), and the right to respect for private life. It then focuses on the latter right and especially on the margin
of appreciation that is attached to it, as the two first mentioned rights, in their negative conception, are ‘absolute’ rights, leaving no room for discretion. This is different for the right to respect for private life, protected by Article 8 ECHR, which has been interpreted by the ECtHR as encompassing a right to choose when and how to die. The second paragraph of Article 8 is a general limitation clause, which sets forth some requirements that need to be fulfilled for an interference with the right in the first paragraph to be justified. In its case law on Article 8, the ECtHR appraises Member States’ compliance with these requirements. In general, it leaves a margin of appreciation to the national authorities to determine the proportionality or necessity of a restrictive measure. And it is this margin of appreciation that plays a prominent role in the case law of the Court on assisted dying, which forms the third and largest part of this article. This third part first evaluates the general attitude of the ECtHR towards assisted dying and the approach it has adopted in the five assisted dying cases that have come before it. After these general conclusions, the article is centred around the distinction between Member States that allow some form of assisted dying and Member States that forbid assisted dying. This distinction makes it possible to conduct a more targeted analysis, limited to the relevant cases in respect of each of both ethical choices, and thus to draw specific conclusions for both sides of the legislative spectrum. It is concluded that, even though the Court is very reluctant in its review and the Member States enjoy a wide margin of appreciation to regulate assisted dying, the Court’s case law comprises general rules for both restrictive and permissive national regulatory frameworks that have to be complied with when regulating assisted dying.

Three relevant human rights

Pretty v. UK (2002), the first assisted dying case that came before the ECtHR, immediately highlighted the three human rights that are relevant or predominant in cases regarding assisted dying. The applicant relied on Articles 2, 3, 8, 9, and 14 of the ECHR to challenge the blanket
ban on assisted suicide in the UK and the refusal of the Director of Public Prosecutions to grant an immunity from prosecution to her husband if he assisted her in committing suicide, which she was not able to do on her own because she suffered from motor neurone disease.\(^{18}\) Whereas the Court’s considerations about the freedom of thought, conscience, and religion (Article 9), and the prohibition of discrimination (Article 14) were highly concise,\(^ {19}\) the bulk of its reasoning was devoted to the right to life (Article 2), the prohibition of torture or inhuman or degrading treatment (Article 3), and the right to respect for private life (Article 8).\(^ {20}\) Although each of these three provisions is considered to be relevant with respect to assisted dying,\(^ {21}\) in its subsequent case law the ECtHR focused on (the fair balance between) the right to life and the right to respect for private life. The rationale behind this more explicit focus on the latter two rights can be found in *Pretty*, where the Court, among others, emphasised the interconnection between Articles 2 and 3 ECHR:

*Article 3 must be construed in harmony with Article 2*, which hitherto has been associated with it as reflecting basic values respected by democratic societies. […] Article 2 of the Convention is first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being and does not confer any right on an individual to require a State to permit or facilitate his or her death.\(^ {22}\)

Both the right to life and the prohibition of torture are ‘absolute’ rights (in their negative conception), which means they leave no room for discretion.\(^ {23}\) Hence, the Member States are not given any leeway to decide on depriving someone of life nor to engage in torture. However, as important as the right to life is in end-of-life matters, the main complaint in almost every assisted dying case is the alleged breach of Article 8 ECHR. Applicants usually claim that this Article includes the right to choose when and how to die.\(^ {24}\) In contrast to the non-derogable rights in Articles 2 and 3 ECHR, the right to respect for private life in Article 8 ECHR can be legitimately interfered with if the conditions laid down in paragraph 2 of that Article are fulfilled. Article 8 ECHR thus leaves some discretion to the Member States, but this discretion is conditional. More specifically, a restriction of the right to respect for private life must meet the conditions of legality, legitimacy, and proportionality.\(^ {25}\)
In view of the highly controversial nature of assisted dying and, as a result, the lack of consensus between the Member States, it is not surprising that the ECtHR gives a leading role to the margin of appreciation contained in the proportionality test of Article 8 ECHR. That is why we first need to outline the margin of appreciation doctrine in the case law of the ECtHR.

**Article 8 ECHR and the margin of appreciation: finding a way out of the dilemma**

*General limitation clause (Article 8(2) ECHR)*

As mentioned, a general limitation clause has been included in the second paragraph of Article 8 ECHR. It lays down requirements that need to be fulfilled for an interference with the right to respect for private life to be justified.\(^{26}\)

The first requirement is that of legality\(^ {27}\): the restriction must be prescribed by law.\(^ {28}\) In the Convention, ‘law’ is perceived as an autonomous concept, independent of the meaning that is given to it in the national legal systems of the Member States.\(^ {29}\) It must be interpreted in a substantive way; the ECtHR does not require the restriction to have a basis in formal law.\(^ {30}\) The requirement of legality consists of three subrequirements:

1. The requirement of a legal basis: the restriction must have *some* basis in national law.\(^ {31}\)
2. The requirement of accessibility, which means that ‘the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case’.\(^ {32}\) The Court considers this requirement to be met when the rules have been properly published.\(^ {33}\) Nonetheless, a lack of publication of rules can be acceptable, provided that the restriction is sufficiently foreseeable (the third subrequirement), for example because the legal rule is complemented with an established practice.\(^ {34}\)
3. The requirement of foreseeability, which is the most crucial one.\(^ {35}\) It requires that individuals must be able to foresee with sufficient certainty what kind of restrictions apply to the exercise of their fundamental rights, so that they can adjust their behaviour...
When it comes to restrictions included in general regulations, the Court recognises that some vagueness might be inevitable and even indispensable to attain general applicability. However, sometimes provisions are so vague that it is impossible to grasp their real meaning and scope. In that case, the interpretation or clarification of the relevant provision by the national courts will be an important factor for the ECtHR.

The second requirement that restrictions of fundamental rights must meet in order to be in accordance with the Convention, is that of legitimacy: the restriction has to pursue a legitimate aim. More specifically, Article 8(2) ECHR permits interference with private life ‘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’. Considering that this list of criteria is sufficiently large to cover most government activity, the ECtHR usually assumes a measure to be suitable to achieve one of the aims listed in Article 8(2) ECHR.

Most of the Court’s decisions concerning the second paragraph of Article 8 ECHR revolve around the third requirement, the proportionality (or necessity) of the restriction. This requires the restriction to be necessary to achieve the aim pursued, which entails that the national authorities must have struck a fair balance between the competing interests of the individual and of society. The proportionality requirement is referred to in Article 8(2) ECHR as ‘necessary in a democratic society’, a phrase that has been specified in respect of the analogous requirement in Article 10(2) in the Sunday Times judgment:

It must now be decided whether the “interference” complained of corresponded to a “pressing social need”, whether it was “proportionate to the legitimate aim pursued”, whether the reasons given by the national authorities to justify it are “relevant and sufficient under Article 10 (2) (art. 10-2)” […].
However, the case law of the Court is not very consistent in its review of the proportionality requirement: in some cases, the Court examines whether a ‘pressing social need’ exists, in others it verifies whether the same objective could have been achieved by less severe measures.43

In applying (any formula of) the proportionality test, the ECtHR generally allows the Member State concerned a margin of appreciation.44 Depending on the subject, Member States are granted more or less discretion to determine the proportionality or necessity of a domestic measure. Given the importance of the margin of appreciation in assisted dying cases, it is necessary to briefly elucidate the application of the margin of appreciation doctrine in the case law of the Court before proceeding with our analysis of the case law on assisted dying.

**Margin of appreciation doctrine**

The margin of appreciation refers to a level of discretion that is awarded to the Member States in determining what degree of interference with fundamental rights is proportionate.45 It enables the ECtHR to reconcile its goal to ensure a high level of human rights protection with the need to respect the cultural, political, and social differences between the Member States.46 The existence of the margin of appreciation doctrine indicates that the Court believes there is no ultimate solution to the question as to how to strike a fair balance between a Convention right and other rights or the public interest.47 It will rather check whether the way in which a Member State has struck the balance is a possible solution that corresponds to the wording and the objectives of the ECHR and thus whether the national authorities have stayed within their margin of appreciation.48

The margin of appreciation doctrine is founded upon the subsidiary position of the ECtHR vis-à-vis the Member States.49 This means that it is first and foremost up to the Member States to choose the measures which they consider appropriate in matters which are governed by the
Convention; the review by the Court concerns only the conformity of these measures with the requirements of the Convention.\textsuperscript{50} In essence, the Court’s task is confined to verifying whether the Member States have remained within the boundaries of their discretion.\textsuperscript{51} The implications of the subsidiary nature of the Convention mechanism for the Court’s jurisprudence have been clearly worded by the Court in a judgment regarding an alleged violation of Article 10 ECHR (freedom of expression):

The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. […] It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context. Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. […] Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court […] is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision.\textsuperscript{52}

The ECtHR uses the margin of appreciation doctrine to determine the intensity of its review.\textsuperscript{53} In this respect, it distinguishes between a wide and a narrow margin of appreciation.\textsuperscript{54} This distinction results in a gliding scale (of intensity of review), ranging from a lax standard of proportionality to an intense proportionality appraisal.\textsuperscript{55} If the national authorities are allowed a wide margin, the Court only marginally and reticently examines the choices made by the national authorities, in that it merely assesses whether the result is manifestly unreasonable or disproportionate, or places an excessive burden on the applicant.\textsuperscript{56} The reluctance of the Court in these cases is often reflected in a strong procedural review, whereby it will mostly not find a violation of the ECHR if it figures that the case has been carefully assessed by the national authorities.\textsuperscript{57} If, by contrast, the margin of appreciation is a narrow one, the review will be very strict: in these cases, the Court generally closely appraises the facts of the case, carefully identifying the interests at stake and deciding for itself how the balance between the conflicting interests should have been struck.\textsuperscript{58} The national authorities then bear the burden of proving that the restrictive measure is based on a careful and objective assessment of all relevant facts and interests and, more in general, that the restriction is reasonable.\textsuperscript{59} Moreover, the Court will
be more inclined to consider the availability of less intrusive measures and to criticise the lack of specific procedural safeguards against abuse of powers.\textsuperscript{60}

To determine the breadth of the margin of appreciation that is accorded to the Member States and, consequently, the intensity of the review, the ECtHR takes into account several factors. The first is the ‘common ground’ factor: the existence or non-existence of a consensus (or common ground) within the Member States of the Council of Europe.\textsuperscript{61} The existence of a clear consensus about a particular issue will result in a narrow margin of appreciation and therefore a stricter review by the ECtHR.\textsuperscript{62} If, on the other hand, there is no, or hardly any, consensus between the Member States, the Court will accord a wide margin of appreciation.\textsuperscript{63}

Another factor is the ‘better placed’ argument: the Court often confers a wide margin of appreciation to the national authorities because they are in a better position to assess the necessity, suitability, proportionality, or overall reasonableness of restrictive measures.\textsuperscript{64} This factor has proven to be of particular significance in ethical matters.\textsuperscript{65} Examples of cases in which the ECtHR has exercised restraint are cases concerning adoption and IVF, gay marriage and, particularly, abortion.\textsuperscript{66} In these cases, the Court invariably argues that the national authorities are better placed to discern the prevailing concerns about these kind of ethically controversial issues and that they must therefore be given sufficient leeway to decide on the necessity of certain measures or policy choices.

Lastly, the ECtHR attaches great importance to the nature of the affected right and its importance for the individual.\textsuperscript{67} In principle, whenever an important aspect (the ‘core’) of an individual right is at stake, the margin of appreciation will be narrow.\textsuperscript{68} The closer an aspect of a Convention right is related to the fundamental principles of the ECHR, including human dignity, personal autonomy, democracy, and pluralism, the more important it is.\textsuperscript{69} In this context, the Court generally leaves only a narrow margin of appreciation if a restrictive measure
affects the most intimate or sensitive aspects of someone’s life, such as someone’s sexuality, because in such cases, the notion of personal autonomy is of major importance.

As will be outlined below, the ‘common ground’ factor has been accorded a pivotal role in the case law of the ECtHR on assisted dying, enabling the Court to make extensive use of the margin of appreciation. Nevertheless, this case law has yielded some general rules (i.e., human rights principles) for national regulatory frameworks, either allowing some form of assisted dying or endorsing a total ban on assisted dying. Before elaborating on the human rights principles that must be complied with by either restrictive or permissive regimes, this article will first throw light on some general conclusions that can be drawn from the Court’s reasoning in assisted dying cases. These general findings relate to the general attitude of the ECtHR towards assisted dying and the overall approach it has adopted in assisted dying cases, including the manner in which it has applied the margin of appreciation doctrine.

**How the ECtHR deals with assisted dying cases**

*General attitude and approach*

As indicated above, to date only five applications concerning assisted dying have resulted in a judgment on the merits being delivered by the ECtHR: Pretty v. UK (2002), Haas v. Switzerland (2011), Koch v. Germany (2012), Gross v. Switzerland (2013), and Lambert and Others v. France (2015 and 2019). Pretty and Koch concern restrictive assisted dying regimes, whereas Haas, Gross, and Lambert pertain to national frameworks that allow some form of assisted dying. The common thread throughout these five cases is the cautious approach of the Court: due to the controversy surrounding, and the lack of consensus about, assisted dying, the Court has chosen to exercise restraint; it doesn’t want to take a definite stand on the issue of assisted dying. What is clear, though, is that the Court has never expressed opposition to assisted dying as such. Immediately after Pretty, a case regarding a blanket ban on assisted
suicide, the conclusion seemed to be that Member States may prohibit assisted dying, but not that they must do so. After Gross, Stephen Brown even went a step further by declaring that the Court is ‘inexorably moving towards acceptance of a universal right to die’. In support of this contention, he stated that:

[w]hile this right will not manifest itself until individual state legislatures have established a domestically-recognized right to die, the Court has indicated that it will create no impediments when that time comes.

Likewise, Gregor Puppinck and Claire de La Hougue proclaim to have noticed a gradual shift towards recognition of a ‘right to assisted suicide’ in the case law of the ECtHR. It is indeed true that the case law of the Court has developed from not excluding that the right to respect for private life encapsulates the right to choose when and how to die (Pretty, 2002) to the full acceptance of the applicability of article 8 ECHR to assisted dying cases (Haas, 2011). In any event, the Court has been happy to highlight its subsidiary position in matters regarding assisted dying, as it must duly respect national majoritarian values inherent in democratic legislative measures. After all, this subsidiarity approach has made it possible to allow a blanket ban on assisted suicide as well as national laws that regulate assisted dying in one way or another.

The ECtHR has seemingly preferred to limit its involvement in assisted dying cases to a procedural review, focusing on the quality of the national judicial and parliamentary process of decision-making. Through a procedural approach, the Court wants to ensure that rights granted in domestic law are ‘practical and effective’, without commenting on the substance of the domestic law. With regard to the latter, it is clear from the case law that the Court only intervenes once a Member State considers the practice of assisted dying to be legal in certain circumstances; only then it will impose procedural requirements. As long as a Member State prohibits assisted dying, the Court prefers to stay out of the controversy. This means that Member States that allow some form of assisted dying bear a greater legislative burden to clearly define their procedural requirements.
As pointed out, the ECtHR has developed its case law on assisted dying on the basis of (the margin of appreciation contained in the proportionality test of) Article 8 ECHR, which it usually balances against, or complements with, Article 2 ECHR. In this context, the right to respect for private life is perceived as a right to personal autonomy, which, in turn, comprises the right to choose when and how to die. Hence, the question is no longer whether such a right exists, but rather to what extent a Member State can restrict the exercise of this right, because once domestic law recognises the right to assisted dying, that right cannot remain purely ‘theoretical and illusory’.

Application of the margin of appreciation

In dealing with cases concerning assisted dying, the ECtHR has relied to a very great extent on the margin of appreciation. Since national regulatory frameworks for assisted dying vary from an absolute ban to rather liberal, albeit conditional, approaches to the practice of assisting patients in terminating their lives, the Court mainly focuses on the lack of consensus within Europe to conclude that the Member States enjoy a wide margin of appreciation to justify restrictions of the right to choose when and how to die, resulting from Article 8 ECHR. As explained above, a wide margin of appreciation goes hand in hand with a cautious, strong procedural review, applying a lax standard of proportionality. In other words, it is essentially through the application of the margin of appreciation doctrine that the ECtHR has found a way to avoid getting too involved in the debate on assisted dying.

Regulating assisted dying: general rules

Notwithstanding the reluctance of the ECtHR and the wide margin of appreciation that is accorded to the Member States, the case law of the Court comprises general rules for both restrictive and permissive national regulatory frameworks. These general rules are the human rights principles that have to be complied with when regulating assisted dying. Considering that
the ECtHR only imposes procedural requirements on Member States that have legalised assisted
dying in some way, it goes without saying that the human rights principles that must be
complied with by Member States that prohibit assisted dying will be less stringent than those
that need to be observed by Member States that allow some form of assisted dying. To give a
clear overview of both sets of human rights principles, a distinction will be made between the
cases relevant for Member States that forbid assisted dying and the cases containing general
rules for Member States that allow some form of assisted dying. This distinction allows us to
conduct a more targeted analysis, singling out the relevant human rights principles that apply
to restrictive regimes and those that apply to permissive regimes.

**Human rights principles for restrictive regimes**

In respect of Member States that prohibit assisted dying, the analysis of the human rights
framework is limited to two cases: *Pretty v. UK*\(^{97}\) and *Koch v. Germany*\(^{98}\). In terms of content,
however, the case of *Koch* is actually of little relevance for this analysis (because it solely
concerns the procedural aspect of Article 8 ECHR)\(^{99}\), yet in some respects the reasoning in
*Koch* adds to the human rights principles that can be derived from *Pretty*. For that reason, the
case of *Koch* will only be referred to insofar as it comprises elements that are complementary
to the conclusions that can be drawn from the case of *Pretty*.

Diane Pretty was a woman who was in the advanced stages of motor neurone disease (MND),
causing her to become paralysed from the neck down. MND is an untreatable, progressive
neuro-degenerative disease that affects the voluntary muscles of the body and usually results in
death due to respiratory failure. However, Pretty’s ability to make decisions was unimpaired.
As she was afraid of the suffering and indignity that she would have to endure if the disease
reached her very final stages, she wanted to control how and when she died, but her physical
condition prevented her from committing suicide without assistance. Her husband wanted to
assist her, but, while it was not a crime to commit suicide under English law, the Suicide Act of 1961 imposed (and still imposes) criminal liability on anyone assisting in suicide. Since Pretty didn’t want her husband to be prosecuted, her attorney wrote a letter to the Director of Public Prosecutions (DPP) with the request not to prosecute Pretty’s husband should he assist her in committing suicide. After the DPP refused to abstain from prosecution, Pretty applied for judicial review of the DPP’s decision. However, both the Divisional Court and the House of Lords (on appeal) upheld the decision of the DPP. Eventually, Pretty brought the case before the ECtHR, alleging that the refusal of the DPP to grant an immunity from prosecution to her husband and the prohibition in domestic law on assisting suicide infringed her rights under Articles 2, 3, 8, 9, and 14 of the Convention.

According to Pretty, Article 2 ECHR protected not only the right to life but also the right to choose not to go on living. Put differently, she argued that the right to life included a right to die. The Court dismissed this claim, emphasising that no right to die could be inferred from Article 2 ECHR:

The Court is not persuaded that “the right to life” guaranteed in Article 2 can be interpreted as involving a negative aspect. […] [Article 2] is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention […]. Article 2 cannot […] 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.

By explicitly excluding the existence of a right to die and a right to self-determination under Article 2 ECHR, the ECtHR made it clear that Article 2 cannot be relied on to oppose a restrictive assisted dying regime. However, the Court was willing to accept that the blanket ban on assisted suicide constituted an interference with Pretty’s right to respect for private life as guaranteed under Article 8 ECHR, as she was prevented by law from exercising her choice to avoid what she considered would be an undignified and distressing end to her life. More in general, it was established in Pretty (and reaffirmed in Koch) that Article 8 ECHR
encompasses a right to personal autonomy in making end-of-life decisions. An interference with the exercise of that right cannot be justified unless it meets the conditions set out in paragraph 2. Since the prohibition of assisted suicide was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others, the only issue in the Pretty case was the proportionality of the interference. In this respect, the applicant attacked the blanket nature of the ban on assisted suicide, because it failed to take into account her situation as a mentally competent adult who had made a fully informed and voluntary decision, and thus could not be regarded as vulnerable and requiring protection. However, three factors convinced the ECtHR of the proportionality of the blanket ban. First, the law in question unequivocally reflected the importance of the right to life, as it was designed to safeguard life by protecting the weak and vulnerable and especially those who are not in a position to take informed decisions against acts intended to end life or to assist in ending life. Second, it was primarily up to the States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicide were relaxed or if exceptions were to be created. Third, since consent was needed from the DPP to bring a prosecution and the law provided for a maximum sentence, enabling lesser penalties to be imposed as appropriate, the system allowed due regard to be given in each particular case to the public interest in bringing a prosecution.

The way in which the Court assessed and confirmed the compliance of the domestic measure with the requirements of legality, legitimacy, and proportionality discloses the human rights framework that must be respected by the Member States to justify an interference with the right to personal autonomy, protected by Article 8 ECHR. More specifically, a limitation of the right to choose when and how to die must meet the following requirements:

1. The restriction must have a clear legal basis. In Pretty as well as in Koch, the restrictive measure was based on a criminal law provision.
2. The restriction must pursue a legitimate aim. In *Pretty*, the ECtHR accepted that an interference with the right to personal autonomy could be imposed in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others, especially the most vulnerable. The importance of pursuing a legitimate aim was further corroborated in *Koch*, where the Court ruled that the interference with the applicant’s right didn’t serve any of the legitimate aims enumerated in the second paragraph of Article 8 ECHR. It can be established from this case law that a restriction of the right to self-determination, even if it takes the form of a blanket ban, can legitimately be imposed with a view to protecting the rights of others.

3. The restriction must be necessary to achieve the (legitimate) aim pursued (requirement of proportionality).

Taking into account that even a blanket ban on assisted suicide has been considered proportionate, it is difficult to imagine circumstances that would lead to a violation of the proportionality requirement. This is especially true in the light of the wide margin of appreciation that is accorded to the Member States, the conviction of the Court that it is up to the national authorities to assess the risk of abuse in the event of a relaxation of the prohibition, and the overall caution of the Court in cases concerning assisted dying. As long as a domestic measure restricting the right to choose when and how to die has some basis in national law and has been imposed to protect the rights of others, in particular the most vulnerable, the Court prefers not to get involved.

Even though the ECtHR didn’t really discuss the margin of appreciation in *Pretty*, it is still presumed to have been a decisive factor behind the judgment.\textsuperscript{110} After all, it follows from the Court’s reasoning that it doesn’t recognise restrictions of the desire to choose the time and manner of one’s death as affecting a core area of personal autonomy.\textsuperscript{111} The ECtHR thus implicitly tilted the balance in favour of the right to life, as safeguarded by national law.
Moreover, in *Koch*, although the Court didn’t examine the substantive aspect of Article 8 ECHR, it couldn’t resist referring to the lack of consensus between the Member States, pointing towards a considerable margin of appreciation for the national authorities.  

Taking all of the above into consideration, the conclusion with respect to restrictive regimes can best be summarised as follows: when a fundamental right such as the right to life is at stake, other provisions of the ECHR that conflict with it will hardly ever be successfully invoked. 

As long as the ECtHR has verified the legality and the legitimacy of the domestic measure, the proportionality will always be a matter left to the Member States.

**Human rights principles for permissive regimes**

In relation to permissive assisted dying regimes, the human rights framework looks quite different; the line of reasoning that is used by the Court in *Haas v. Switzerland*, *Gross v. Switzerland*, and *Lambert and Others v. France* differs to a significant extent from the one used in *Pretty* (and *Koch*). Although the (quite conservative) assisted dying landscape in France is not comparable to the (relatively liberal) one in Switzerland, all three cases revolve around some form of assisted dying. While the two cases against Switzerland were initiated by applicants that wanted to commit suicide with the assistance of a Swiss right-to-die organisation (respectively Dignitas and EXIT), the case against France concerned the withdrawal of artificial life-sustaining treatment, sometimes referred to as ‘passive euthanasia’. Since the overarching human rights principles that can be extracted from *Lambert* are transposable to cases of euthanasia and assisted suicide, no distinction will be made between the different forms of assisted dying.

In *Haas*, the applicant had been suffering from a bipolar affective disorder for about twenty years. He asked Dignitas to assist him in ending his life, because, in his experience, his illness made it impossible for him to live with dignity. He approached several psychiatrists to obtain
15 grams of sodium pentobarbital (the necessary lethal substance), which was only available on prescription, but he was unsuccessful. He then contacted various official bodies seeking permission to procure sodium pentobarbital from a pharmacy without a prescription, but all of his requests and subsequent appeals were dismissed on the ground that sodium pentobarbital could only be obtained on prescription. As a last resort, Haas sent a letter to 170 psychiatrists to ask them whether they would agree to see him for the purpose of carrying out a psychiatric examination and with a view to issuing a prescription for sodium pentobarbital, but they all refused. Before the ECtHR, he alleged that his right to choose the time and manner of his death (Article 8 ECHR) was not respected, as the requirement of a medical prescription made it impossible for him to die with dignity.

The applicant in Gross had never been seriously ill, but she had been experiencing a decline of her physical and mental faculties. She wanted to end her life by taking a lethal dose of sodium pentobarbital and contacted EXIT for assistance, but the organisation replied that it would be difficult to find a medical practitioner who would be ready to provide her with a medical prescription for the lethal drug. This turned out to be true: since Gross didn’t suffer from any illness, all medical practitioners felt prevented by the code of professional medical conduct and declined to issue the requested prescription. She then asked the Health Board of the Canton of Zurich to be provided with 15 grams of sodium pentobarbital without a medical prescription, but her request was rejected, as were her subsequent appeals. The Federal Supreme Court considered that there was no (positive) obligation enjoining the State to guarantee an individual’s access to a lethal substance in order to allow them to die in a painless way and without the risk of failure. It further observed that the applicant did not fulfil the prerequisites laid down in the medical ethics guidelines on the care of patients at the end of life adopted by the Swiss Academy of Medical Sciences, as she was not suffering from a terminal illness. Taking the case to the ECtHR, the applicant complained that the Swiss authorities had violated
her right to choose when and how to die (Article 8 ECHR) by depriving her of the possibility of obtaining a lethal dose of sodium pentobarbital.

In Lambert, the applicants were the parents, a half-brother, and a sister of Vincent Lambert. The latter had been involved in a road accident in September 2008, leaving him tetraplegic and in a state of complete dependency. For many years, his family had been divided on the question whether he should be kept alive: Vincent’s wife, Rachel, and six of his eight brothers and sisters advocated for the discontinuation of artificial nutrition and hydration, whereas the applicants were in favour of continuing. Dr Kariger’s announcement that he intended to discontinue artificial nutrition and hydration on 13 January 2014, because in his view prolonging Vincent’s life by continuing his artificial nutrition and hydration would amount to unreasonable obstinacy, marked the beginning of a lengthy legal battle over Vincent’s fate. Eventually, the case ended up before the Conseil d’État, which concluded that the various conditions imposed by law had been met. Therefore, Dr Kariger’s decision to withdraw the artificial nutrition and hydration could not be held to be unlawful. The applicants brought the case before the ECtHR, which emphasised that, although the applicants lacked standing to allege a violation of Articles 2, 3, and 8 ECHR in the name and on behalf of Vincent Lambert, it was willing to examine all the substantive issues arising under Article 2 ECHR, given that they were raised by the applicants on their own behalf.

Whereas in claims against Member States that prohibit assisted dying the ECtHR precluded applicants from successfully relying on Article 2 ECHR, it emphasised the need to read the Convention as a whole in cases against Member States that allow some form of assisted dying.\(^{121}\) This entails that, in the context of examining a possible violation of Article 8 ECHR, reference should be made to Article 2 ECHR (and vice versa).\(^ {122}\) This latter Article sheds a different light on the interpretation of Article 8, as it obliges the national authorities to protect vulnerable persons (even against actions by which they endanger their own lives) and, more
specifically, to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved.\textsuperscript{123}

These observations immediately disclose the first human rights principle that Member States with a permissive regime must adhere to: they are under an obligation to protect vulnerable persons, which in practice means that the Member State concerned has to put in place enhanced protective measures for vulnerable persons. The ECtHR highlighted this requirement in \textit{Haas} by explicitly pointing out that the Swiss measure, \textit{i.e.}, the requirement to obtain a medical prescription, pursued the legitimate aims of ‘protecting everybody from hasty decisions and preventing abuse, and, in particular, ensuring that a patient lacking discernment does not obtain a lethal dose of sodium pentobarbital’.\textsuperscript{124} As was the case in \textit{Pretty}, here too, the risk of abuse plays a fundamental role. After all, the Court regards such protective measures as indispensable due to the risks of abuse inherent in a system that allows assisted dying.\textsuperscript{125} In this way, it accentuates the overall importance of safeguards aimed at minimising the potential risks of abuse in the context of assisted dying.\textsuperscript{126}

By recognising these risks and acknowledging that the Swiss measure was designed to protect public health and safety and to prevent crime, the ECtHR instantly emphasised the second human rights principle, namely that Article 2 ECHR obliges the Member States to establish a procedure capable of ensuring that a decision to end one’s life corresponds to the free will of the individual concerned.\textsuperscript{127} This principle was reaffirmed in \textit{Lambert}, where the ECtHR put the patient’s wishes in the decision-making process at the heart of its judgment.\textsuperscript{128} The Court attached great importance to the fact that the French judiciary believed it to be sufficiently proven that Vincent had voiced the wish not to be kept alive artificially in a highly dependent state. This convinced the ECtHR that the patient’s wishes had been given the priority they deserved by French law and, consequently, that France’s legislative framework and decision-making process offered sufficient protection for the right to life under Article 2.\textsuperscript{129}
Some of the Court’s considerations in *Haas*, *Gross*, and *Lambert* impart a third, rather evident, human rights principle: the (overarching) requirement of due diligence. In *Haas*, the ECtHR emphasised that ‘where a country adopts a liberal approach in this manner, appropriate implementing measures for such an approach and preventive measures are necessary’. In the end, the Court didn’t find a violation of Article 8 ECHR, because it was persuaded that the requirement of a medical prescription could be regarded as a measure that was apt to counterbalance the possible hazards within a permissive regime. In *Gross*, by contrast, the ECtHR ruled that the applicant’s right to respect for her private life had been violated due to the absence of clear and comprehensive legal guidelines. The reasoning of the Court, which focused on the uncertainty the applicant and the medical practitioners must have faced as to the extent of the applicant’s right to end her life, suggests that the non-existence of such guidelines equates to a lack of due diligence by the national authorities, as the Court believed that they could have done more to clarify whether and under what circumstances a doctor is entitled to issue a prescription for sodium pentobarbital to a patient who is not suffering from a terminal illness:

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

Lastly, in *Lambert*, the ECtHR considered that there would be no violation of Article 2 ECHR if the national authorities were to implement the judgment of the Conseil d’État. It stressed that the provisions of the relevant French law, as interpreted by the Conseil d’État, constituted a legal framework which was sufficiently clear, for the purposes of Article 2 ECHR, to regulate with precision the decisions taken by doctors in situations such as the present one. Not only had the national authorities put in place a sufficiently clear legal framework, but they also made sure that the case was subjected to ‘an in-depth examination in the course of which all points
of view could be expressed and all aspects were carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies.\textsuperscript{133}

The underlying message emerging from these considerations is that Member States that allow assisted dying need to develop a careful regulatory framework. In particular, they have to provide for clear legislation which makes it possible to carefully assess a request for assistance in dying. According to Henk Leenen, a legislative framework concerning assisted dying must in any case contain strict rules as to the voluntary nature of the patient’s request and principles of careful medical practice for the assessment of the request.\textsuperscript{134} With regard to the latter, it follows from \textit{Lambert} that Member States must indeed have in place a legislative framework that regulates with precision the decisions taken by doctors in end-of-life matters.\textsuperscript{135}

The choice as to what restrictive measures will be applied to ensure compliance with these human rights principles is one that falls within the wide margin of appreciation enjoyed by the Member States.\textsuperscript{136} In this respect, the ECtHR has tried to limit its involvement to a minimum in all three cases: in \textit{Haas}\textsuperscript{137} and \textit{Lambert}\textsuperscript{138}, it did so by emphasising the lack of consensus between the Member States, whereas in \textit{Gross}\textsuperscript{139}, there was a more general focus on the Court’s subsidiary position. These factors warranted leaving significant leeway to the Member States, which enabled the Court to stick to a cautious, merely procedural review. But of course, the ECtHR still requires that any limitation of Article 8 ECHR be foreseeable and clearly applicable.\textsuperscript{140} After all, that is where Swiss law fell short: while it admitted the possibility of assisted dying, it did not provide guidelines that sufficiently clarified the scope of the right.\textsuperscript{141} The Court therefore urged the Swiss authorities to eliminate the lack of clarity concerning the extent of the right of individuals who are not terminally ill to end their lives in a dignified manner.\textsuperscript{142}
In summary, the Court’s case law obliges Member States that allow some form of assisted dying to put in place a clear legal framework that:

1. defines the extent of the legally available option of assisted dying in a clear and careful manner;
2. regulates with precision the decisions taken by doctors in the event of a request for assisted dying;
3. contains enhanced protective measures for vulnerable persons; and
4. provides for a procedure capable of ensuring that a decision to end one’s life corresponds to the free will of the individual concerned.

Conclusion

Since 2002, the ECtHR has been confronted with the ethically sensitive and thus rather challenging task to adjudicate cases concerning assisted dying. Due to the lack of consensus between the Member States of the Council of Europe, the Court has been able to rely to a large extent on the margin of appreciation doctrine. This has resulted in a very cautious approach: the Court confers a broad discretion on the national authorities to shape their assisted dying policies and limits itself to a procedural review. Nevertheless, its case law has generated several human rights principles that are generally applicable to assisted dying cases. These principles constitute the human rights framework that has to be complied with when regulating assisted dying and are of particular relevance for Member States that have recently introduced or are considering legislation on assisted dying.

The ECtHR has recognised that the right to choose when and how to die is a component of the right to personal autonomy, which, in turn, forms part of the right to respect for private life, protected by Article 8 ECHR. With respect to Member States that prohibit assisted dying, the Court has developed its case law on the basis of the general limitation clause in the second
paragraph of Article 8 ECHR: a domestic measure interfering with the right to choose when and how to die must have a clear legal basis, must pursue a legitimate aim, and must be necessary to achieve the legitimate aim pursued. In the light of the wide margin of appreciation that is left to the Member States and considering that even a blanket ban on assisted suicide has been held to be proportionate, it appears that any legally enshrined restriction imposed in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others, especially the most vulnerable, will stand the human rights test.

If, on the other hand, a Member State decides to legalise assisted dying, it has to observe a number of requirements that flow from the balancing act between Article 8 and Article 2 ECHR. In particular, they must put in place a clear legal framework which (1) defines the extent of the legally available option of assisted dying in a clear and careful manner, (2) regulates with precision the decisions taken by doctors in the event of a request for assisted dying, (3) contains enhanced protective measures for vulnerable persons, and (4) provides for a procedure capable of ensuring that a decision to end one’s life corresponds to the free will of the individual concerned. Hence, Member States that allow some form of assisted dying must arrive at a clear regulatory framework which is suitable to ensure a careful assessment of a request for assisted dying and which meets at least the abovementioned procedural requirements. The question as to how the national authorities seek to translate these requirements into law falls within the boundaries of their margin of appreciation.

In other words, the Member States are free to either allow or forbid assisted dying. If they decide to allow it, they are obliged to put in place a carefully drafted, clear legal framework that fulfils the above requirements. By contrast, if Member States prohibit assisted dying, they are accorded a wide margin of appreciation, which means that such a prohibition will not constitute a violation of human rights, as long as it has some basis in national law and has been imposed to protect the rights of others, in particular the most vulnerable.
Having regard to the absence of ground-breaking developments in the Court’s case law pertaining to other ethically sensitive areas (e.g., abortion\textsuperscript{143} and IVF\textsuperscript{144}), this relatively new line of case law concerning assisted dying, characterised by great deference to the Member States, is not likely to change radically in the near future, as it is to be expected that the lack of consensus within Europe will persist for many years. Nonetheless, every application has the theoretical potential to turn things around, so one can only be curious about what the ECtHR will decide in the pending case of Mortier v. Belgium\textsuperscript{145}.
References and Notes


3. For the purposes of this article, the term “assisted dying” is used as an umbrella term for end-of-life procedures in which the free will of the individual has a direct or indirect role in the ultimate decision. The choice for this broad interpretation of the term “assisted dying” (which, strictly speaking, only captures euthanasia and assisted suicide) has been made following an in-depth analysis of the case law of the ECtHR in end-of-life matters, which not only consists of cases on assisted suicide (closely related to euthanasia), but also includes a case concerning the withdrawal of artificial life-sustaining treatment (the case of Lambert; see further). In both types of cases, the Court uses a similar line of reasoning, indicating that, from a human rights perspective, these cases give rise to similar concerns and considerations. Accordingly, the general rules flowing from the case of Lambert coincide with and complement the general rules flowing from the other end-of-life cases. For this reason, it was deemed necessary to include the case of Lambert in what is called the “human rights framework on assisted dying”, especially because the Court itself links this case to the other end-of-life cases, although they pertain to a different kind of end-of-life decision. So despite the undeniable
differences between both types of end-of-life decisions, the reasoning of the ECtHR demonstrates the undeniable similarities in terms of (overarching) human rights considerations.


9. This article merely focuses on the cases (1) the applications of which have (at least initially) been declared admissible and (2) in which the ECtHR has, hitherto, handed down a final judgment on the merits. Consequently, neither the case of **Nicklinson and Lamb v. the United Kingdom** (Application Nos. 2478/15 and 1787/15; inadmissibility decision) nor the case of **Mortier v. Belgium** (Application No. 78017/17; currently pending) will be discussed. For a commentary on the inadmissibility decision in **Nicklinson and Lamb v. the United Kingdom**, see E. Wicks, ‘**Nicklinson and Lamb v United Kingdom**: Strasbourg Fails to Assist on Assisted Dying in the UK’, *Medical Law Review* 24(4) (2016), pp. 633-640.

10. And in particular to cases concerning euthanasia and assisted suicide. Although this article resorts to a broad interpretation of assisted dying in respect of the case law of the ECtHR, the specific focus is still on the human rights principles that must be observed by the Member States of the Council of Europe when regulating assisted dying in the strict sense.


16. It is important to note that the terms ‘restrictive’ and ‘permissive’ are used in this article without any value judgment and instead are intended to refer neutrally to Member States that forbid assisted dying and, respectively, Member States that allow some form of assisted dying.


25. Article 8(2) ECHR.


27. For an example of a domestic case that centred around the requirement of legality, see *R (Purdy) v. DPP* [2009] UKHL 45, in which the House of Lords decided that the Code for Crown Prosecutors did not satisfy the requirements of accessibility and foreseeability in assessing how prosecutorial discretion was likely to be exercised in cases of assisted suicide under section 2(1) of the Suicide Act 1961.


34. See, for example, Silver and Others v. the United Kingdom, Application No. 5947/72, 25 March 1983.


37. Sunday Times v. the United Kingdom, Application No. 6538/74, 26 April 1979, para 49; Gerards, EVRM, p. 120; D. Ormerod and K. Laird, Smith, Hogan, and Ormerod’s Text, Cases,


42. Sunday Times v. the United Kingdom, Application No. 6538/74, 26 April 1979, para 62.


52. Handyside v. the United Kingdom, Application No. 5493/72, 7 December 1976, paras 48-49.


65. Gerards, EVRM, p. 200; Gerards, General Principles, p. 177.

66. With regard to adoption and IVF, see, for example, Fretté v. France, Application No. 36515/97, 26 February 2002; Evans v. the United Kingdom, Application No. 6339/05, 10 April 2007; Kearns v. France, Application No. 35991/04, 10 January 2008. With regard to gay marriage, see, for example, Schalk and Kopf v. Austria, Application No. 30141/04, 24 June 2010. With regard to abortion, see, for example, A, B and C v. Ireland, Application No. 25579/05, 16 December 2010.


70. Dudgeon v. the United Kingdom, Application No. 7525/76, 22 October 1981, para 52.

71. Gerards, EVRM, p. 216; Haeck and Burbano Herrera, Procederen voor het EHRM, p. 143.


88. Wicks, ‘Strasbourg Fails to Assist on Assisted Dying in the UK’, p. 639.


99. The applicant in *Koch* complained that the domestic courts’ refusal to examine the merits of his complaint about the Federal Institute’s refusal to authorise his wife to acquire a lethal dose of sodium pentobarbital had infringed his right to respect for private and family life under Article 8 ECHR. The ECtHR explicitly limited itself to examining the procedural aspect
of Article 8, concluding that the applicant’s right to respect for his private life had indeed been violated by the domestic courts’ refusal to examine the merits of his motion. With regard to the substantive aspect of the complaint under Article 8, the Court relied on the principle of subsidiarity, considering that it was primarily up to the domestic courts to examine the merits of the applicant’s claim.


117. Whereas in Switzerland, there is a well-established practice of right-to-die organisations providing assisted suicide, France prohibits both euthanasia (considered as murder) and physician-assisted suicide (risk of disciplinary sanctions).


119. Despite the undeniable differences between euthanasia and assisted suicide on the one hand and so-called “passive euthanasia” on the other hand, the case law of the ECtHR demonstrates the undeniable similarities in terms of (overarching) human rights considerations. Therefore, it is argued here that the general rules established by the ECtHR in *Lambert* are of great relevance for the human rights framework concerning assisted dying (bearing in mind that the notion of “assisted dying”, strictly speaking, only captures euthanasia and assisted suicide).

120. It must be noted that the application in this case has eventually been found to be inadmissible by the majority of the Grand Chamber, because the applicant’s conduct constituted an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention. See *Gross v. Switzerland*, Application No. 67810/10, 30 September 2014. Although this means that the initial judgment of the ECtHR (Second Section) no longer stands, it is still relevant to include this case in the analysis of the Court’s case law concerning assisted dying, as it provides insight into the way in which the Court will, in all likelihood, deal with similar cases in the future.


143. See A, B and C v. Ireland, Application No. 25579/05, 16 December 2010.

144. See S.H. and Others v. Austria, Application No. 57813/00, 3 November 2011.

Abstract

National regulatory frameworks for assisted dying vary from an absolute ban to rather liberal, albeit conditional, approaches to the practice of assisting patients in terminating their lives. Countries that take a restrictive stance towards assisted dying emphasise the ‘absolute’ nature of the right to life, whereas states that exhibit a more permissive regime put more emphasis on the right to respect for private life, as including in particular the right to self-determination at the end of life. Although the European Court of Human Rights uses the margin of appreciation in such a way as to avoid taking a normative stance on the issue of assisted dying, its case law comprises general rules that have to be complied with when regulating assisted dying. This article examines the reasoning of the Court in cases concerning assisted dying and discusses these rules as they apply to countries that have in place restrictive or permissive assisted dying regimes. This human rights framework will become increasingly important as more and more countries are introducing or considering legislation on assisted dying. Against this background, this article aims at providing insight into what is expected of national regulations, from a human rights perspective, in the context of assisted dying.