



UNIVERSIDADE CATÓLICA PORTUGUESA

The margin of appreciation doctrine and the right to life

The article 2 of the ECHR

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To Nuno, who not only is my brother but also my role model in life, by teaching me how to reach our goals without harming others and by showing that dreams will not work unless we do.

*But the real way to get happiness is by giving out happiness to other people. Try
and leave this world a little better than you found it.*

Baden-Powell

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To my whole family who is and always will be my priority in life. A special mention to my parents Domingos and Elizabete: the ones who support me the most and who gave me wings to fly and live life no matter what, always with caution and never with fear of trying, never forgetting that “in life, there’s only one way to do things: the right way”.

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Resumo

A doutrina da margem nacional de apreciação revela-se um mecanismo cada vez mais fundamental no que toca aos direitos humanos, uma vez que a proteção dada a tais direitos varia de Estado para Estado, e de tempo em tempo, consoante as crenças e as tradições daqueles.

Esta tese tem como objetivo não apenas dar a conhecer o conceito de margem nacional de apreciação e a sua evolução, mas também estabelecer a relação de tal doutrina com o direito à vida, previsto no artigo 2.º da Convenção Europeia dos Direitos Humanos.

Deste modo, e por se afigurar interessante do ponto de vista comparativo, indicar-se-á o regime legal, à data da escrita da dissertação, de três Estados membros do Conselho da Europa.

Palavras-chave: artigo 2.º; consenso europeu; Convenção Europeia dos Direitos Humanos; direito à vida; eutanásia; margem nacional de apreciação.

Abstract

The margin of appreciation is proving to be an increasingly fundamental mechanism when it comes to human rights since the protection given to such rights varies from state to state, and from time to time, depending on their beliefs and traditions.

The purpose of this thesis is not only to explain the concept of the margin of appreciation and its evolution throughout time but also to establish the relationship of this doctrine with the right to life, enshrined in Article 2 of the European Convention on Human Rights.

Thus, and because it becomes interesting from a comparative perspective, the legal regime of three Member States of the Council of Europe, at the time of writing, will be indicated.

Keywords: article 2; European consensus; European Convention on Human Rights; euthanasia; national margin of appreciation; right to life.

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Acronyms and abbreviations

CFRF – Charter of the Fundamental Rights and Freedoms

CoE – Council of Europe

ECHR – European Convention on Human Rights

ECPHRFF – European Convention for Protection of Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

ICPCR – International Covenant on Political and Civil Rights

MoA – Margin of appreciation

PPC – Portuguese Penal Code

RTE – Regional Euthanasia Review Committee

UDHR – Universal Declaration of Human Rights

UK – United Kingdom

1. Introduction

Acceptance of the ECHR is the first step towards its incorporation into national law. However, since human rights will be interpreted differently in each of the Council of Europe's Member States, in order to meet their commitments under the Convention, the Court will grant national authorities a certain margin of appreciation.

Nevertheless, there is a disagreement regarding whether the doctrine covers all ECHR's clauses. The MoA doctrine has not been employed in all human rights protected under the Convention system, even though there are no restrictions to its applicability, in theory. For instance, as developed further, the ECtHR never used the doctrine to evaluate absolute rights guaranteed in Articles 2-4.

In this matter, and in relation to the right to life, the issue of euthanasia has been undergoing significant changes in numerous areas, leaving traditional ideas of death and the right to die under jeopardy, resulting in debates regarding specific situations. As a result, it has openly questioned what defines death and what rights are granted to individuals who have already been denied the right to live by medical science or to those who only live artificially, only while a machine sustains their vital functions.

In this regard, not only is crucial to analyse the evolution of the doctrine but also to understand the relation between article 2 and other articles, being interesting to acknowledge how euthanasia is understood and, in some cases, legislated, in three different European countries.

2. The Margin of appreciation doctrine

The term “margin of appreciation”, which comes from the French expression *marge d’appréciation*, is defined as the doctrine developed by the European Court of Human Rights, generally referring “to the amount of discretion the Court gives national authorities in fulfilling their obligations under the Convention. It is somewhat analogous to a standard of review”¹ - considering that the European Convention on Human Rights will be interpreted differently in the various member states of the Council of Europe, according to the legal and cultural traditions that differ among them. In the words of Howard Charles Yourow², the MoA is described as “the line at which international supervision should give way to a State Party’s direction in enacting or enforcing its laws”. Thus, the margin of appreciation provides the Court with the essential flexibility to strike a balance between member states’ sovereignty and their duties under the ECHR³.

The MoA doctrine was first applied in *Greece v. United Kingdom* (“Cyprus”)⁴ case, in 1958, in which the Commission considered that “the Government should be able to exercise a certain measure of discretion”⁵ in assessing the extent requires by the exigencies of the situation. In the mentioned case, the Commission conceived the margin of appreciation as a means by which “it could grant to the Member States experiencing a state of emergency the benefit of the doubt as to compliance with their obligations under the Convention.”⁶

The concept in question was first explained by the ECtHR in *Handyside v. United Kingdom*⁷ in which the Court had to consider whether a conviction for possessing an obscene article could be justified under Article 10(2) of the ECHR as a limitation upon freedom of expression that was necessary for the protection of morals.

¹ Bauch, Jeffrey A. (2005) “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” *Columbia Journal of European Law* Vol. 11, p. 115.

² In “The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence” (1996), Kluwer Academic Publishers, p. 13.

³ The margin of appreciation conferred to the Member States it is not limited to the courts: it includes all national constitutional bodies, even though the ECtHR weighting may differ depending on the organ.

⁴ Which involves various alleged violations of the Convention by the UK which was, at that moment, administering the island of Cyprus. On his behalf, the UK invoked Article 15 of ECHR. Application no. 176/56 Judgement 12th May 2014.

⁵ As pointed out in the study “Margin of Appreciation” by the Council of Europe.

⁶ Feingold, Cora S. (1977) “Doctrine of Margin of Appreciation and the European Convention on Human Rights” in *Notre Dame Law Review*, Vol. 53, Issue 1, Article 6, p. 92.

⁷ Application no. 5493/72, Judgment of 7th December 1976.

The abovementioned case law involved the publication of a book called the *Little Red Schoolhouse* that targeted young readers and mixed generally liberal social advice with controversial encouragements to smoke marijuana and experiment sexually. After some complaints, the Director of Public Prosecutions requested that the Metropolitan Police investigate the publisher's premises, after which the books were collected and destroyed. The publisher was found guilty of benefiting from the possession of obscene books.

Handyside filed a complaint with the Court alleging, *inter alia*, that his conviction infringed on his right to freedom of expression under Article 10 of ECHR. His claim was denied, and the conviction was upheld. In doing so, the Court used an analysis that has become common in cases involving the margin of appreciation. First, the Court immediately decided that Handyside's conviction violated his "right to freedom of expression" under Article 10 (1). The Court then considered whether the UK had legitimately interfered with that right under Article 10 (2) and looking at the terms of this article, determined that the UK's action was "prescribed by law", referring to its obscenity law. It also discovered that the UK intervened to protect one of the aims specifically mentioned in Article 10 (2) – morals. The Court specifically noted that, particularly what concerns morals,

(...) State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements (of morals) as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.⁸

However, the crucial question was whether the UK's actions were "necessary" in achieving that goal. The Court then proceeded to weigh the importance of Handyside's entitlement against the UK's responsibility to preserve morals. The balance swung in the UK's favour to take the measures it did, especially given the age group of children who were the book's main target.

In the case *Lawless v. Ireland*⁹, the first extended discussion of the margin of appreciation came in arguments. G. R. Lawless alleged, in the mentioned case, that the Republic of Ireland was employing, inappropriately, preventative detention, breaching Articles 5 and 6 of the Convention. On their behalf, Ireland justified their action by referring to Article 15 of ECHR, stating that preventive detention was a necessary

⁸ *Handyside v. The UK* - § 48.

⁹ Application no. 332/57, Judgement of 1st April 1961.

response to a national emergency caused by terrorist attacks by the Irish Republican Army.

Without specifically referring to the doctrine itself, and even though these actions might have violated rights and freedoms guaranteed under the Convention, the Court upheld the Irish Government's discretion in taking actions like the detention in question to "quell civil strife and the activities of the Irish Republican Army in the Republic and Northern Ireland"¹⁰. In conclusion, the Irish government's decision to employ preventative detention to stop the Army's violence was affirmed by the Court without any reference to the margin of appreciation.

Thus, the margin of appreciation has become "an integral part of the Court's jurisprudence."¹¹ It is certain that under Articles 5 and 6 – which safeguard liberty, security, and the right to a fair trial -, the Court has allowed a far narrower margin of appreciation. Just as Jeffrey A. Bauch refers¹²,

The standard explanation for this narrower margin is that Articles 5 and 6¹³ are drafted with greater detail, leaving less room for varying government interpretations and applications. For example, Article 5 does not simply assert a right to liberty of person; it details specifically what is and what is not allowed in the arrest and detention of an individual. Similarly, Article 6 contains several specific descriptions of what is necessary for a fair trial, including things such as the presumption of innocence, the right to be informed of accusations in a language the defendant understands, the right to free assistance of an interpreter, and the right to legal assistance.

As well known, the ECtHR interprets and recognizes the Convention as a living document, "often applying a teleological reading to the text based on observed consensus rather than the intent of the drafters"¹⁴.

Indeed, the 'European Consensus' can be defined as a "generic label used to describe the Court's inquiry into the existence or non-existence of a common ground, mostly in the law and practice of the Member States"¹⁵. An aspect worth mentioning is the fact that the Court should not be seen as a body of last resort in relation to national courts, in the sense of superseding constitutional justice or serving as a supranational integrative review

¹⁰ *Vide* footnote 2, p. 17.

¹¹ *Vide* footnote 1, p. 119.

¹² *Ibidem*, pp. 120-121.

¹³ Articles 5 and 6 of the ECPHRFF.

¹⁴ *Vide* footnote 5.

¹⁵ *Ibidem*.

body. However, it does not lose its status as the Convention's last interpreter, and its jurisprudence is crucial for the interpretation and application of the Convention's rights.¹⁶

As pointed out by Thomas A. O'Donnell,¹⁷ the MoA doctrine is one of judicial review which governs the extent to which the Commission and the ECtHR will "scrutinize a complained-of practice", being crucial to mention that, as stated by Janneke Gerards, "the margin of appreciation doctrine applies only to the review of reasonableness, not to the definition of the scope of rights".¹⁸

The MoA doctrine is, indeed, a material limitation on the ECtHR's supervisory jurisdiction as an international court. The Court's activities are guided by the subsidiarity concept – which will be developed later.

a. Wide and narrow margin of appreciation

It now becomes crucial to distinguish between a wider and a narrower margin of appreciation, since the "width" of the margin may greatly affect the level of protection required by the Member States"¹⁹ and the determination of the mentioned width of MoA "depends on the "fundamental nature" of the asserted right in comparison to the "objectivity and importance" of the state practice in question, and the degree of convergence among the Member States"²⁰

There will be a wider margin of appreciation if there are similar patterns of practice or regulation across the various Council's Member States and, when wider, "there is an initial presumption in favor of the defendant state"²¹. On the other hand, the lack of European Consensus on the topic will normally lead to a narrower margin of appreciation, and if so, "a close scrutiny will be made".²²

¹⁶ Botelho, Catarina (2011), "*Quo Vadis* "doutrina da margem nacional de apreciação"? – O amparo internacional dos direitos dos homens face à universalização da justiça constitucional" in *Estudos dedicados ao Professor Doutor Luís Alberto Carvalho Fernandes*, Vol. I, *Revista da Faculdade de Direito da Universidade Católica Portuguesa*; Universidade Católica Editora, p. 344.

¹⁷ O'Donnell, Thomas A, (1984) "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights" in *Human Rights Quarterly*, Vol. 4, p. 475.

¹⁸ Gerards, Janneke (2018), "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights" *Human Rights Law Review*, 18, 495-515, Oxford, p. 499.

¹⁹ Wada, Emily (2005) "A Pretty Picture: The Margin of Appreciation and the Right to Assisted Suicide" *Loyola of Los Angeles International and Comparative Law Review*, Article 4, Vol. 27, Number 2, p. 279.

²⁰ *Ibidem*.

²¹ O'Donnell, p. 475.

²² *Ibidem*.

Thus, the margin of appreciation of a member state is generally wider in cases of public emergency – as the Court held in *Brannigan & McBride v. The UK*²³-; in cases involving national security – *Klass v. Germany* (1978) -; in cases protecting morals, (since this notion varies among the member states) – *Handyside v. the UK* -; in cases where there is no consensus within the member states of the Council of Europe, particularly in cases where ethical or sensitive moral issues arise; and in cases where the state is required to strike a balance between competing interests or Convention rights – *Evans v. the UK*.

A narrow margin of appreciation, on the other hand, will be given to the member state in cases where an important face of an individual's identity or existence is at stake²⁴; where the justification for a restriction is the protection of the authority of the judiciary²⁵; cases dealing with articles 2 and 3 of ECHR (these articles protect absolute rights, generating obligations for members states which cannot be balanced either against other rights or against the pursuit of any legitimate interest²⁶); cases where an “intimate aspect of private life” is in question under Article 8²⁷; and lastly, where racial or ethnic discrimination are implicated, for instance in the *D.H. and Others v the Czech Republic*²⁸ case the Court held that the margin of appreciation could not be used to justify racial or ethnic segregation in what concerns education.

Considering their specific knowledge and responsibilities under domestic law, the case law on the margin of appreciation demonstrates that national authorities' judgment is already granted a certain degree of deference when considering weighing public and individual interests. In circumstances where a breach is detected, the Court explicitly explains the nature of the incompatibility with the Convention and leaves it to the national authorities to develop a more Convention-complaint system.

This thesis aims to cast theoretical light on the narrow margin of appreciation that is usually associated with the right to life.

²³ Application no. 14553/89; 14554/89, Judgment of 25th May 1993.

²⁴ For instance, see *Evans v. The UK* – Application no 6339/05 Judgment of 10th April 2007.

²⁵ See case *Sunday Times v. The UK* – Application no 6538/74 Judgment of 6th November 1980.

²⁶ However, it is important to state that the lack of consensus among member states may influence the Court's opinion that the matter is better left to individual states, *vide Pretty v. The UK* – Application no. 2346/02 Judgement of 29th April 2002.

²⁷ See *Dudgeon v. The UK*– Application no 7525/76 Judgement of 24th February 1983.

²⁸ Application no 57325/00 Judgement of 13th November 2007.

b. The subsidiary principle and Margin of appreciation

The importance of the margin of appreciation theory was “recently” highlighted by the adoption of Protocol No 15, which requests for the terms “margin of appreciation” and “subsidiarity” to be included in the Preamble of the Convention.²⁹

Considered to be one of the essential principles that sustain the Convention system, the subsidiary principle has a variety of meanings depending on the context; however, in what concerns the ECtHR, this principle is seen as

the task of ensuring respect for the rights enshrined in the Convention lie first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task.³⁰

Even though there is no direct mention, in the ECHR, of this particular principle, - unlike treaties establishing the European Union -, it can be deduced, indirectly, from some of its articles such as article 53 (which ensures that more favorable national human rights guarantees should not be limited by the standards set in the ECHR to ensure that the more favorable guarantee is applied); article 1 (that binds the Contracting States to ensure that everyone within their national jurisdiction has access to the rights and freedoms established in section 1 of the Convention); article 13 (which goes hand in hand with Article 1 since it provides the right to an effective remedy before a national authority to enforce the content of the Convention rights in the form they have been applied in the corresponding domestic legal order).

Thus, the subsidiary principle is a “limitation to the Court’s power of control, that is applied indifferently to all disputes, whereas the doctrine under analysis is considered only in certain circumstances, and its wideness varies on a case-to-case basis”³¹.

Regarding this principle, it is crucial to mention the Interlaken Declaration: in 2010, under the Swiss Chairmanship of the Council of Europe, a High-Level Conference on the Future of the ECtHR was held in a Swiss city, Interlaken. The conference culminated in the abovementioned Declaration which included an Action Plan containing most of the

²⁹ Ita, Rachel Eguono, (2018) *The Margin of Appreciation Doctrine and the Interpretation of the European Convention on Human Rights as a Living Instrument*, Doctor of Philosophy, University of Derby, p. x.

³⁰ Note by the Jurisconsult in *Interlaken Follow-Up, Principle of Subsidiarity*, 2010, European Court of Human Rights, p. 2.

³¹ Botelho, p. 349.

recommendations proposed by the “Group of Wise Persons”³². A closer look should be taken into what the High-Level Conference stated, for instance:

PP6 Stressing the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role that national authorities, (...) must play in guaranteeing and protecting human rights at the national level;

(...)

The Conference

(...)

(2) Reiterates the obligation of the States Parties to ensure that the rights and freedoms outlined in the Convention are fully secured at the national level and calls for a strengthening of the principle of subsidiarity;

(3) Stresses that this principle implies a shared responsibility between the States Parties and the Court;

Indeed, the existence of effective domestic solutions capable of providing appropriate remedy, already at the national level for a violation of a Convention right and thus obviating the need for applicants to bring their case before the ECtHR, is a key factor for a successful national implementation of the Convention.³³

Besides the above-mentioned, under the terms of the Action Plan – attached to the Declaration – the Conference “invites the Court to (...) take fully into account its subsidiary role in the interpretation and application of the Convention” and, in the case law *Varnava and others v. Turkey*³⁴ the Court stated, “In line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level.”

In this matter, it is also crucial to mention the Brussels Declaration (2015), in which, the High Conference reiterated

the subsidiary nature of the supervisory mechanism established by the Convention and in particular the primary role played by national authorities, namely governments, courts, and parliaments, and their margin of appreciation in guaranteeing and protecting human rights at the national level while involving National Human Rights Institutions and civil society where appropriate;³⁵

³² The primary role of the Group is to “reflect on the development of innovative ideas and concepts and deliver a report that contributes to a general inter-institutional debate on the future of the Customs Union.” as described in Wise Persons Group on Challenges Facing the Customs Union (WPG).

³³ Council of Europe in “The Interlaken Process: Measure taken from 2010 to 2019 to secure the effective implementation of the European Convention on Human Rights” (2020), p. 21.

³⁴ Applications Nos.16064/90 *et. al.*, Judgment of 18th September 2009, § 164.

³⁵ High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility” Brussels Declaration, 27 March 2015, p. 1.

As a result, the Court can so actively assist in the main protection of basic rights on a national level, by exercising its essential subsidiary role³⁶, not forgetting that “The domestic margin of appreciation is thus accompanied by a European supervision.”³⁷

c. The MoA and Incrementalism

When it comes to the interaction between the national and the European “constitutional levels”, we may face a variety of ways to realize it by looking at the constitutional provisions governing the effects of ECHR rules on domestic orders³⁸. To this extent, Janneke Gerards refers that how “Constitutions protect fundamental rights reflect national constitutional values, national traditions and legal culture”.³⁹ For instance, the German Basic Law⁴⁰ expressly refers to human dignity, in its article 1, as being inviolable; in Sweden, the Freedom of Expression act (*Ytrandefrihetsgrundlag*) is one of the four fundamental laws⁴¹, thus, the importance of such freedom is emphasized in the Swedish Constitution.

To this extent, the national constitutions determine how fundamental rights are protected and, consequently, the level of protection of such rights – as stated before – will differ between the Member States, since “one of the rationales of the margin of appreciation doctrine is that, in principle, the national authorities are best placed to assess the necessity and appropriateness of restrictions and limitations”.⁴² As a result, and even though the Court’s primary role is to decide on individual claims and to provide redress in the issue at hand,⁴³ the Court is often able to grant some authority to the States in deciding whether interferences with the Convention rights are acceptable.

Indeed, if all States were given the same margin of appreciation in all cases, it is certain that the Court’s supervision would always be limited. As a result, the concept of fundamental rights would be quite hollow, with a low overall level of protection.⁴⁴

³⁶ Gerards, Janneke (2012) “The Prism of Fundamental Rights” *European Constitutional Law Review*, 8 no 2, p. 185.

³⁷ Case *Aksoy v. Turkey* Application no. 21987/93, Judgment of 18th December 1996 § 68.

³⁸ Bourgeois, Stephanie, (2016) “ The Implementation of the European Convention on Human Rights at the domestic level” in *Comparative study on the Implementation of the ECHR at the National Level*, Belgrade, Council of Europe Publishing, p. 10.

³⁹ Gerards, footnote 18 p. 495.

⁴⁰ Also known as *Grundgesetz*.

⁴¹ As referred in “The Constitution of Sweden: The Fundamental Laws and the Riksdag Act” (2016), Sveriges Riksdag, p. 27.

⁴² Gerards, footnote 18, p. 498.

⁴³ *Vide* articles 34 and 46 of the Convention.

⁴⁴ Gerards, footnote 18, p. 499.

In the words of Janneke Gerards, there are two strategic instruments for establishing effective standards for fundamental rights protection in Europe: the margin of appreciation doctrine and ‘incrementalism’ “(...) the margin of appreciation doctrine potentially may be a very important doctrine (...)” whereas, the incrementalism “(...) increasingly seems to have replaced the use of the margin of appreciation doctrine as a primary instrument to deal with the need to reconcile European standard setting and national diversity”.⁴⁵

It is also crucial to refer to how the Court could use the abovementioned strategic instruments to its advantage, when dealing with different standards of fundamental rights, in Europe.

For instance, if the Court is faced with a relatively new and possibly delicate and controversial subject, such as the right to assisted suicide or abortion, it proceeds in a “very cautious, incremental, and circumscribed manner.”⁴⁶ Regarding assisted suicide and euthanasia, the Court’s interpretation of Article 8 evolved from ‘not excluding’ that a right to assisted suicide would be encompassed by the right to personal autonomy in 2002, to unequivocally, and accepting the applicability of Article 8 to such cases, in 2011.⁴⁷ To illustrate this, in a decision from 2013, a Chamber of the Court went farther, holding that the “applicant’s wish (...) to end her life falls (...) under Article 8 of the Convention.”⁴⁸

Regarding abortion, even though the Court has always been very restrained, it also stresses the importance of procedural guarantees, to member states in which abortion is legal to ensure effective access.⁴⁹ In *Tysiac v. Poland*⁵⁰, the Court claims that a pregnant woman’s rights under Article 8 have been violated if she is not given the opportunity to be heard in person before an independent authority that issues written grounds for its decisions. In a similar manner, the Court seems to have decided for incrementalism in laying positive requirements on states to provide for legal recognition of same-sex

⁴⁵ *Ibidem*, p. 497.

⁴⁶ *Ibidem*.

⁴⁷ *Ibidem*, p. 508. Also, see *Pretty v. United Kingdom* § 67 and *Haas v. Switzerland* Application No 31322/07, Judgement 20th January 2011, § 51.

⁴⁸ *Gross v Switzerland* Application No 67810/10, Judgement 14th May 2013, § 60.

⁴⁹ Brems, Eva; Laurens Lavrysen (2013) “Procedural Justice in Human Rights Adjudication: The European Court of Human Rights” in *Human Rights Quarterly* 35, no. 1, p. 197.

⁵⁰ Application No. 5410/03, Judgment of 20th March 2007, § 117 *in fine*.

couples' relationships and in cases dealing with the right to access to information, under Article 10.

In all the above cases, the Court clearly sees value in the ability to modify its position if its approach is confronted with significant national criticism without looking weak and while maintaining a relatively high degree of protection for Convention rights – even if only since States are subject to specific procedural responsibilities.⁵¹

Afterward, the Court may list the 'general principles' it has produced in its case law, which "are based on the outcomes of *ad hoc* balancing in previous cases, which the Court has tested and found to be sufficiently acceptable and broadly applicable to serve as general standards in later case law"⁵². When the Grand Chamber brings together the lines drawn by the various Chambers in their case law⁵³, it may confirm, clarify, refine, or revise a previous stated standard⁵⁴, or it may adopt a harmonized approach when there are conflicting precedents.⁵⁵

In some instances, the Court works in the opposite direction of "incrementalism" and progressive acknowledgment of general principles. The Court then begins a new line of case law by, firstly, stating a broad concept, and only later implementing and refines in concrete cases. The use of a lawyer during police interrogations is a well-known example. To this extent, the *Salduz v. Turkey* case is critical, since the Court confronted the issue of whether such assistance must be provided and, after going into some detail, it concluded that, in principle, such aid should always be granted.⁵⁶ Because the ECtHR's interpretation of a right is based on an *in concreto* review of the case, considering all the circumstances of it, the extent to which an ECHR's interpretation can be transposed to a national legal order will be determined by a variety of reasons.⁵⁷

⁵¹ Gerards, footnote 18, pp. 508 and 509.

⁵² *Ibidem*, p. 509.

⁵³ Such as *Scoppola v. Italy* (No 3), Application No 126/05, Judgement 22nd May 2012; *J.K. and Others v Sweden* Application No 59166/12, Judgement 23rd August 2017.

⁵⁴ *Hutchinson v The United Kingdom* Application No 57592/08, Judgement 17th January 2017 §s 59 et seq.; *A. and B. v Norway* Applications Nos 24130/11 and 29758/11, Judgement 15th November 2016, at §s 105 et seq.

⁵⁵ Gerards, footnote 18, p. 509.

⁵⁶ "Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" (...) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. (...)" *Salduz v. Turkey case*, Application No 36391/02, Judgment 27th November 2008, § 55.

⁵⁷ Namely "the exact formulation of relevant principles of domestic law, the scope of application *ratione materiae* of the constitutionally protected rights and freedoms, etc." *vide* Gerards, Janneke and

Lower courts may interpret the ECHR in a broader way than the ECtHR which, sometimes, is due to a lack of satisfactory understanding of the case-law of the ECtHR,⁵⁸ and so, the decision on the mentioned case made the States responding to it in different ways which caused many new cases. This led to the Court dealing with numerous post-*Salduz* cases⁵⁹ where “it has had to clarify, revise and refine the meaning of its first judgment”⁶⁰ making the Court open a fact sheet on the question.⁶¹ All of these specific implementations eventually revealed that the previously set general norms were not sufficiently workable and clear. As a result, in *Ibrahim and Others v United Kingdom*,⁶² at paragraph 257, the Court chose to reformulate and enhance the general standards, considering the difficulties that had been proven in the individual cases. As Gerards concludes⁶³

This example discloses a certain search for reflective equilibrium in that it shows a continuous movement from definition of general principles to refinement in individual cases, to the redefinition of general principles and further refinement in individual cases.

At this point, and bearing in mind all the above-mentioned ideas, it now becomes crucial to mention and develop the main topic of this thesis: the right to life and its connection with the MoA doctrine.

3. The right to life and the MoA doctrine

As well known, the term “human rights” refers to a person’s unalienable and unrestricted rights. From a wide sphere of a person’s rights, only few are fundamental,⁶⁴ thus, these are subjective rights that belong to citizens and are necessary for their life, liberty, dignity, and freedom, as well as the free development of human personality.

The human right in question falls under the category of fundamental right and it is one of the first rights to be declared and established in international law⁶⁵, also being codified

Joseph Fleuren (eds.) (2014) “Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: a Comparative Analysis”, Intersentia Cambridge – Antwerp – Portland, p. 129.

⁵⁸ *Ibidem*, p. 131.

⁵⁹ For instance, *Simons v. Belgium* Application No 71407/10, Decision of 28th August 2012; *Diriöz v. Turkey* Application No 38560/04, Judgement 31st May 2012.

⁶⁰ Gerards, footnote 18, p. 511.

⁶¹ Factsheet – Police arrest and assistance of a lawyer” European Court of Human Rights.

⁶² Applications no. 50541/08, *et. al.*, Judgment of 13th September 2016.

⁶³ Gerards, footnote 18, pp. 511 and 512.

⁶⁴ Which are distinguished from other subjective rights based on two criteria: a) their importance to the individual; and b) their value to the state.

⁶⁵ Namely the UDHR in which it is established a common ideal that is to be accomplished by all states in the world bearing in mind its first article that proclaims all human beings are born free and equal in dignity and rights.

in various international and national legal instruments⁶⁶, not only considered to be the basis of all human rights but it is also the right upon which the exercise of all other rights is based, since “if one could be arbitrarily deprived of one’s right to life, all other rights would become illusory.”⁶⁷

Article 2(1)⁶⁸ ECHR states that “Everyone’s right to life shall be protected by law (...)” thus, as a provision that protects the right to life and specifies the circumstances under which the deprivation of life may be justified, this article is one of the most fundamental provisions in the Convention as well as one of the few that cannot be derogated from in time of war⁶⁹ or another national emergency.⁷⁰

As said, it is conceivable to consider the right to life as a component of other rights. For instance, in cases where one’s life is being deprived, their liberty and the possibility of self-improvement are also being divested. Hence, a case may be made out for the right to life from other rights, and since this right is an absolute one, the rare circumstances in which deprivation of life may be justified require a strict interpretation and so the Court’s approach

must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions must be interpreted and applied so as to make its safeguards practical and effective.⁷¹

In what concerns the restrictions on this right, besides article 15, as previously said, article 2 enumerates four cases in which a State “can interfere with the right to life, including execution of a court sentence following a conviction for a crime for which deprivation of life is the penalty provided by law.”⁷² Furthermore, deprivation of life is not considered to be inflicted in violation of Article 2, when it results from the use of the force that is no more than absolutely necessary in the defense of any person against

⁶⁶ *Vide* Article 3 of the UDHR; Article 6 of the CFRF; Article 2 of ECHR; Article 2 of Human Rights Act; Article 24 of the Portuguese Constitution; Article 38 of the Polish Constitution.

⁶⁷ Korff, Douwe (2006) “The right to life: a guide on the implementation of Article 2 of the European Convention on Human Rights” in *Human rights handbooks*, No.8, 1st edition, p. 6.

⁶⁸ This Article, in what concerns the death penalty, must be read in accordance with Protocols no. 6 and 13.

⁶⁹ Although, and bearing in mind article 15(2) ECHR, “deaths resulting from lawful acts of war” do not constitute violations of the right to life.

⁷⁰ Which demonstrates the fundamental nature of the right in question.

⁷¹ *Vide McCann and Others vs The United Kingdom*, Application No. 18984/91, Judgement of 27th September 1995, § 146.

⁷² Renucci, Jean-François (2005) “Introduction to the European Convention on Human Rights. The rights guaranteed and the protection mechanism”, Council of Europe Publishing, p. 11.

unlawful violence and, finally, when it results from lawfully taken actions to quell a riot or insurgency.⁷³

It is safe to say that “it is not life, particularly, but the right to life that must be protected by law, since the Convention’s goal is not to expressly recognize the existence of the right to life, but to impose to national authorities the obligation to protect anyone’s right to life.”⁷⁴ Indeed, the provision “enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take reasonable efforts to safeguard the lives of individuals under its authority.”⁷⁵

In this matter, it is important to bring up the fact that the control bodies use a range of means to establish the scope and the extent of states’ commitments, one of them being that every right may entail three types of obligations: the “obligation to respect”⁷⁶, the “obligation to protect”⁷⁷ and the “obligation to implement”.⁷⁸

On the contrary, the ECtHR classifies governments’ obligations into two categories: a) negative obligations and b) positive obligations. Despite different, this strategy has a lot in common with the preceding one. On this basis, the Court now ensures broader protection for the rights guaranteed by the Convention.

On one hand, negative obligations – which require states to refrain from interfering with the exercise of rights – have always considered inherent in the ECHR, whereas the positive obligations, even though being laid down from the outset, in the text itself, the concept as such did not make their appearance until the late 1960s, under the case *Belgian linguistic case*⁷⁹. Since this remarkable decision, the Court has continued to expand this category with the addition of new aspects, to the point where practically all of the Convention’s standard-setting provisions now contain a negative and a positive requirements.

⁷³ *Ibidem* pp. 11 and 12.

⁷⁴ Botelho, pp. 363 and 364.

⁷⁵ As sustained by the Court in *LCB vs United Kingdom* Application No. 23413/94, Judgement of 9th June 1998, § 36.

⁷⁶ Which requires the state’s organs and agents not to commit violations themselves.

⁷⁷ This obligation involves the state to protect the owners of rights from third-party interference and to punish the perpetrators.

⁷⁸ Which requires the state to take specific positive measures to give full realization to the rights owners.

⁷⁹ Application No 1474/62; *et. al.*, Judgment of 23rd July 1968.

The ECtHR holds that the most important feature of positive obligations is the fact that, in practice, they force national authorities to take the required means to safeguard a right or, more precisely, to adopt reasonable and appropriate measures to protect individual rights.⁸⁰

Positive obligations⁸¹ all pursue the same goal: to ensure the effective application of the European Convention and the effectiveness of the rights it protects and, having this said, it is safe to say that Article 2 imposes positive obligations on Member States – such as the need to properly prosecute crimes against people, the obligation to protect someone whose life is in danger, and, in some circumstances, even the obligation to protect people from themselves. Assuming that, in most cases, positive obligations have the effect of expanding the standards that nations must meet, the question of their legal basis is critical⁸². In fact, and due to the general principle of attribution, every positive obligation has been linked to a clause of ECHR by European judges.⁸³

However, the abovementioned duty – to take preventive operational measures aiming to protect an individual whose life is at risk – is not absolute, since “the Court considers itself bound to take into account the difficulties inherent in carrying out police duties, the operational choices made by the domestic authorities and the unpredictability of human behaviour.”⁸⁴ Indeed, as stated by the ECtHR in *Osman vs. United Kingdom*⁸⁵, not every alleged risk to life entails a Convention need for authorities to take operational measures to prevent such risk from materializing.

Hence, in a variety of circumstances, the state has a duty to protect, namely, when death is caused by state agents; when it is the outcome of dangers originating from public authority activities; when it is caused by third parties, or when it is induced by the victim herself or himself. According to the Court, article 2 also imposes a positive obligation on

⁸⁰Akandji- Kombe, Jean-François (2007) “Positive obligations under the European Convention on Human Rights: a guide to the implementation of the European Convention on Human Rights”, *Human Rights Handbooks*, No.7, Council of Europe, p.7.

⁸¹ Whether based on a specific standard-setting provision or a combination of that provision with Article 1 ECHR, or with general principles of European Law.

⁸² *Vide footnote* 80, p. 7.

⁸³ “Which means that the Court is not competent to protect rights which do not have their basis in the Convention”, *ibidem*, p.7.

⁸⁴ *Ibidem* p. 21.

⁸⁵ Application No. 23452/94, Judgement of 28th October 1998, § 116.

States to investigate deaths that may have happened in violation of this article.⁸⁶ In *McCann vs. The UK*, the Court states that

The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 (...) requires (...) that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by (...) agents of the State.⁸⁷

Nevertheless, the underlying question related with Article 2 interpretation has to do with the topic of the beginning and the end of "human life" – since the Convention does not clarify when "life" begins or ends. Firstly, does the expression "everyone" include the unborn? Even though the answer is not clear yet, the truth is that there are plenty of provisions that protect, for instance, the right to life of the unborn, namely article 6(5) of the International Covenant on Civil and Political Rights, as well as article 4(5) of American Convention on Human Rights which prohibit the death penalty in relation to pregnant women. Article 4 expressly states that the right to life "shall be protected (...) from the moment of conception".

Truly, rather than imposing a uniform standard, the Commission and the Court assessed and assess matters relating to the above question on a case-by-case basis, leaving to the States considerable freedom to regulate the issues at hand.⁸⁸

For instance, the Court, in *Vo. vs France*⁸⁹ case law stated

(...) the issue of when the right to life begins comes within the margin of appreciation which Court generally considers that States should enjoy in this sphere notwithstanding an evolutive interpretation of the Convention (...) "(...) which must be interpreted in the light of the present-day conditions" (...) the issue of such protection has not been resolved within the majority of the Contracting States themselves (...) and the European consensus on the scientific and legal definition of the beginning of life.⁹⁰

Bearing in mind this case law, the Court argues that it is neither desirable nor practicable to address the question of whether the unborn child is a person for the purposes of Article 2, in the abstract.⁹¹ On the contrary, Judge Ress, in his dissenting opinion,

⁸⁶ This procedural requirement was originally stated in *McCann case* which involved killings by State's agents. This was the first time in which the Court had to interpret and implement Article 2.

⁸⁷ *Ibidem*, § 161.

⁸⁸ If they do so in an appropriate manner, by giving appropriate weight to the various interest at stake and cautiously balancing those interests.

⁸⁹ Application no. 53924/00, Judgment of 8th July 2004.

⁹⁰ § 82.

⁹¹ *Ibidem*, § 85.

considers that Article 2 “applies to human beings even before they are born (...)” and, therefore, that “there has been a violation of Article 2 of the Convention.”⁹²

In this matter, in *W.P v. United Kingdom*⁹³, the Commission pointed out that abortion is not mentioned in the Article in question. For instance, it does not include, in its second paragraph’s list of actions, which are “not [to] be regarded as inflicted in contravention of this article”. According to the Commission, this left only three options: either Article 2 does not include an unborn fetus, at all; or it recognizes a right to life for the fetus with some implicit limits; or it grants the fetus an absolute right to life. The Commission expressly laid out the latter interpretation since it did not allow for the consideration of any risk to the mother’s life: that “would mean that the ‘unborn life’ of the fetus would be viewed as having a higher worth than the pregnant woman’s life.”⁹⁴

Regarding the end of life, death can be perceived from a variety of perspectives, including theological, philosophical, and biological points of view. However, biological indications are used to determine death criteria.

In what concerns this thesis, although article 2, apart from the death penalty, only allows for a restricted number of scenarios in which a person’s right to life can be withdrawn, the truth is that none of these includes suicide or euthanasia. However, this raises several difficult questions: besides the one related to acknowledging when life ends, another question is related to know if it is appropriate to provide palliative care to a terminally ill and dying person, even if the therapy may shorten the patient’s life as a side effect. Thirdly, must the State “protect” the right to life of someone who does not want to live any longer, despite that person’s wishes? Or do individuals have a right under ECHR not just to life and to live, but also to die whenever and however they would like? Lastly, is the State allowed – or can it be allowed – to end someone’s life to end their suffering even if the person is not able to express his/her wishes?

As with the beginning of life, there is no European legal consensus⁹⁵ on when this moment occurs – except, possibly, that “death is not a moment, but a process, which

⁹² *Ibidem* §9 of the dissenting opinion of Judge Ress.

⁹³ Application No. 8416/78, decision of the Commission.

⁹⁴ *Ibidem*, § 19.

⁹⁵ As pointed out by Korff, in “The right to life (...)”, p. 15 in most member States, the question is whether life-support devices can be turned off before a person is “clinically dead” in order not to unduly extend the dying process.

suggests that it is scientifically, and thus arguably also legally, impossible to provide a clear-cut answer to the question”⁹⁶.

Due to the lack of consensus, if the case-law on abortion is any indication, the solution to the question of when life ends – just like the question of when life starts – will be left mostly to the States. For instance, according to Portuguese Law no. 141/99 of 28 August⁹⁷, “death corresponds to the irreversible cessation of the functions of the brainstem.” Becoming crucial to mention that, also in Portugal, there are “brain death criteria” – established in Declaration of Portuguese Medical Association⁹⁸ from 11th October 1994 – which must be fulfilled in order to establish the diagnosis of brain death.

The Biomedicine Convention⁹⁹ is a legally binding instrument in the field of biomedicine for human rights protection. As well as ECHR, the first-mentioned Convention fails to acknowledge euthanasia and other end-of-life issues which may come as a surprise given the heated discussions on these topics in numerous European and non-European countries.

Even though the ECtHR did not specifically address the role of MoA in its decision-making process, the Court issued its first ruling in *Pretty v. The UK* although the applicant did not want the assistance of a health care provider to assist her in ending her life – which will be better explained next.

Mrs. Pretty, a 43-year-old English citizen, was quadriplegic due to severe Motor Neuron Disease (“MND”¹⁰⁰), in 2002. Mrs. Pretty’s limited physical condition made it impossible to put an end to her suffering without her husband’s help. However, while England’s Suicide Act of 1961¹⁰¹ did not make it a crime for her to commit suicide, it did make criminally liable anyone who assisted her in doing so. As a result, Mrs. Pretty’s lawyer wrote to the Director of Public Prosecutions, urging not to charge Mrs. Pretty’s husband if he were to assist in ending her life, requested that was upheld by the mentioned

⁹⁶ *Ibidem*.

⁹⁷ Which establishes the principles on which the verification of death is based.

⁹⁸ Available here https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=237&tabela=leis

⁹⁹ Also known as Oviedo Convention, drafted within the Council of Europe, ratified in 1950.

¹⁰⁰“(…) an uncommon condition that affects the brain and nerves. It causes weakness that gets worse over time. There’s no cure for MND (...). MND can significantly shorten life expectancy and, unfortunately, eventually leads to death” *National Health Service’s website, United Kingdom*. <http://www.nhs.uk/conditions/motor-neurone-disease/>

¹⁰¹ Suicide Act 1961 states “A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.”

Director. Thus, the applicant alleged this decision “infringed her rights under Articles 2, 3¹⁰², 8¹⁰³, 9¹⁰⁴ and 14¹⁰⁵ of the Convention.”¹⁰⁶

The ECtHR decided that Mrs. Pretty failed to fulfill her burden of proving that the UK violated the Convention by refusing to allow her husband to assist her suicide absent criminal liability. On one hand, in relation to Article 2, Mrs. Pretty argued the Article implies not only a right to life, but also a right to choose the continuation of life, and that the protection embodied therein was meant for violations inflicted by third parties (State, public bodies), not by the holder himself.¹⁰⁷ On the other hand, since Article 2 prohibits the intentional taking of life except in certain situations, the Court decided that it would be incoherent to accept that it also protects the right to seek another’s assistance in committing suicide, since “the Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. (...)”¹⁰⁸

In what concerns the dignity of terminally ill and dying people, the Court referred, in the abovementioned case, the Recommendation 1418(1999) of the Parliamentary Assembly of the Council of Europe which urges the Committee of Ministers to encourage the Member States to respect and protect, in all aspects, the dignity of terminally ill or dying persons by taking a couple of measures such as

¹⁰² Prohibition of torture. Regarding this article, Mrs. Pretty invoked that her suffering would constitute “inhuman and degrading treatment”. The Court held that, read in line with article 2, “no positive obligation arises under Article 3 of the Convention to require the respondent State either to give an undertaking not to prosecute the applicant's husband if he assisted her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide.” (§56).

¹⁰³ Right to respect for private and family life.

¹⁰⁴ Freedom of thought, conscience, and religion: Mrs. Pretty alleged that in seeking her husband’s assistance she “believed in and supported the notion of assisted suicide for herself” (§ 80). The Court, on the other hand, observed that “not all opinions or convictions constitute beliefs in the sense protected by Article 9 § 1.

¹⁰⁵ Prohibition of discrimination. In what concerns this article, in Mrs. Pretty’s point of view, she would be a victim of discrimination, in that people in different situations were treated identically situations. On its turn, the ECtHR held that “a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. (...) Consequently, there has been no violation of Article 14 of the Convention in the present case.”.

¹⁰⁶ *Pretty v. the UK*, § 3 *in fine*.

¹⁰⁷ In Mrs. Pretty’s perspective, the right to life would include the right to die as a corollary, allowing her to avoid foreseeable and unbearable suffering, as well as an undignified end of life in her opinion. On the contrary, a so-called right to death, in the eye of the British government, was not a corollary but the antithesis of the right to life.

¹⁰⁸ *Pretty* § 40.

- c. upholding the prohibition against intentionally taking the life of terminally ill or dying persons while:
 - i. recognizing that the right to life, especially with regard to a terminally ill or dying person is guaranteed by the Member States, in accordance with Article 2 (...);
 - ii. recognizing that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person;
 - iii. recognizing that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.¹⁰⁹

Regarding the right to life, how does one define 'living'? Is life only a matter of survival or does it include some level of dignity? Established in 1935, the Voluntary Euthanasia Society¹¹⁰ argued that, as a general proposition,

individuals should have the opportunity to die with dignity, and that an inflexible legal regime that had the effect of forcing an individual, who was suffering unbearably from a terminal illness, to die a painful protracted death in indignity, contrary to his or her express wishes, was in breach of Article 3 of the Convention.¹¹¹

According to Mrs. Pretty, Article 8 protected the right to self-determination and claimed that this right included the ability to choose when and how to die. The Court sustained that personal autonomy was a crucial guiding principle in interpreting Article 8, also observing that issues of "quality of life", under this article, were relevant.

Moreover, the Court also held that, in what concerns preventing a person from exercising her decision to avoid what she would believe to be an undignified end of life, it was "not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8§1 ECHR. (...)."¹¹²

Taking this into account, the ECtHR determined that Mrs. Pretty's wish to be assisted in suicide falls within the notion of 'private life', and that any interference with the exercise of such choice must be justified under Article 8 (2)¹¹³ of the Convention.

In addition, the Court decided in the same way in the case *Haas v. Switzerland*,¹¹⁴ by affirming that it believes that one of the features of the right to respect for private life, as defined by Article 8, is an individual's right to choose how and when his or her life will

¹⁰⁹ Paragraph 9 of the Recommendation 1418(1999).

¹¹⁰ Which is a leading research organization in the UK on issues related to assisted dying.

¹¹¹ *Pretty* § 25.

¹¹² *Ibidem* § 67.

¹¹³ Which prescribes "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

¹¹⁴ § 51.

end, provided that he or she is capable of independently making that choice and acting on it. However, in *Haas* the Court made obvious the difference between this case and *Pretty*: in the first one, and unlike *Pretty*, “the applicant cannot, in fact, be considered infirm, in that he is not at the terminal stage of an incurable degenerative disease which would prevent him from taking his own life.”¹¹⁵

Nonetheless, and as reminded by Karin de Vries, “the Court also held in the *Pretty* [§74] judgment that the State Parties may justifiably prohibit or regulate assisted suicide, in particular with a view to the protection of vulnerable individuals who are not capable of taking informed decisions against acts aimed at ending life”.¹¹⁶

In *Koch v. Germany*¹¹⁷, the Court reasoned that

in an era of growing medical sophistication combined with longer life expectancies, many people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with strongly held ideas of self and personal identity.

However, where assisted suicide is permitted in a State Party, and as in the case of *Gross*¹¹⁸, the appropriate legislation should be sufficiently explicit and accessible to allow individuals to know when the conditions are met.¹¹⁹

Euthanasia is a commonly used term to describe the deliberate ending of a person’s life by someone other than the individual involved and cannot be confused with assisted suicide: the first one refers to “the intentional termination of life by someone other than the person concerned”¹²⁰, whereas the latter consists in assisting someone who has made the decision to end his or her own life.

Within the notion of euthanasia, it is important to distinguish between active euthanasia and passive euthanasia. The School of Medicine of Missouri University defines¹²¹ active euthanasia as the act of “killing a patient by active means, for example, injecting a patient with a lethal dose of a drug. Sometimes called “aggressive”

¹¹⁵ *Ibidem* § 52.

¹¹⁶ Vries, Karin de (2018) “Chapter 12: Right to Respect for Private and Family Life (Article 8)” in *Theory and Practice of the European Convention on Human Rights*, 5th ed., Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn, Leo Zwaak (eds.), Intersentia, p. 697.

¹¹⁷ Application no. 497/09, Judgement of 19th July 2012 §51.

¹¹⁸ *Vide* footnote 48.

¹¹⁹ *Vide* footnote 116, p. 697.

¹²⁰ Sartori, Daria (2018) “End-of-life issues and the European court of Human Rights. The value of personal autonomy within a ‘proceduralized’ review” in *Questions of International Law*, 23-43 pp. 23 and 24.

¹²¹ <https://medicine.missouri.edu/centers-institutes-labs/health-ethics/faq/euthanasia>

euthanasia”; on the other hand, passive euthanasia is defined as the act of “intentionally letting a patient die by withholding artificial life support such as a ventilator or feeding tube. (...)”.¹²²

In what concerns active euthanasia, the Court has not yet pronounced itself on the question whether legislation allowing it would be incompatible with the right to life, as pointed out by Janneke Gerards.¹²³

A recent case law worth explaining, and regarding passive euthanasia, is *Lambert and Others v. France*¹²⁴, which involved several applicants who disagreed with a French *Conseil d’État*’s decision and contested it to declare lawful the doctor’s decision to stop providing artificial feeding and hydration to their tetraplegic relative. In France, the topic is regulated by the French Public Health Code, under which treatments must not be maintained with “unreasonable obstinacy” and they may be stopped or withheld if they appear to be “futile or disproportionate, or to have no other effect than to sustain life artificially”.¹²⁵

Regarding the case, Mr. Lambert was a tetraplegic who spent years in a vegetative condition, his treating providers had begun the collective procedure after noticing rising indicators of treatment resistance. Mr. Lambert’s wife has consented to withdrawal, but his parents and two siblings objected and took the matter to domestic court, which found that the choice to stop artificial nutrition and hydration was legal. The applicant argued that withholding his artificial feeding and hydration would violate the member State’s positive obligations under Article 2. The ECtHR’s Grand Chamber held that there would be no breach of the mentioned Article when the judgment of the *Conseil d’État* would be implemented.¹²⁶ The Court specifically noted, in the case’s paragraph 72, that there was no consensus among Council of Europe’s Member States on the issue of allowing the removal of life-sustaining treatment.

¹²² Even though the terms ‘voluntary euthanasia’ and ‘non-voluntary euthanasia’ are self-explanatory, Daria Sartori (vide footnote 120, p. 24) distinguishes both terms. On one hand, “voluntary euthanasia refers to the termination of life at the involved person’s request, while non-voluntary euthanasia implies the lack of an express request (eg because the person is (...) unable to express his/her wishes)”.

¹²³ Gerards, Janneke (2018) “Chapter 6: Right to life (Article 2)” in *Theory and Practice of the European Convention on Human Rights*, 5th ed., Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn, Leo Zwaak (eds.), Intersentia, p. 357.

¹²⁴ Application no. 46043/14, Judgement 5th June 2015.

¹²⁵ Article L. 1110-5 and for more information regarding this Public Health Code vide § 53 of *Lambert case*.

¹²⁶ *Lambert case*, § 182.

Therefore, it determined that the issue at stake under Article 2 was not the respect for the prohibition to take life, but conformity with the State's positive obligation to protect life, based on a distinction between "euthanasia" and "therapeutic abstention". The Court used a twofold approach to determine whether France had fulfilled its obligations: firstly, underlined the *Glass*¹²⁷ case law in which it analysed the necessity to read the Convention "as a whole", and, to read Article 8 considering Article 2. The ECtHR assessed that "in analysing a probable breach of Article 2, reference should be made to Article 8 of the Convention and the right to respect for private life and the notion of personal autonomy that it encompasses."¹²⁸

The Court then drew three criteria – also known as "*Lambert criteria*" - from its case law "that domestic authorities must respect when it comes to administering or withdrawing treatments"¹²⁹:

- (a) the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2 (...);
- (b) whether 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 the event of doubts as to the best decision to take in the patient's interests (...).¹³⁰

The ECtHR concluded that the French legislative framework was "sufficiently clear, for the purposes of Article 2 of the Convention, to regulate with precision the decisions taken by doctors in situations such as that in the present case".¹³¹ As mentioned by Daria Sartori¹³², the fact that in paragraph 147 in the *Lambert* case, the ECtHR brought up the comparative analysis¹³³, it did not pronounce on the balance of interests in question: its reasoning was effectively restricted to ensuring the observance of procedural guarantees. Thus, it concluded that

States must be afforded a margin of appreciation, not just as to whether or not permit the withdrawal (...), but also as regards the means of (...) balance between the protection of patient's right to life and the protection of their right to respect for their private life and their personal autonomy (...). However, this margin of appreciation is not limited (...) and the

¹²⁷ Application no. 61827/00, 9th March 2004.

¹²⁸ *Lambert* § 142.

¹²⁹ Sartori, p. 34.

¹³⁰ *Lambert* § 143.

¹³¹ *Ibidem* § 160.

¹³² Sartori, p. 34.

¹³³ According to which "no consensus exists among the Council of Europe member States in favor of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appear to allow it."

Court reserves the power to review whether or not the State has complied with its obligations under Article 2.¹³⁴

Janneke Gerards,¹³⁵ refers that the Court found that the judicial order to cease the treatment fell within the state's margin of appreciation since the national decision-making process in *Lambert* had been very meticulous and there had been sound judicial remedies.

Many considerations, such as differences in local laws, and customs justify the use of the margin of appreciation, particularly when dealing with highly sensitive matters. It is when consistent European ideas of the scope of rights or constraints are difficult to define, that the margin of appreciation – by being a “degree of discretion” granted to the Member States – is frequently asserted.

Besides the euthanasia example, assisted suicide is a well-known political and moral discussion that falls within the margin of appreciation allowed to the Member States.

Under Article 8 and quoting Korff “the Court took a much more positive approach to Mrs. Pretty's case (...). In a way, this became the provision under which the difficult and sensitive issues involved were addressed in the greatest depth and detail.”¹³⁶

The ECtHR, however, has rejected to extend its rationale to a full-fledged ‘right to die’. In the words of William Schabas, “it has stopped short of recognizing that someone who is not infirm may nevertheless have a right to commit suicide with dignity.”¹³⁷

The Court acknowledges that end-of-life decisions may constitute a balance between Article 2 and Article 8 interests,¹³⁸ – a connection which will be developed next – bearing in mind that the ECtHR's scrutiny is frequently limited to the respect of procedural guarantees by domestic authorities in charge of the balance.¹³⁹

a. Article 2 in relation to article 8 of the ECHR

Even though there is no “*a priori*” restriction to the articles to which the margin of appreciation can be applied, the doctrine has generally been employed in combination

¹³⁴ *Lambert* § 148.

¹³⁵ Gerards, footnote 123.

¹³⁶ *Vide* footnote 67, pp. 20 and 21.

¹³⁷ Schabas, William A. (2015) “The European Convention on Human Rights: A commentary”, Oxford University Press, p.382.

¹³⁸ *Haas* § 53; *Lambert* § 142.

¹³⁹ Sartori, footnote 120, p. 38.

with a few specific Convention's provisions, while others have been traditionally left out of its domain of application.

As mentioned by Daria Sartori – and quote – “it is self-evident that the termination of life in the person's best interest raises issues which are relevant under both Articles 2 and 8 ECHR, and that a contrast may arise between the safeguard of life and respect for individual autonomy.”¹⁴⁰

If there is one feature that distinguishes Article 2 from other articles, it is that - as previously discussed - it specifically imposes a substantive positive obligation on the parties. Article 8 is similar since it requires “respect” for private life, which the European Court interprets as implying a duty to take positive action.

Since it is a broad concept,¹⁴¹ the ECtHR has never been able to offer a clear and precise definition of “private life” even though it is “clearly wider than the right to privacy (...) and it concerns a sphere within which everyone can freely pursue the development and fulfilment of his personality”.¹⁴² However, the latter is commonly perceived as “the private sphere of personal relations”¹⁴³ which also “covers the physical and moral integrity of the person, including his or her sexual life”.¹⁴⁴

While the right to life is primarily seen as a provision that requires Member States to act or refrain from acting to protect life, on the other hand, the right to respect private and family life is understood as an entitlement to personal autonomy. In the above-mentioned case *Pretty*, the Court underlined, by citing previous case law that the term “private life” in Article 8 “is a broad term not susceptible to exhaustive definition”. It then went on to recognize a new notion of ‘personal autonomy as a fundamental principle underlying the interpretation of the ECHR's safeguards, even though no earlier decision has established a right to self-determination as being contained in Article 8.¹⁴⁵

¹⁴⁰ *Ibidem*, p. 27.

¹⁴¹ As stated by the Court in *Costello-Roberts v. the United Kingdom*, Application No. 13134/87, Judgment of 25th March 1993, § 36.

¹⁴² Kilkelly, Ursula (2003) “The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights”, *Human rights handbooks, No. 1*, Council of Europe, p. 11.

¹⁴³ Renucci, footnote 72, p.41.

¹⁴⁴ In *X and Y v. The Netherlands* Application no. 8978/80, Judgement of 26th March 1985, § 22.

¹⁴⁵ § 61 of *Pretty v. The UK*.

In the words of Arend Hendriks, “personal autonomy notably seeks to guarantee the right to be free to exercise one’s rights and freedoms the way one wants.”¹⁴⁶ And as pointed out by the mentioned author, in the case of health care, this right normally requires that physicians (and other health care providers) firstly, provide appropriate information on the various treatments options before an individual gives his or her informed consent.¹⁴⁷ This is completely comprehensible since, just as the Court stated in *Pretty*, “the imposition of medical treatment without the consent of a mentally competent adult patient, would interfere with a person’s physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 (...).”¹⁴⁸

The Court’s recognition of “personal autonomy” allowed it to address the *Pretty* case’s main question: whether this principle protects the right of mentally capable individuals to choose death – with help of others if necessary –, or whether “the principle of sanctity of life” should override such “self-determination”. The Court held that there was “the common ground [between the parties] that the restriction on assisted suicide, in this case, was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others.”¹⁴⁹

In *Csoma v. Romania*,¹⁵⁰ the Court refers to the general principles established under Articles 2 and 8 of the Convention, regarding the State’s liability for medical negligence. It emphasizes that the Contracting States must enact legislation requiring both public and private hospitals to take sufficient precautions to protect their patients’ lives. Furthermore, the ECtHR has emphasized the importance of individuals facing health risks having access to information that allows them to assess those risks. It has been determined that the Contracting States are bound under this obligation to

adopt the necessary regulatory measures to ensure that doctors consider the foreseeable consequences of a planned medical procedural on their patient’s physical integrity and to inform patients of these consequences beforehand, in such a way that the latter are able to give informed consent.¹⁵¹

As previously seen, both Articles at stake may be connected, being important to balance the rights in question: is it more important to live and “respect” Article 2 or is it

¹⁴⁶ Hendriks, Arend Cornelis (2019) “End-of-life-decisions. Recent Jurisprudence of the European Court of Human Rights”, *ERA Forum 19*, Springer Link, p. 564.

¹⁴⁷ *Ibidem*.

¹⁴⁸ *Pretty v. the UK* § 63.

¹⁴⁹ *Ibidem* § 69.

¹⁵⁰ Application no. 8759/05, Judgement of 15th January 2013, § 41.

¹⁵¹ *Ibidem* § 42.

even more important to live with dignity and be able to choose, when being a terminally ill or dying person – and, obviously by fulfilling strict criteria –, whether to die?

It is, indeed, and has been, a debate where there is no consensus: the ones in favor argue that people have the right to decide questions regarding their body and to choose when and how they want to die and also “those who believe in its significance as a path to avoid pain and suffering for terminal ill or people in terminal phase or without quality of life, a conscious path that reflects an informed choice.”¹⁵²

On the contrary, arguments against euthanasia relate with religion, the respect for “the inviolability of life, and its value, or ethical considerations about the doctor’s function, which is to treat and not to kill.”¹⁵³

Euthanasia, in some cases, is established as a separate legal form of crime, while it is classified as a less serious crime, in others. In other circumstances, it is seen as a less serious kind of homicide called “privileged homicide”¹⁵⁴. However, in some countries, it falls into the category of simple homicide.

On this regard, it becomes not only important but also interesting to develop the comparative perspective on this matter, since there is no European agreement on whether euthanasia should be legal or not and which criteria must be observed.

b. A comparative perspective

It is believed that understanding the process and the interpretative mechanisms used to establish them is just as important as knowing the standards developed by the ECtHR since “national courts have an important role in the interpretation of the Convention through the cases that are brought before them, in light of the principle of subsidiarity.”¹⁵⁵

In what concerns the term “European consensus” this can be defined as being the level of uniformity present in the legal frameworks of the member States of the Council of Europe on a particular topic and this is a principle used by the Court

both to justify a wide margin of appreciation given to the Member States in the absence of consensus, thus stagnating the development of case law, and to impose new standards, where

¹⁵² “Eutanásia e Suicídio Assistido: Enquadramento Internacional” (2020), Divisão de Informação Legislativa Parlamentar, Assembleia da República, Coleção Temas n.º 60, p. 6.

¹⁵³ Almeida, Carlos M. Costa (2018) “A Eutanásia”, in *Newsletter da Cirurgia C.*

¹⁵⁴ Article 133 of Portuguese Criminal Code – even though there is no crime, in Portugal as “euthanasia” *per se*.

¹⁵⁵ “Interpretative mechanisms of ECHR case-law: the concept of the European consensus”, in *Human Rights Education for Legal Professionals*, Council of Europe Portal.

there is a clear trend in most Member States, thus advancing the interpretation of the Convention.¹⁵⁶

While the Court uses the term “European consensus”, the Convention itself contains no definition, criteria, or regulation of it. Moreover, the ECtHR “has not clearly defined what it means by European consensus, and it has not been analysed systematically in academic work”.¹⁵⁷

Despite this, to support its arguments on the interpretation of the Convention, the Court frequently uses a comparative analysis which may lead to the creation of a European consensus or a “common European standard” in some cases.¹⁵⁸ This “uniform standard” and its development must be a gradual process since the whole legal framework is based on the agreement of Member States. Just as the Court summed up in *Glor v. Switzerland*¹⁵⁹ the Convention is a human rights’ protection system and, as being so, “the Court must, however, have regard to the changing conditions in the Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved”, the existence or non-existence of common ground between the Member States’ laws being one of the relevant factors in determining the scope of the MoA left to the authorities.¹⁶⁰

Except concerning discriminatory conduct, a broader margin of appreciation is justified by a lack of consensus on the relative importance of the interest at stake or the best strategies to protect it, especially in cases regarding delicate issues related to morals or ethics.¹⁶¹

As stated by the Court, in *Fabris v. France*¹⁶² “the scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background, but the Court must determine in the last resort whether the Convention requirements have been complied with.”

Euthanasia is a “moral issue”, just like abortion and same-sex marriage. As previously pointed out, euthanasia “can primarily be linked to a conflict between religious and

¹⁵⁶ *Ibidem*.

¹⁵⁷ Dzehtsiarou, Kanstantsin (2011) “Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights”, p. 1.

¹⁵⁸ *Vide* footnote 155.

¹⁵⁹ Application No. 13444/04, 30th April 2009, §75.

¹⁶⁰ *Rasmussen v. Denmark*. Application no. 8777/79, Judgement of 28th November 1984, §40.

¹⁶¹ *Vide X and others v. Austria*. Application No. 19010/07, Judgement of 19th February 2013, § 148.

¹⁶² Application No. 16574/08, Judgement of 7th February 2013, §56.

secular political parties, as these issues can be interpreted as a matter of Christian versus secular morality.”¹⁶³

Furthermore, the presuppositions underlying the admissibility of euthanasia have evolved significantly. Whereas it was once viewed through the lens of the State’s right to kill, it is now seen as the patient’s right to die or to have his pain relieved, implying that the State and health professionals, in general, have a duty to provide adequate palliative care to reduce suffering.¹⁶⁴

In Recommendation 779 (1976), regarding the rights of sick and dying people, the Parliamentary Assembly of the Council of Europe advocated the Committee of Ministers to invite the governments of each Member State to “establish national commissions of inquiry, composed of representatives of all levels of the medical profession, lawyers, moral theologians, psychologists, and sociologist, to establish ethical rules for the treatment of persons approaching the end of life.”

The principles enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms, particularly the ones established in the mentioned convention with regard to the Application of Biology and Medicine, provide an ethical and legal frame of reference “through which member states endeavour to find common, co-ordinate responses to the questions which arise in society, with the aim of ensuring that human dignity is protected.”¹⁶⁵

One thing is certain: despite the differences in cultural and socioeconomic attitudes, the end of life and the challenges it raises is one of the current concerns of CoE’s Members which some allow euthanasia and/or assisted suicide, while others still consider that helping or promoting suicide is a criminal offense.

Due to the lack of consensus, the Court has, thus far, granted a broad margin of appreciation that embraced all the contrasting alternatives and “did not impose any

¹⁶³ Green-Pedersen, Christoffer (2007) “The Conflict of Conflicts in Comparative Perspective: Euthanasia as a Political Issue in Denmark, Belgium and the Netherlands” in *Comparative Politics*, Vol. 39, No.3, p. 276.

¹⁶⁴ See footnote 152, p. 9.

¹⁶⁵ “Guide on the decision-making process regarding medical treatment in end-of-life situations” (2014), Council of Europe, p. 6.

positive obligations on the States except for the ones they were already willing to undertake by their national laws.”¹⁶⁶

At this point, it is now important to acknowledge three distinct legal systems regarding euthanasia: Portugal, the Netherlands, and Poland.

i. Portugal

The Portuguese Constitution enshrines in articles 24 to 79 an extensive list of rights and fundamental freedoms.¹⁶⁷ Article 9, b) of the Portuguese Constitution states that it is the primary role of the state to protect fundamental rights and liberties. The Portuguese legal system provides a specific system for the protection of rights, liberties, and guarantees, as opposed to economic, social, and cultural rights, in addition to a general system for the protection of fundamental rights.¹⁶⁸

In the Portuguese legal system, euthanasia is either considered to be “privileged homicide” or “murder at the victim’s request”.¹⁶⁹ In the first case, which is based on an appreciable reduction in the perpetrator’s guilt, the prison sentence is reduced (when compared to the one applicable in simple homicide cases) to between 1 and 5 years, if one of the determining motives for the perpetrator provided for therein occurs, namely that the perpetrator was overcome, in committing the conduct by “compassion, desperation, or a motive of relevant social or moral value”. The lowered culpability may result from different disturbing factors, all of which influence the agent’s decision, who only decides to do so due to the fact he is in an affected psychological state.

In what concerns “murder at victim’s request”, this is a specific type of homicide with even greater mitigation on the applicable abstract penalty, in which the perpetrator is “determined by a serious, instant and express request” from the victim and is punished with a prison sentence of up to three years.¹⁷⁰ This legal type of crime excludes cases of participation in or assistance to another’s suicide, namely those punishable as incitement

¹⁶⁶ Drpljanin Vildan, (2019) “The Right to Die – Euthanasia and Assisted Dying Under the European Convention on Human Rights” in *Católica Law Review*, Vol. III, No.1, pp. 149 and 150.

¹⁶⁷ Which can be explained by the historical circumstances surrounding its drafting namely the Portuguese State's emergence from a long period of dictatorship and the dogmatic evolution of human rights and fundamental rights which had already been achieved in 1976.

¹⁶⁸ Homem, Filipe Aragão (2019) “O Tribunal Europeu dos Direitos Humanos e o Sistema de Proteção de Direitos Fundamentais: Estudo sobre a aplicação do princípio da subsidiariedade no caso português”, Almedina, pp. 133, 134.

¹⁶⁹ Established in article 133 and article 134, respectively, of the Portuguese Criminal Code.

¹⁷⁰ In this situation, it is considered that the guilt is diminished, justifying the legislator’s benevolence.

or aid to suicide (article 135 of PPC). In the words of Manuel da Costa Andrade,¹⁷¹ “what makes homicide at victim’s request unique, and explains the privileged status that the law accords it, is the fact that the death results from the victim’s self-responsible exercise of self-determination.”

Although Portugal has not decriminalized euthanasia and assisted suicide in the context of terminally ill people, it does recognize the living will, which consists of the creation of a

unilateral document, freely revocable at any time by the person himself/herself, in which a person of legal age and capable, who is not mentally handicapped or incapacitated, expresses in advance his conscious, free and informed will concerning the health care he/she wishes to receive or does not wish to receive if for any reason he is incapable of expressing his will personally and autonomously.¹⁷²

It is important to mention that, according to article 3 of the Law no. 15/2014, 21st March 2014, the user of health services has the right to consent or to refuse health treatment, which naturally relates to the correlative duty to respect such will. Thus, this expressly enshrined right is crucial to understand the topic of passive euthanasia, which is allowed when a patient expresses his/her will not to continue with the treatments.¹⁷³

Moreover, on this regard, the Medical Ethics Regulation,¹⁷⁴ on its article 65, expressly forbids the doctor to aid suicide, euthanasia, and dysthanasia, and thus, emphasizing, with respect for the patient’s dignity at the end of life, palliative care.

In what concerns the religion’s perspective, it is crucial to mention the Pastoral Note,¹⁷⁵ of the Permanent Council of the Portuguese Bishops’ Conference, in which it refers that the inviolability of human life does not end when the person who holds it gives her or his consent. In the Permanent Council’s opinion, the right to life is inalienable and expresses the objective value of the human being’s dignity.

Either way, in Portugal there has been an attempt to decriminalize euthanasia. On 28th January 2021, the Portuguese Parliament approved the Draft Bill to legalize euthanasia

¹⁷¹ In “Comentário Conimbricense do Código Penal: Parte especial. Tomo I, Artigos 131.º a 201.º” (1999), Jorge de Figueiredo Dias (ed.), Coimbra Editora, p.63.

¹⁷² *Vide* article 2 of Portuguese Law no. 25/2012, from 16th July which regulates advance wills, namely in the form of living will and the appointment of a health care proxy and creates the National Register of Living Wills. *Vide* also Ordinance n.º 96/2014, from 5th May, which regulates the organization and the function of National Register of Living Wills.

¹⁷³ *Vide* footnote 152, p. 43.

¹⁷⁴ Regulation no. 707/2016, 21st July.

¹⁷⁵ From 8th March 2016.

and, thus, modify the Criminal Code. However, and respecting the powers vested on the President of the Republic, enshrined in the Portuguese Constitution, the President must, within twenty days counted since the reception of any decree from the Parliament to be approved, either promulgate it or exercise the veto power, requesting a new decree's appreciation in a reasoned message, according to article 136 (1) of the Portuguese Constitution.

In the light of Article 278(1) of the Constitution, the President requested, in February 2021, to the Constitutional Court the preventive constitutional review of the decree in question, and, in April, by its decision no. 123/2021 of 12th April 2021, the Constitutional Court found it unconstitutional, defending the inviolability of the right to life and returning it to the Parliament. Moreover, the Court invoked the fact that the content of the right to life's enshrinement in the Portuguese Constitution makes it clear that it does not have a negative dimension. The Constitutional Court also held that in the Portuguese legal system, the fundamental right to the development of personality,¹⁷⁶ reflects the values of general freedom of action and the capacity for individual self-determination.

In the same year, in November, the Parliament, bearing in mind the previous ruling of the Constitutional Court, elaborated a new Draft and approved the decriminalization of euthanasia, which was sent to the President for approval, being returned to the Parliament without any promulgation and with it, the President requested some clarifications regarding the Decree's text.

There has not been any development in this regard ever since. However, as it is possible to conclude, the Parliament is up to decriminalize euthanasia and leave it up to terminally ill people to decide on how and when they wish to die instead of continuing living with no dignity and causing emotional damage to their beloved ones.

ii. The Netherlands

Being the first European State to decriminalize voluntary euthanasia¹⁷⁷ it becomes crucial to mention the Dutch legal system and refer that the debate on euthanasia has

¹⁷⁶ Established in Article 26(2) of the Constitution.

¹⁷⁷ Wise, Jacqui (2001) in Bulletin of the World Health Organization, 79 (6), p. 580.

resulted in a widespread practice in the Netherlands for several years, which has culminated in the approval of a bill by the Dutch Parliament on 12th April 2001.¹⁷⁸

This legislation explicitly provides for the introduction in the Dutch Criminal Code, namely in Section 293(2), of a cause of exclusion of punishability if euthanasia and assisted suicide is carried out by the doctor,¹⁷⁹ who must meet the requirements of due care, referred in Article 2 of the already mentioned Act. For instance, the doctor needs to be convinced that the “patient’s request is voluntary and well-considered”, that “the patient is suffering hopeless and unbearable”. Besides, the doctor must have informed the patient of his or her clinical situation and “come to the firm conclusion with the patient that there was no reasonable alternative solution”. Moreover, the patient must have been examined by at least one other independent physician, who has seen the patient and has given his written opinion on the due care criteria and reached the same conclusion as the doctor. The last requirement needed to be fulfilled is that the doctor has performed the termination of life (or assisted suicide) with medical care.

If the law’s requirements are not met, the doctor may be punished with a crime, punishable by up to 12 years in jail for euthanasia and up to three years in prison for assisted suicide. On the other hand, the physician has the right to conscientious objection, which allows him to refuse to execute the act.¹⁸⁰

One question may arise regarding the terminally ill patients who have already scheduled euthanasia: in the situation that throughout the time they are in a state of semi or total unconsciousness and show signs of great suffering, the physician may still perform the act.

In what concerns minors of 12 years old, they can request euthanasia with the approval of their parents or legal representatives, by the age of 16, they can make the decision on their own, however, their parents must be included in the process. Once they reach 18 years old, they have the right to request it without parental consent. Regarding newborns, doctors are allowed to execute euthanasia in extraordinary circumstances stipulated by

¹⁷⁸ The Termination of Life on Request and Assisted Suicide Act which came into force in the 1st of April in the following year.

¹⁷⁹ Magro, Maria Beatrice (*s.d.*) “Eutanasia e Diritto Penale” in *Itinerari di Diritto Penale - Collana diretta da Giovanni Fiandaca – Enzo Musco – Tullio Padovani – Francesco Palazzo*, 12, p. 245.

¹⁸⁰ See footnote 152, p. 38.

the law and abortion at the conclusion of the gestation period in cases of major defects found in the fetus.

The Euthanasia Code, in the Netherlands, explains how the law's application procedures work in practice, as well as providing guidelines for doctors on how to comply with the law's requirements for euthanasia and assisted suicide. In 2018, the five *Regional Euthanasia Review Committees* – established in the Netherlands – updated the mentioned Code.¹⁸¹

According to these five Regional Committees, in their 2019's annual report, relevant actions were taken to improve and professionalize the way the RTE operates and is organized. Even more importantly, as in previous years, the review of notifications in 2019

delivers the incontrovertible message that due care is exercised in the practice of euthanasia in the Netherlands: in only four of a total of 6,361 notified terminations of life on request in the past year (2019) did the RTE find a failure to satisfy one or more of the due care criteria laid down in the Act.

At one point, although a question of the existence of a culture of death was raised in the Netherlands, owing to a high number of early deaths of patients,¹⁸² the Royal Dutch Medical Association (KNMG) reiterated in the past that the law on the termination of life must be seen as an exception and not the rule and “it will never become ‘standard’”.¹⁸³

Finally, in the Netherlands sedation should be used to diminish end-of-life pain rather than to kill, and it is allowed in patients with a life expectancy of less than two weeks. The patient, close relatives, and/or health care experts make this decision. It is also worth noting that euthanasia and assisted suicide are only available to Dutch citizens.

iii. Poland

According to article 38 of the Polish Constitution, every human being's life must be protected by the State. Article 30 goes on to affirm that the intrinsic and inalienable dignity of the human person, which it considers inviolable, is the source of individual and citizen freedoms and rights, which must be maintained and defended by governments.

¹⁸¹“Euthanasia Code 2018: Review Procedures in Practice”, Regional Euthanasia Review Committees.

¹⁸² Banović, Božidar, and Veljko Turanjanin (2014) “Euthanasia: Murder or Not: A Comparative Approach” (2014) in *Irarian J Publ Health*, Vol. 43, No.10, p. 1319.

¹⁸³ KNMG Position Paper, (2011) “The role of the physician in the voluntary termination of life”, p. 7.

In Poland, “euthanasia” is not defined by the Medical Ethics Code nor by the legal guidelines, however it is perceived that “doctrine and health professionals implicitly give to the generic term of euthanasia the connotation of active euthanasia, (...).” Either way, the mentioned Code expressly states, in its article 31, that “a doctor must not use euthanasia or assist a patient to commit suicide.”

In this legal system, euthanasia is a crime against life and is understood as a homicide. It is, however, subject to a specific legal type of crime involving the death of someone at his request and out of compassion, which carries a prison sentence ranging from 3 months to 5 years.¹⁸⁴

Furthermore, even though article 150 of the Polish Penal Code does not explicitly distinguish between active and passive euthanasia, it has been held that in cases of omission of treatment, the person in question can be charged under article 162 of the mentioned Code up to 3 years of deprivation of liberty, for failing to assist a person whose life was suddenly threatened. However, one note must be made: the withdrawal of long-term therapy at the patient’s desire is not deemed passive euthanasia or a crime. In this case, the main issue is that the Polish legal system lacks a definition of what constitutes “persistent treatment”.¹⁸⁵

Two requirements must be met for the crime to be committed,¹⁸⁶ namely, the victim’s request to be killed and the compassion felt by the agent. The request must be firm, clear, and unmistakable, and must come from someone who is aware of and capable of assessing the situation in which he finds himself.

Article 30 of the Medical Ethics Code imposes that the physician should make every effort to offer the patient terminal health care and conditions that allow him or her to die with dignity. According to this article, the physician has a duty to relieve the pain of an end-of-life patient to the greatest extent possible while maintaining the highest possible quality of life.

However, according to article 32, when faced with grave terminal situations, the physician is not required to create activities targeted at resuscitating the patient, to apply persistent medicines that only prolong life, or to use extraordinary clinical tools for this

¹⁸⁴ As enshrined in article 150 of the Polish Penal Code.

¹⁸⁵ *Vide* footnote 152, p. 40.

¹⁸⁶ Which includes euthanasia itself and any voluntary activities designed to end the life of someone at his or her request and out of compassion for the person performing it.

purpose. The decision as to when to stop administering them rests solely with the physician according to his assessment of the patient's chances of survival.

Despite all the above-mentioned, many questions have been raised about whether a physician can practice passive euthanasia in relation to a terminally ill patient by discontinuing therapies, or if, on the contrary, he should continue to offer these treatments at any cost.

Lastly, and unlike Portugal, although it is practicable to follow up on advance directives, such as a living will, the Polish legal system does not control the possibility of a person drafting such. Hence, all directives expressed by a conscious patient can be respected if they are in accordance with the prescriptions governing the way they are expressed and collected, as defined by the Civil Code, the Law on the Physician's Profession, and other regulatory provisions relating to medical law as well deontological codes.¹⁸⁷

¹⁸⁷ "Replies to the questionnaire for member states relating to euthanasia" (2003), steering Committee on Bioethics, (CDBI), Council of Europe, p. 51.

4. Conclusion

As seen, when deciding on contentious matters, the MoA is an important interpretative tool used by the ECtHR, with case law demonstrating that States Parties enjoy a margin of appreciation in how they implement the Convention in their legal systems, depending on the facts of the case and the rights and freedoms at stake. This underlines the fact that the Convention system is subsidiary to the national safeguarding of human rights. As a result, Court's role is to determine whether national authorities' decisions are compatible with ECHR, while considering the State's margin of appreciation.

Reaching a European consensus in all matters is a long and hard path to take, since not all States have the same beliefs, culture, and traditions, thus, and in what concerns the right to life, it may carry a double interpretation: on one hand, it is understood that life is inviolable (we speak here of cases of homicide, death penalty, among others); on the other hand, living with dignity and without suffering must be assured and protected by the right foreseen in article 2. Hence, people should have the right/freedom to choose whether they want to prolong their suffering, becoming crucial not to confuse cases in which the person is dying and intends to die (right to die with dignity) with the cases in which death is anticipated by the doctor.

However, there must be, of course, criteria that need to be met, namely the fact the patient is conscious, that expressly requests to die, that there has been medical supervision by more than one health professional (not only a doctor but also psychologists, nurses) and, above all, the patient in question must be a terminally ill person and there must not exist an alternative solution.

What is important to note is that the right to euthanasia does not oblige one to die whenever a person is in a terminally ill situation since it is not called "duty to euthanasia", but it will give him/her the chance, once and only when the criteria are met, to die with dignity and in peace.

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