MICHAŁ BALCERZAK

Euthanasia and Withdrawal of Life-Sustaining Treatment in the Case-Law of the European Court of Human Rights: Twenty Years After Pretty v. United Kingdom

The author focuses on the case-law of the European Court of Human Rights in two sensitive areas related to the end of human life, notably euthanasia and the withdrawal of life-sustaining treatment (passive euthanasia). These highly controversial issues required the Court to answer crucial questions regarding the scope and essence of the obligations of state parties under Article 2 (the right to life) and Article 8 (the right to respect for private and family life) of the European Convention on Human Rights. Over twenty years ago, in Pretty v. United Kingdom (2002), the concise formulation of Article 2 of the ECHR inevitably led the Court to conclude that the Convention does not guarantee the „right to euthanasia". However, this has not prevented the Court from inferring a general right to decide on one's end of life as an element of privacy protected under Article 8 of the ECHR. Since the judgment in Pretty, the case-law of the Court on assisted suicide and withdrawal of life-sustaining treatment has been balancing between conflicting interests. Having adjudicated several landmark cases, mainly from the United Kingdom, Switzerland, Belgium, Germany, and France, the Court has calibrated the essence and scope of the states' margin of appreciation in allowing (or not allowing) for assisted suicide and the withdrawal of life-sustaining treatment. However, one should not expect that the Court's standards will satisfy everybody's expectations, given the different philosophical, ethical, and religious approaches to human death and the state's role in protecting the right to life.

MICHAŁ BALCERZAK associate professor, University of Szczecin
ORCID – 0000–0002–6421–1742 / e-mail: michal.balcerzak@usz.edu.pl

KEYWORDS: European Convention on Human Rights, right to life, right to privacy, euthanasia, withdrawal of life-sustaining treatment, positive obligations

HTTPS://DOI.ORG/10.36128/PRIW.VI46.699

1 Introduction

The right to life enshrined in Article 2 of the Convention on the Protection of Human Rights and Fundamental Freedoms[1] (European Convention on Human Rights, ECHR) is rightly considered one of its „most fundamental provisions"[2]. It requires that state parties provide legal protection of that right („Everyone's right to life shall be protected by law") and prohibits intentional killing. Leaving aside the question of circumstances precluding state responsibility for non-intentional deaths when a necessary force was used (Article 2 para. 2)[3], as well as the question of the death penalty, which is currently outlawed in all member states of the Council of Europe (even though it is still reflected in para. 1 of Article 2), the Convention does not say much about any permissible 'involvement' of states in bringing human life to an end[4].

It is noteworthy that the Convention is deliberately silent on when life begins and ends[5]. When faced with the issue of determining the beginning of life in the context of its legal protection, the European Court of Human Rights (the Court, ECtHR) expressed an opinion that it falls to the margin of appreciation of state parties, given that there was „no European consensus on the scientific and legal definition of the beginning of life"[6]. In another milestone judgment concerning the possible application of Article 2 to human embryos, Evans v. United Kingdom, the Court held that since, under

1 Convention on the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950, European Treaty Series no. 005.

2 William Schabas, *The European Convention on Human Rights* (Oxford: Oxford University Press, 2015), 122 et seq.

3 The situations referred to in Article 2 para. 2 of the Convention are sometimes considered as „exceptions" from the right to life, which is incorrect. The prohibition of intentional killing in Article 2 para. 1 knows no exceptions (the only exception is the death penalty which nowadays is an obsolete part of this provision). The state responsibility for deprivation of life in circumstances provided in Article 2 para. 2 may not occur only if the death was non-intentional.

4 It is not elaborated here on the „deaths resulting from lawful acts of war" referred to in Article 15 para. 2 of the Convention in the context of derogation in times of emergency.

5 Janneke Gerards, „Right to Life", [in:] *Theory and Practice of the European Convention on Human Rights*, ed. Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (Cambridge–Antwerp–Portland: Intersentia, 2018), 355–357.

6 See Vo v. France, judgment of 8 July 2004, appl. no. 53924/00, § 84.

English law, embryos „did not have independent interests and could not claim – or have claimed on its behalf – a right to life under Article 2", the latter provision is not applicable[7].

Another dilemma arose concerning the obligation of state parties when a person expresses a wish to end his or her life for reasons related to an untreatable medical condition. There is hardly any doubt that the right to life – with all its consequences, such as the obligation mentioned above to protect by law and the prohibition of intentional killing – applies throughout a person's life until his or her death. In other words, the scope of application of Article 2 of the Convention – at least in theory – leaves fewer controversies about the end of human life than it does about the beginning. Nevertheless, this does not make it any easier to determine whether a request for assistance in dying has any basis in the Convention law. As will be elaborated on below, it has been the position of the Court that the right to medically assisted death is not – as such – protected under the Convention. However, the decision on how and when to die may be regarded as one belonging to the sphere of private life and thus covered by Article 8 (right to respect for private and family life). However, states enjoy a wide margin of appreciation in this regard, and it would be unrealistic to expect the Court to infer a „right to euthanasia" under the existing legal conventional framework.

The present paper comments on the Court's case-law concerning euthanasia and withdrawal of life-sustaining therapy, known as passive euthanasia. Both situations are sometimes referred to as „medically assisted death"[8]. The Court has been struggling with cases involving claims from both those requesting to be assisted to die and members of their families. More often than not, the cases concerned jurisdictions where some form of euthanasia was allowed by state regulations (Switzerland, Belgium). However, there were also judgments concerning the United Kingdom and Germany, where the debate on euthanasia has been ongoing.

In a preliminary remark, one should note that cases concerning euthanasia and withdrawal of life-sustaining therapy are intrinsically linked to

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7 See Evans v. United Kingdom, judgment of 10 April 2007, appl. no. 6339/05, § 54.

8 Miriam Cohen, Jasper Hortensius, „A human rights approach to end of life? Recent developments at the European Court of Human Rights" *Revista do Instituto Brasileiro de Direitos Humanos*, No. 17/18 (2018): 193.

the concept of human dignity[9] and its reflection in human rights law[10]. There is little doubt that dignity should be regarded as both a source of human rights and a legal principle that should permeate its interpretation in individual cases. At the same time, the questions of „dignified life" or „dignified death" are hard to answer just by reference to legal provisions. As important as the case-law of the ECHR is in shaping what is called a „European public order", one should remember that it will not replace domestic law-makers in finding solutions to ensure that both life and death can be considered dignified.

2 | Euthanasia and the Right to Life

The practice of euthanasia, an intentional ending of one's life to eliminate pain and suffering, in the context of human rights, has been the subject of unabated scholarly attention[11]. In the context of the ECHR, some crucial questions have been posed posed about protecting the right to life and the right to privacy for decisions regarding euthanasia or assisted suicide. The Court was faced for the first time with questions directly related to euthanasia in Pretty v. United Kingdom[12], a landmark case adjudicated over twenty years ago. The application was brought by Diane Pretty, who suffered from motor neuron disease that prevented her from committing suicide alone, thus demanding that her husband help her without facing criminal charges. Her claims were thoroughly examined by British courts,

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9 Hazel Biggs, *Euthanasia. Death with Dignity and the Law* (Oxford–Portland: Hart 2001), passim.

10 Ginevra Le Moli, *Human Dignity in International Law* (Cambridge: Cambridge University Press 2021), 216–218; Veronika Fikfak, Lora Izvorova, „Language and Persuasion: Human Dignity at the European Court of Human Rights" *Human Rights Law Review*, No. 3 (2022): 1–24.

11 Diego Zannoni, „Right or duty to live? Euthanasia and assisted suicide from the perspective of the European Convention on Human Rights" *European Journal of Legal Studies*, No. 2 (2020): 181–212; Stevie Martin, *Assisted Suicide and the European Convention on Human Rights* (London–New York: Routledge, 2021); Aaron Fellmeth, Nourin Abourahma, „The Human Right to Suicide under International Law" *Human Rights Law Review*, No. 3 (2021): 641–670; in a broader context: *Regulating the End of Life. Death Rights*, ed. Sue Westwood (London–New York: Routledge, 2021).

12 Judgment of 29 April 2002, appl. No. 2346/02.

but to no avail. Therefore, the applicant raised them in Strasbourg, invoking, among other things, a violation of Articles 2 and 8 of the Convention.

The case was adjudicated by a Chamber of seven judges, not by the Grand Chamber. However, the judgment was unanimously adopted and set a firm precedent that can be considered valid after two decades. Let us recall the Court's findings and then comment on the subsequent cases which raised similar issues. The applicant's main argument was that Article 2 of the Convention protected „the right to life and not life itself" and that an individual should be able to choose whether or not to continue living. Ms. Pretty claimed that her right to die to avoid inevitable suffering and indignity should be inferred from Article 2 of the Convention as a „corollary of the right to life"[13]. The Court was not persuaded by these arguments, emphasizing that the right to life enshrined in Article 2 of the ECHR can hardly be interpreted as having a „negative aspect" as opposed – for instance – to freedom of association (Article 11 of the Convention). The latter included both positive and negative aspects, i.e. the right to join and not to be forced to join any association. When one looked at how Article 2 of the Convention was phrased, things were different. In the words of the Court: „Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely the 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"[14].

The „right to self-determination" was the subject of the Court's assessment also from the viewpoint of Article 8 of the Convention (protection of private life), as the applicant invoked that decisions about one's body fall within the scope of this provision. She insisted that choices about when and how to die belonged to the intimate part of her private life and should be protected under Article 8 in the same manner as choices about how a person conducts his or her life. In a cautiously drafted reasoning, the Court admitted that while „the very essence of the Convention is respect for human dignity and human freedom" and „without in any way negating the principle of sanctity of life protected under the Convention", the notions of the „quality of life" take on significance as part of the right to the respect for privacy guaranteed in Article 8. Thus, preventing the applicant from exercising her choice „to avoid what she considers will be an undignified and distressing end of her life" could have interfered with

13 Ibidem, § 35.
14 Ibidem, § 39.

her right to respect her private life. However, this finding did not prejudge whether interference amounted to violation of the Convention. The latter can be found if the interference was not „in accordance with the law" or did not pursue a legitimate aim as provided in Article 8 para. 1, or if it was not "necessary in a democratic society".

There was no doubt that a legal basis for criminalizing assisted suicide existed at that time in the UK; it was also undisputed that it served the aim of „protecting the rights of others", so the remaining issue at stake was whether the interference was necessary, that is, if it corresponded to a pressing social need and whether it was proportionate to the legitimate objective pursued.

The applicant insisted that a blanket ban on assisted suicide did not take into account her situation as a mentally competent adult who made a fully informed and voluntary decision. In contrast, the British government argued that the domestic system provided some flexibility on whether to bring a prosecution in individual cases and as regards the imposition of lesser penalties[15]. The Court was not convinced that a blanket ban on assisted suicide could be considered disproportionate and noted that although the situation of terminally ill individuals may vary, many of them are vulnerable, „and it is the vulnerability of the class which provides the rationale for the law in question"[16]. The evaluation of risk and likely incidence of abuse was considered necessary in case the general prohibition on assisted suicide was relaxed or if exceptions were created, which fall within the task and the margin of appreciation[17]. In essence, the Court did not find that the refusal of domestic authorities to refrain from prosecuting the applicant's husband if he assisted in her death was arbitrary or unreasonable. Therefore, the interference at stake was justified as "necessary in a democratic society", and as a result, there was no violation of Article 8 of the ECHR.

Irrespective of the Court's other findings in the Pretty case[18], at least two points were made clear: firstly, there exists no „right to euthanasia" (or „right to die") protected under Article 2 of the Convention and, secondly, the blanket ban on assisted suicide did not violate Article 8 of

15 Ibidem, § 76.
16 Ibidem, § 74.
17 Ibidem.
18 The Court also found that there was no violation of Article 3 (prohibition of torture or other inhuman or degrading treatment), Article 9 (freedom of religion) or Article 14 (prohibition of discrimination).

the Convention. Indicating the „clear points" is far from stating that the problem of euthanasia or assisted suicide was in any way „solved" in the Pretty judgment, especially given that the right to private life encompasses choices taken with respect to one's body and the quality of life. There seems to be no European consensus on the legal situation of those suffering and expressing the wish to end their life due to the distress and indignity inflicted by the last stages of untreatable diseases. However, the vast majority of states criminalize euthanasia and attach more weight to the protection of an individual's life than to allowing (or legalizing) assistance in its termination[19].

However, neither the lack of European consensus nor the outcome of the Pretty case in 2002 has stopped other applicants from knocking on the door of the Court in cases relating to euthanasia. Such was the case brought by applicants from Britain who were attempting to prove – first in UK courts and then in Strasbourg – that the developments since the Pretty case should lead to a finding that the blanket ban on assisted suicide may no longer be considered a proportionate interference with the right to privacy protected under Article 8 of the Convention[20]. In the joint cases of Nicklinson and Lamb v. the United Kingdom, the applicants challenged domestic legislation relying on the UK's procedural obligations under Article 8 of the Convention. They invoked the UK Human Rights Act of 1998. The case reached the British Supreme Court, which unanimously held that the question of the compatibility of domestic legislation with Article 8 lay within the margin of appreciation; however, the Supreme Court was divided as regards its authority to pronounce on this matter. Five justices believed that they had the constitutional authority to make such a declaration, whereas four considered the question to be answered by the Parliament rather than the Supreme Court. The nine justices presented their views in individual judgments, which reflected divergent views both on the competence of the Supreme Court and on the merits of the dispute itself, with two justices (Baroness Hale and Lord Kerr) ready to conclude that the blanket ban on assisted suicide in domestic law was no longer a proportionate interference with Article 8 rights.

19 Zannoni, „Right or duty", 196. As of 2023, active euthanasia is allowed in the Netherlands, Belgium, Luxemburg and Spain. In Switzerland the law allows lethal drugs to be prescribed by doctors, on the condition that the assistance is not provided for „selfish motives".

20 Nicklinson and Lamb v. the United Kingdom, decision of 25 June 2015, appl. nos. 2478/15, 1787/15.

The Strasbourg Court was not ready to follow the applicant's line of reasoning on the procedural obligations under Article 8 of the Convention regarding the availability of a judicial remedy to decide requests for assisted suicide. Irrespective of the above, the ECtHR ruled that the majority of Supreme Court judges dealt with the substance of the claims of the first applicant and the application was manifestly ill-founded. The second applicant's claims were rejected due to the non-exhaustion of domestic remedies. Importantly, the Nicklinson and Lamb cases indicate that the debate on the proportionality of a blanket ban on assisted suicide in the United Kingdom is ongoing, both on the highest levels of the judiciary and within the Parliament[21].

There were also cases from other jurisdictions that need to be commented on, given their relevance to the discussed issues. In the Haas v. Switzerland case[22], the applicant, suffering from bipolar affective disorder, complained in Swiss courts that he was denied direct access to sodium pentobarbital (a lethal substance prescribed for euthanasia). Thus, he claimed that his right to decide how and when to end his life has been violated. After unsuccessful attempts to obtain the lethal substance by prescription, and the Federal Court examined his case, the applicant argued in Strasbourg that his rights under Article 8 were violated because he could not obtain sodium pentobarbital. The applicant further claimed that in exceptional situations – such as his own – access to the necessary medical products for suicide should be guaranteed by the State. There were no references to Article 2 of the Convention in the applicant's case.

The ECtHR confirmed that an individual has a right to decide by what means and at what point his or her life will end, provided that he or she can freely decide on this question. The right to make this kind of decision was considered as part of the right to respect for private life within the meaning of Article 8 of the Convention[23]. The Court distinguished the case from Pretty v. United Kingdom, as it did not concern a claim to immunity for a person assisting with suicide. The Court answered the central question of whether the applicant had the right to obtain a lethal substance without a medical prescription in the negative and with respect to several interpretative principles. One of them implies that the Convention must be

21 Nataly Papadopoulou, „From Pretty to Nicklinson: Changing Judicial Attitudes to Assisted Dying" *European Human Rights Law Review*, vol. 3 (2017): 298–307.
22 Haas v. Switzerland, judgment of 20 January 2011, appl. No. 31322/07.
23 Ibidem, § 51.

read as a whole. Thus, the Court itself invoked Article 2, which „creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives"[24]. The Court recalled that under Article 2 of the Convention, state parties have a general duty to prevent individuals from taking his or her own life „if the decision has not been taken freely and with a full understanding of what is involved"[25].

Furthermore, the Court relied on the principle of interpreting the Convention in the light of present-day conditions, stressing that – as of 2011 – there was still no consensus among member states of the Council of Europe concerning an individual's right to choose how and when to end his life. While noting that the applicant wanted to commit suicide in a safe and dignified manner, the Court observed that the regulations put in place by the Swiss authorities (especially the requirement to obtain medical prescription) pursue legitimate aims, i.e., protect from hasty decisions and prevent abuses. The states enjoyed a wide margin of appreciation in this sensitive area, which led the Court to conclude 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"[26].

The essence of the Haas case indicates that the Swiss regulations regarding euthanasia (allowing for the prescription of lethal drugs by medical doctors, provided that the assistance is not offered for „selfish motives") are not *per se* incompatible with the requirements of the Convention. Bypassing the requirement of medical prescription to obtain lethal substances would open the door to unpredictable consequences and endanger the rights of those in vulnerable conditions. The margin of appreciation of states – and in this case, Switzerland – remained the primary point of reference in examining whether the domestic regulations that allowed for the assistance in suicide corresponded to the interests at stake. This margin also applies insofar as the state duties resulting from the right to life are concerned. These duties cannot be ignored when the issue of administering lethal drugs is considered.

The difficulties in obtaining a medical prescription for sodium pentobarbital by a person who wanted to end his or her life were also the background of another case against Switzerland, adjudicated by the Chamber and the

24 Ibidem, § 54.
25 Ibidem.
26 Ibidem, § 61.

Grand Chamber[27]. The outcome of the case was extraordinary since the Court – by a nine to eight majority – decided that because the applicant had abused the right of application, the latter was inadmissible. The abuse consisted of the applicant taking special precautions to prevent information about her death from being disclosed to her counsel, let alone to the Court. The applicant complained about the difficulty in finding a medical practitioner who would be prepared to provide her with a medical prescription for the lethal drug. However, she finally obtained the prescription in October 2011 and ended her life shortly thereafter. The Court was unaware of this fact when it delivered the Chamber judgment in 2013. It is worth noting that that the death of an applicant does not lead *ex lege* to the discontinuation of the case. However, the need to continue the proceedings depends on whether the heirs or close family members express the wish to pursue them and whether they have sufficient interest in the case[28]. In any event, in the Gross case, the Court was indeed misled on a matter crucial to the essence of the applicant's complaint.

Even though the Grand Chamber judgment overruled the previous (Chamber) one in the same case, one should mention that in the Chamber judgment, the Court concluded – by four votes to three – that there had been a violation of Article 8 of the Convention. The majority of the Chamber was ready to consider that the applicant's wish to receive the lethal drug falls within the scope of her right to private life and concluded that „Swiss law while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, does not provide sufficient guidelines ensuring clarity as to the extent of this right"[29]. This statement is equivalent to a direct criticism of Swiss domestic rules on the accessibility of lethal drugs. However, the Court did not go as far as to question the obligation to acquire a medical prescription. The Chamber judgment in the Gross case was not particularly convincing, especially regarding the Court's doubts towards the state-approved guidelines defining the circumstances under which medical practitioners may issue a requested prescription[30].

27 Gross v. Switzerland [GC], judgment of 30 September 2014, appl. No. 67810/10. Chamber judgment in the same case was delivered on 14 May 2013.

28 See: Council of Europe/European Court of Human Rights, *Practical Guide on Admissibility Criteria*, 2022, 19.

29 Gross v. Switzerland, § 67.

30 Ibidem, § 66.

However, the split in votes was sharp[31], and it can be only regretted that the Grand Chamber did not examine the applicants' arguments regarding the merits.

In discussing the cases brought to Strasbourg on assisted suicide, one should also mention two other that were filed by the relatives of those who decided to end their lives voluntarily. In the first of these cases, Koch v. Germany[32], the applicant claimed that both his deceased wife and himself were victims of a violation of Article 8 of the Convention, given that their requests to the German authorities to be provided with a lethal dose of the drug for the applicant's quadriplegic wife ended unsuccessfully, also at the administrative courts. The applicant's wife committed suicide in Switzerland with the assistance of an association. After his wife's death, the applicant lodged an action in German administrative courts to obtain a declaration that the decisions denying access to lethal drugs had been unlawful. Having exhausted domestic remedies, the applicant brought the case to the Strasbourg Court, which ruled that the decisions of the German authorities to reject the applicant's requests and the administrative courts' refusal to examine the merits of the applicant's motion did violate his rights to respect for his private life under Article 8 of the Convention.

However, regarding the part of the complaint alleging a violation of the applicant's late wife, the Court had to address whether the applicant had legal standing to act on her behalf. The previous case-law of the Court indicated that Article 8 of the Convention has a non-transferrable character and, as such, cannot be pursued by a close relative or a successor of the immediate victim. The Court did not find sufficient reasons to depart from this case-law. It ruled that the applicant had no legal standing to rely on his wife's rights under Article 8. Still, it highlighted that the applicant was not deprived of protection under the Convention, given the Court's earlier conclusion on the violation of the applicant's rights[33].

In another case – Mortier v. Belgium[34] – introduced by a relative (a son) of a person who died by euthanasia, the applicant raised allegations under Articles 2 and 8 of the Convention, complaining that the euthanasia of his mother was performed without him or his sister being informed. This

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31 See the Joint dissenting opinion of Judges Raimondi, Jočienė and Karakaş (annexed to the Chamber judgment).

32 Koch v. Germany, judgment of 19 July 2012, appl. No. 497/09.

33 Ibidem, § 81.

34 Mortier v. Belgium, judgment of 4 October 2022, appl. No. 78017/17.

was due to the applicant's mother's explicit wish and against her doctors' repeated advice. The applicant challenged the statutory procedure of euthanasia in Belgium, claiming that the state party failed to fulfil its rights under Article 2 of the Convention. The case was admissible *ratione personae* under Articles 2 and 8 of the Convention since the applicant invoked Article 8 on his behalf, alleging that the lack of effective protection of his mother's life violated his right to respect private and family life. Concerning Article 2, according to the Court's case-law, the members of the close family of a deceased person are considered indirect victims when they claim a violation of this provision in respect of their close one[35].

Having examined the Belgian legislative framework and practice concerning euthanasia, as well as the individual circumstances of the case, the Court did not find a violation of Article 2 by the very solutions foreseen in the legislative framework governing the preparations for euthanasia, nor concerning the conditions in which euthanasia was carried out in case of the applicant's mother. What was found to violate Article 2, however, was the post-euthanasia review procedure and its shortcomings that were considered to fail the state's positive obligations. In particular, the Court indicated the lack of independence of the federal administrative body, which was in charge of reviewing and assessing euthanasic procedures, as well as the length of the criminal investigation. Concerning the applicant's claims under Article 8, the Court found no violation with regard to the behaviour of the doctors assisting the applicant's mother. The Court took into account their professional obligations, including the duty of confidentiality and medical secrecy, as well as their – unsuccessful – efforts to convince the applicant's mother to contact her children about her intention to end her life.

As noted in one of the separate opinions to the Mortier judgments, it was the first time the Court had an opportunity to examine the nature of states' obligations under Article 2 of the Conventions when applied in a jurisdiction that provides for the possibility of active euthanasia[36]. One should recall, however, that the Court is not supposed to pronounce on specific legal regimes *in abstracto* but on its application in a particular case. The outcome of the Mortier case should – and probably will – result in some adjustments to the post-euthanasia assessment procedures provided in the

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35 Ibidem, § 112.

36 Cf. Partly concurring and partly dissenting opinion of Judge Elósegui, § 1 (annexed to the *Mortier* judgment).

Belgian legal system. Nevertheless, on a more general level, it could be argued that neither the Belgian nor any other case would solve all potential dilemmas concerning the performance of euthanasia in those state parties to the Convention that provide for such possibility. It is a challenge to apply an international treaty that directly obliges states to protect human life and prohibits intentional killing while simultaneously – and with equal legal force – protects the right to privacy and one's choices concerning when and how to end one's life.

3 | Withdrawal of life-sustaining treatment

In several cases, the ECtHR was confronted with a dilemma of the same magnitude as in the case of active euthanasia, and notably, the scope and essence of states' duties as regards the protection of the right to life and the right to privacy, when the withdrawal of life-sustaining treatment is requested (or challenged) by the relatives of a person unable to express his or her wishes (passive euthanasia). The most notable case in this regard was Lambert and Others v. France[37], in which close relatives of a tetraplegic and vegetative state patient challenged a judgment of the French Conseil d'*État* authorizing the discontinuation of his artificial nutrition and hydration. The applicant's family claimed that this would violate Article 2 of the Convention and also amounted to torture in the meaning of Article 3. They further claimed that discontinuing the applicant's feeding would infringe on his physical integrity, contrary to Article 8 of the Convention.

The Court noted that an essential distinction existed between the intentional taking of life and „therapeutic abstention", which consists of withdrawing or withholding treatment that had become unreasonable[38]. Based on its previous case law concerning various aspects of end-of-life situations and considering the need to interpret the Convention „as a whole", the Court has set out the criteria that it considered relevant to examine the Lambert case.

37 Lambert and Others v. France [GC], judgment of 5 June 2015, appl. No. 46043/14.
38 Ibidem, § 123 and 141.

These criteria included:

a. the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2;
b. whether an account had been taken of the applicant's previously expressed wishes and those of the persons close to him or her, as well as the opinions of other medical personnel;
c. the possibility to approach the courts in case of doubts about the best decision for the patient's interests[39].

The Court further observed that although there was no European consensus in favour of permitting the withdrawal of artificial life-sustaining treatment, the majority of States appeared to allow it, or at least there could be discerned a consensus that patients' wishes in the decision-making process were paramount[40]. Moreover, the Court stressed that in the sphere concerning the end of life, just as in that concerning the beginning of life, States must be afforded a margin of appreciation as regards the way to strike a balance between the protection of the patient's right to life and the protection of their right to respect for their private life and their autonomy[41].

Having applied the abovementioned criteria to the undoubtedly complex case, the Court considered that the French legal framework was sufficiently clear to guide doctors' decisions, such as the one concerning Mr Lambert. Further, the Court held that the decision-making process was meticulous and sought to establish – to the extent possible – what the patient's wishes would be. At the same time, it involved numerous doctors and members of Mr Lambert's family who were not unanimous about the decision to withdraw life-supporting treatment. Finally, the Court found no shortcomings in the proceedings conducted by the *Conseil d'État*. It underlined that it was primarily for the domestic authorities to verify whether the decision to withdraw life-sustaining treatment was compatible with the domestic legislation and the Convention[42]. On the other hand, the Court's role consisted in ascertaining whether the state party fulfilled its positive

39 Ibidem, § 143. The Court also took into account the „Guide on the decision-making process regarding medical treatment in end-of-life situations", which was drawn up by the Committee on Bioethics of the Council of Europe in 2014.
40 Lambert and Others v. France, § 147.
41 Ibidem, § 148.
42 Ibidem, § 181.

obligations under Article 2. As a result, the Court found – by a twelve to five majority – that there would be no violation of Article 2 in the event of the implementation of the *Conseil d'État* judgment concerning the withdrawal of life-sustaining treatment of Mr Lambert[43]. The Court also ruled that it was unnecessary to rule separately on the complaint under Article 8 of the Convention.

The judgment in the Lambert case was not unanimous, and the judges of the minority expressed a view that it concerned euthanasia rather than „therapeutic abstention"[44]. Irrespective of the stance that one takes on the legal, medical or moral aspects of the case, it indeed provokes some profound questions about states' positive obligations in sustaining the life of those in a chronic vegetative state. The Court seemed unwilling to apply Article 2 of the Convention in a way that would replace the assessments made by domestic authorities in a susceptible area of life-sustaining treatment. The approach of the Court was, therefore, more focused on legal and procedural aspects of the decision-making, with due regard to the wishes that the applicant might have expressed regarding his condition (though it was not established beyond reasonable doubt what these wishes were). The *Lambert* case was neither an assisted suicide nor a „typical" case when life-supporting machines are disconnected.

Even though the Anglo-Saxon maxim that „hard cases make bad law" applies to the discussed case, it has set a firm precedent in similar instances in which the discontinuation of life-sustaining treatment of vegetative patients was subject to a legal dispute. In two cases brought against the United Kingdom by parents of babies diagnosed with rare and usually terminal genetic conditions[45], the Court held that „the relevant regulatory framework in the United Kingdom does not disclose any shortcomings which could lay the basis of an arguable claim of a breach of the domestic

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43 Mr. Lambert died on 11 July 2019.

44 See the Partly dissenting opinion of Judges Hajiyev, Šikuta, Tsotsoria, De Gaetano and Griţco, § 10. The opinion includes the view that „(…) once all is said and written in this judgment, after all the subtle legal distinctions are made and all the fine hairs split, what is being proposed is nothing more and nothing less than that a severely disabled person who is unable to communicate his wishes about his present condition may, on the basis of a number of questionable assumptions, be deprived of two basic life-sustaining necessities, namely food and water, and moreover that the Convention is impotent in the face of this reality" (ibidem, § 1).

45 Gard and Others v. United Kingdom, decision of 27 June 2017, appl. No. 39793/17; Parfitt v. the United Kingdom, decision of 20 April 2021, appl. No. 18533/21.

authorities' obligation to protect the right to life"[46]. Having established that the other „Lambert criteria" were also fulfilled in both cases, the Court found both applications manifestly ill-founded and thus inadmissible as regards the applicants' claims under Article 2 of the Convention. The above-mentioned decisions show that the Court consistently applies the precedent set in the Lambert case while attaching significant weight to the margin of appreciation awarded to the domestic authorities.

4 | Conclusion

The distinction between euthanasia and withdrawal from life-sustaining treatment can sometimes be a matter of language rather than substance, although they refer to different end-of-life situations. What they have in common from the perspective of the ECHR is that they both need to balance the implications of the right to life and the right to privacy, or more precisely, the right to respect for private and family life. The case-law of the ECtHR attempted to offer some guidance on how to set this balance in compassionate cases where individuals expressed their wish to die and requested the assistance of the state, as well as in similar instances in which the right to life was invoked by the relatives of those in a vegetative state.

The period of twenty years that passed between the Pretty v. United Kingdom and the Mortier v. Belgium judgments allowed the Court to calibrate its case-law on end-of-life situations. However, in cases of active euthanasia, the cautious and restrained position of the Court remains unchanged. The states parties to the Convention have no duty to introduce regulations that would decriminalize assisted suicide; nevertheless, there is also no prohibition to do so if the national parliament so decides. It has been affirmed that states enjoy a margin of appreciation in this regard. However, it does not mean that if assisted suicide is allowed under national laws, the positive obligations under Article 2 are different than those in states that prosecute such cases.

46 Gard and Others, § 81; Parfitt, § 40.

Regarding the discontinuation of life-sustaining treatment (or passive euthanasia), the „Lambert criteria" have a precedential value and are most likely to shape the Court's jurisprudence in the future. An important conclusion from Lambert and similar cases is that the Court is unwilling to replace domestic judicial authorities or medical bodies in their assessments of whether or not a life-sustaining therapy should be discontinued. The burden of such decisions is on the domestic authorities. On the contrary, the Court's role has been rightly identified as ensuring that the decision-making process has met the criteria of Articles 2 and 8 of the Convention.

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