European Court of Human Rights (ECHR)

Topic:

Why Cannot I Decide My Death?

(PRETTY v. THE UNITED KINGDOM)

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WELCOME LETTER FROM THE CHAIR

Dear Delegates:

Hello everyone! Welcome to the 2024 Peking University National Model United Nations Conference for High School Students. We are the chair of the European Court of Human Rights (ECHR). We sincerely hope that you would enjoy your time in the 2024 PKUNMUN.

ECHR was established to protect basic human rights of European people, in the pursuit of liberty, equality, and dignity. In the modern world where productivity and industrialization appear to be of greatest importance, ECHR provides individuals an opportunity to voice their request for basic human dignity, to cry for respect, love and care between each human being.

In *Pretty v. the United Kingdom* case, the concepts of the right to life, prohibition of ill-treatment, the right to self-determination, freedom of thought and prohibition of discrimination are discussed and further explored. Nevertheless, these basic human rights are never absolute in social reality. When a butterfly flaps its wings, the whole ecosystem might be affected. While sympathy is given to Mrs. Pretty for her suffering and loss of freedom, there remain other vulnerable individuals who might receive a negative impact from a sentence in favor of Mrs. Pretty. In reality, the very answer to the argument over human rights is all about balancing conflict of interests while demonstrating those values in consensus. Returning to our case, whether Mrs. Pretty could determine her death on her own is still a problem. The question of how to find the balance in pursuit of human rights also calls for your answers with arguments, which are exactly what we are eagerly looking forward to.

Due to the complexity of the law and our limited abilities, we prefer delegates to critically examine the background paper by seeking your supplementary materials. We all believe that a fair verdict for the case can only be reached with the help of every delegate's careful reading, critical thinking and reflection. Hope we could progress together.

The Dais Members would like to introduce themselves. Again, we sincerely extend our welcome at Peking University!

I am Xu Jiaxin, a senior in Law School. This is the second time for me to preside over the ICJ, and also my fourth year in PKUNMUN. As for the topic of euthanasia, it is a complex social problem with diverse views and arguments, which may involve moral, legal, ethical and medical ethics issues. However, I hope that we can work together with enthusiasm and effort to gain knowledge and wisdom in this subject. Through our joint efforts, we can deepen our understanding of this topic and gain valuable insights into its ethical and legal dimensions. Hope to see you all next spring at Peking University!

Hello, I am Qi Huanyu, a junior student from the Department of Chinese Language and Literature at Peking University. I specialize in linguistics and have a minor in law. I serve as one of the DHs on our committee, whose topic, euthanasia, has been a both challenging and captivating issue for jurists and ethicists worldwide for centuries. I hope that through this conference, all of you can gain deeper insights into international human rights protection, and have a great time with all of us who share a passion for Model United Nations. Looking forward to meeting all of you at Peking University!

Hello! I am Wen Ziyi, a sophomore in the School of Foreign Languages. This is the second time for me to participate in PKUNMUN as a dais member. From my point of view, PKUNMUN is a platform for us to have a better understanding of international affairs and try to solve them based on our own interpretation and application of treaties, principles, morality, etc. ECHR, as a new part of PKUNMUN 2024, will focus on the issue of euthanasia concerning human rights like “right to life” and “right to die”, which is still a controversial topic around the world. I am looking forward to your excellent performance in giving your own interpretation and reflection. Hope to meet and communicate with you in ECHR! Wish you would enjoy your journey in PKUNMUN 2024!

Hello! I am Shen Ruoyun, a sophomore in Law School. This is my first time participating in PKUNMUN as a DH. I love ECHR as I found myself interested in the law of Human Rights, and I hope you would find it attractive as well when exploring relevant information. Curious as I am about euthanasia and

assisted suicide, my knowledge is limited and open to further discussions in the coming meeting. May all of you a pleasant, fruitful time in PKUNMUN 2024 and the committee of ECHR. We would progress together!

สวัสดีค่ะ Hello everyone, my name is Tang Yushan and I'm currently studying Thai at Peking University, School of Foreign Languages. At the same time, I also take part in an international law study program in our school. It is my great honor to be the dais member of our committee. The issue concerning international laws has always been interesting and a bit challenging. It is hoped that through this conference delegates can deepen their interest in international laws and observe facts and norms in the interpretation of specific articles of law. However, for me Model United Nation Conference is not only an opportunity for us to just "broaden our horizons" or to gain rewards, but also a chance for everyone to encounter other fascinating spirits. I hope all delegates will cherish this opportunity to practice, to learn and most importantly to enjoy the chance of being with others.

If you have any questions regarding this committee or the case, please contact the dais members:

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Part I Introduction of European Court of Human Rights

1. European Convention on Human Rights (ECHR)

1.1. The Background of the Establishment of the ECHR

The establishment of the European Convention on Human Rights was a milestone achieved through a deliberate and collaborative process among the member states of the Council of Europe. Rooted in the aftermath of World War II and the desire to prevent future human rights abuses, this process culminated in the creation of an institution dedicated to upholding the principles enshrined in the European Convention on Human Rights.

The origins of the European Convention on Human Rights may be traced back to the Western European federalist movements that gained a degree of prominence in the years immediately after the end of World War II in 1945. The horrors of World War II, including the Holocaust and other widespread human rights violations, highlighted the urgent need for a comprehensive framework to protect individual rights and prevent the arbitrary exercise of state power. The initial proposal for the creation of a European human rights jurisdiction was made at the famous Congress of The Hague in May 1948.[1] European governments, however, appeared singularly reserved about the possible development of this incursion into their traditional sphere of sovereignty. Indeed, the Committee of Ministers of the newly established Council of Europe initially refused to place the question of human rights on the agenda of the inaugural session of the organization's Consultative Assembly in August 1949. Nevertheless, faced with the assembly's strong insistence on the question, the Committee of Ministers recanted its initial position.

Given the opportunity to deal with the issue, the assembly proceeded to produce a draft convention of human rights based on the “Teitgen Report”, so named for its principal drafter, Pierre-Henri Teitgen (1908–1997), which it submitted to the Committee of Ministers in September 1949. A series of expert meetings and intergovernmental negotiations were then held over the following year, producing the definitive text of the ECHR. In 1950, the treaty was opened for signature in Rome on November 4, 1950, and was formally adopted by an initial group of ten ratifying states, on September 3, 1953, marking the commitment of member states to its principles. The following years witnessed the ratification of the Convention by various states, allowing it to come into force. In 1959, the European Court of Human Rights was established in Strasbourg, France, as the judicial arm responsible for overseeing the implementation and interpretation of the Convention.

However, the document, as agreed in 1950, encompassed only a comparatively limited range of rights; its scope is notably narrower than that of the United Nation's 1948 Universal Declaration of Human Rights. The ECHR is focused on a core of political and procedural rights, to the exclusion of the broader social and economic rights proclaimed in the Universal Declaration. For the proponents of the European

[1] European Convention on Human Rights and Fundamental Freedoms | Encyclopedia.com.

system, there was a necessary trade-off between the creation of an effective international mechanism for human rights protection and the range of rights that it might, at least initially, encompass.

1.2. Conclusion of the Contents of the ECHR

The European Convention on Human Rights (ECHR) primarily focuses on safeguarding and protecting a wide range of fundamental human rights and freedoms. Its main emphasis is on ensuring that individuals within the member states of the Council of Europe are guaranteed certain essential rights, regardless of their nationality, race, gender, religion, or other characteristics. The Convention covers a broad spectrum of rights, including but not limited to:

a. Civil and Political Rights

The ECHR emphasizes civil and political rights that are essential for the functioning of democratic societies. These rights include the right to life, freedom from torture and inhumane treatment, the right to a fair trial, freedom of thought, conscience, religion, and expression, the right to privacy, and the right to peaceful assembly and association.

b. Equality and Non-Discrimination

The Convention places a strong emphasis on equality and prohibits discrimination based on various grounds such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

c. Protection of Property

The ECHR includes provisions protecting the right to property and ensuring that individuals are not arbitrarily deprived of their possessions.

d. Rights of Victims

The Convention outlines the rights of victims of human rights violations, ensuring that they have access to justice and remedies for the harm they have suffered.

e. Rights of Criminal Defendants

The ECHR safeguards the rights of individuals accused of crimes, including the right to a fair trial, the presumption of innocence, and protection against double jeopardy.

f. Freedom of Expression

The Convention upholds the freedom of expression, including freedom of speech, freedom of the press, and the right to receive and impart information and ideas.

g. Social and Economic Rights

While the Convention primarily focuses on civil and political rights, it also recognizes certain social and economic rights indirectly by ensuring that the protection of other rights does not unduly interfere with these rights.

h. Derogation in Times of Emergency

The Convention acknowledges that in exceptional circumstances, certain rights may be limited temporarily during states of emergency, but such limitations are subject to strict conditions and must be proportionate.

The European Convention on Human Rights, together with the European Court of Human Rights, serves as a powerful framework for upholding human rights across Europe. It reflects a commitment to principles of justice, equality, and dignity, while the court's case law continually shapes the understanding and application of these rights in various contexts.

2. European Court of Human Rights (ECHR)

2.1. Brief Introduction

The European Court of Human Rights (ECHR) is an international judicial body established to protect and uphold human rights across the member states of the Council of Europe. The Council of Europe is a separate organization from the European Union and consists of 47 member states, including both EU and non-EU countries. The court's main purpose is to ensure that member states adhere to the principles and standards outlined in the European Convention on Human Rights (ECHR), which has been introduced in 1.1-1.2.

The ECHR's decisions have had a significant impact on shaping human rights protection and legal standards across Europe. Its rulings are legally binding on the member states, and countries are expected to take measures to rectify violations and ensure compliance with the court's judgment.

In short, ECHR plays a crucial role in promoting and safeguarding human rights within Europe. serving as a final recourse for individuals who have exhausted domestic legal options and are seeking justice in cases involving human rights violations.

2.2. Development

The history of the ECHR is closely tied to the establishment of the European Convention on Human Rights (ECHR) and the overarching goal of ensuring the protection of human rights across Europe. Here are some of the stages of the development of ECHR:

Post-World War II Context: The devastation of World War II and the atrocities committed during the war led to a collective desire among European nations to prevent such horrors from happening again. The

Council of Europe was established in 1949 as an intergovernmental organization aimed at promoting cooperation and human rights among European states.

Adoption of the ECHR (1950): One of the Council of Europe's major achievements was the drafting and adoption of the ECHR in 1950. The Convention outlined a comprehensive set of human rights and fundamental freedoms to be protected across member states.

Entry into Force and Establishment of the Court (1953-1959): The ECHR came into force in 1953 after a minimum number of member states ratified it. In 1959, the European Court of Human Rights was established in Strasbourg, France, to oversee the implementation and interpretation of the Convention.

Initial Challenges and Limited Jurisdiction: Initially, the court faced challenges in terms of its jurisdiction and the number of cases it could handle. Its authority was limited to cases brought by states against other states and did not provide direct access for individuals to submit cases.

Protocol 11 and Individual Petitions (1998): Protocol 11 to the Convention, which entered into force in 1998, expanded the court's jurisdiction to include individual petitions. This meant that individuals could now directly bring cases before the court if they believed their rights had been violated by a state party.

Case Law Development and Impact: Over the years, the court's case law has evolved, setting important precedents and interpretations for the rights enshrined in the Convention. Its decisions have had a significant impact on domestic legal systems and human rights practices across Europe.

Growing Caseload and Reforms: The court's caseload increased substantially over time, leading to discussions about the need for reforms to manage the workload more efficiently. Reforms were introduced to streamline procedures and enhance the court's capacity to handle cases.[2]

The history of ECHR reflects a commitment to ensuring that individuals have a means to seek justice and protection against human rights violations, contributing to the promotion of human dignity, democracy, and the rule of law in Europe.

2.3. The Challenges of ECHR

There is no doubt that ECHR has achieved significant milestones in promoting human rights across Europe. However, like any institution, it also has certain limitations. The followings are parts of the possible challenges that ECHR may face:

Backlog of Cases: The ECHR often faces a significant backlog of cases due to the large number of

[2] History of the ECHR's Reforms (coe.int).

applications it receives. This can lead to delays in the resolution of cases, which may undermine the effectiveness of the court in providing timely justice.

Limited Enforcement Mechanisms: The ECHR lacks direct enforcement mechanisms, and its decisions rely on member states to voluntarily comply with its rulings. In cases where states are unwilling to implement the court's decisions, effective enforcement can be challenging.

Limited Direct Access for Individuals: Individuals generally cannot bring cases directly to the ECHR. Instead, they must first exhaust domestic remedies before applying to the court, which can be a time-consuming process.

Part II Introduction to the Case

3. General Background

3.1. Conceptual Issue: Euthanasia

3.1.1 The Definition of Euthanasia

Euthanasia encompasses all decisions (of doctors or others) intended to hasten or to bring about the death of a person (by act or omission) in order to prevent or limit the suffering of that person (whether or not on his or her request).[3] There are some basic elements for the connotation of "euthanasia":

(1) A killed B or let B die;

(2) A intended to kill B;

(3) the intention specified in (2) was at least partial cause of the action specified in (1);

(4) the causal journey from the intention specified in (2) to the action specified in (1) is more or less in accordance with A's plan of action;

(5) A's killing of B is a voluntary action (which is necessary for A to get rid of the possibility of being threatened to kill B).[4]

However, it is still obscure to define euthanasia, for all that is been defined is at best intentional killing. The principal thing that distinguishes euthanasia from intentional killing is the agent's motive: it must be a good motive insofar as the good of the person killed is concerned,[5] that is, the motive for the action specified in (1), the motive standing behind the intention specified in (2), is the good of the person killed.[6] The treatments used in the process of euthanasia are all designed to release the pain that patients suffer, including physical hurt and mental torture.

[3] Sjef Gevers, 'Euthanasia: law and practice in the Netherlands' [1996] (2) British Medical Bulletin 326.

[4] Michael Wreen, 'The Definition of Euthanasia. Philosophy and Phenomenological Research' [1988] 48(4) Philosophy and Phenomenological Research 637.

[5] Ibid 639.

[6] Ibid 639.

3.1.2 Euthanasia's Development of Practices and Opinions

In ancient Greece, there has been a way to allow the sick and disabled to die freely and peacefully, which was similar to the modern concept of euthanasia. In the Middle Ages, people believed that only God and the sovereign representing God in reality had the ability to dominate human life and death, as a result of which euthanasia was considered a usurpation of power. Under the guidance of the Renaissance, human paid more attention to themselves and claimed that it was justifiable to control their own life and death.

With the development of technology, people had a further understanding of life and death. Euthanasia became a popular tool of eugenics – controlling reproduction within human populations to potentially increase the occurrence of desirable heritable characteristics – during World War II and became associated with racism and prejudice against disabled individuals,[7] bringing negative influence on euthanasia. Today, people put more emphasis on the quality of life. Coupled with the advancement of medical concepts and technology, the legalization of euthanasia has become controversial again worldwide.

3.1.3 The Classification of Euthanasia

Euthanasia is usually divided into two categories: **passive euthanasia and active euthanasia.** Passive euthanasia, often described as letting one die, entails withholding treatment necessary for the continuance of life,[8] which is performed by omission to prolong patients' life. Active euthanasia involves introducing something[9] into the body to cause death.[10]

Cutting across the active-passive distinction, there is a distinction between **voluntary, non-voluntary and involuntary euthanasia**, depending on whether patients autonomously request their death, are unable competently to give consent, or are competent but have their views on the matter disregarded (or overruled).[11] It is said to be voluntary when patients freely and autonomously consent to be killed for his or her own good. Non-voluntary euthanasia, aimed at preventing patients from suffering incurable diseases, typically happens in cases where patients are deemed incompetent and cannot make the decision. Involuntary euthanasia seeks consent from the guardian without accepting or even considering patients' opinions.

Nowadays, many approve of what has been termed passive euthanasia, that is, ceasing all but palliative

[7] Samuel J. Skidmore and Sharon E. Robinson Kurpius, 'Euthanasia in an Aging America: An Ethical Challenge for Mental Health Counselors' [2021] 43(2) Journal of Mental Health Counseling 125.

[8] Golan Luzon, 'The Practice of Euthanasia and Assisted Suicide Meets the Concept of Legalization' [2019] 13 Criminal Law and Philosophy 329.

[9] i.e. lethal substance.

[10] Skidmore and Kurpius (n 7) 126.

[11] E Garrard and S Wilkinson, 'Passive Euthanasia' [2005] 31(2) Journal of Medical Ethics 64.

treatment for dying patients.[12] Active euthanasia is limited to specific circumstances. If not beneficial for the killed, it can be seen as intentional killing. Meanwhile, the process of conducting active euthanasia sometimes involves assistance from a third party, thus defined as assisted suicide.

3.1.4 Assisted Suicide

Assisted suicide is referred to as asking others for help for patients who are possibly incompetent to commit suicide through certain methods like drugs or equipment to end his or her life. On the one hand, assisted suicide is a killing performed by one person upon another, which is ethically distinct from active voluntary euthanasia. On the other hand, when all other relevant factors are equal, and the legislation applies only in cases of a decision-capable patient who is experiencing intolerable suffering as a result of an incurable illness, and who makes a free and informed decision to hasten death rather than endure further suffering, there is no ethical difference between assisting in a suicide and euthanasia.[13]

3.2. The Legislative Position on Euthanasia and Assisted Suicide in the UK

3.2.1 The Suicide Act 1961

Section 2(1) and Section 2(4) of the Suicide Act 1961 are relevant positions.

> *"A person who 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.*[14]

> *No proceedings shall be instituted for an offense under this section except by or with the of the Director of Public Prosecutions."*[15]

Suicide ceased to be a crime in England and Wales by virtue of the Suicide Act 1961. However, assisted suicide is illegal in the UK according to Section 2 of the Suicide Act 1961. Any person found to be assisting suicide is breaking the law and can be convicted of assisting suicide or attempting to do so.[16] According to the government, suicide means a person causes his or her own death intentionally. If "suicide" is carried out by another person, it will be defined as murder, and the one who conducts it is the murderer.

First and foremost, it is in the interest of the public[17] to preserve the lives of its citizens. Dying is not only a personal or individual affair. The death of a person affects the lives of others, often in ways and to

[12] Luzon (n 8) 333.
[13] Ibid 335.
[14] Suicide Act 1961, s 2.1.
[15] Ibid s 2.4.
[16] Luzon (n 8) 332.
[17] i.e. the government or the country.

an extent that cannot be foreseen.[18] The issue of euthanasia together with assisted suicide is one in which the interest of the individual cannot be separated from the interest of society as a whole. Moreover, it is designed to protect those who are tempted by third parties or influenced by personal distress from committing suicide. Any loosening of the ban on assisted suicide will weaken the effectiveness of the Suicide Act 1961 in protecting people who commit suicide at risk unwillingly, as they may be threatened. With the help of legislation on euthanasia and assisted suicide, people who coerce others to death can be restrained, better-preserving citizens' lives.

If the Suicide Act 1961 allows exceptions for people incompetent to suicide, the Suicide Act 1961's principle of protecting life will be seriously weakened, increasing the possibility of being abused. The loosening of the ban on assisted suicide will not prevent suffering but will cause suffering since the weak and handicapped will receive less effective protection from the law than the fit and well. Vulnerable people – the elderly, sick or distressed – would feel pressure, whether real or imagined, to request early death. The message that society sends to vulnerable and disadvantaged people should not obliquely encourage them to seek death but should assure them of our care and support in life.[19]

There are still several concerns about euthanasia and assisted suicide in legislation. Some specialists also believe it is impossible for us to set secure limits on assisted suicide. However, some people in society discuss the punishment of assisted suicide heatedly, recommending that the penalty for assisting suicide should be reduced to seven years, as being sufficiently substantial to protect helpless persons opens to persuasion by the unscrupulous.[20]

3.2.2 Case-law

Case-law has established that an individual may refuse to accept life-prolonging or life-preserving treatment.[21] For instance, in the case *Lord Goff in Airedale NHS Trust v. Bland*[22] it announced that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so.[23] Under this circumstance, the principle of the sanctity of human life must yield to the principle of self-determination. As the House of Lords Select Committee on Medical Ethics concludes, although there are exactly individual cases in which euthanasia may be seen by some to be appropriate, they cannot reasonably establish the foundation of a policy that would have such serious and widespread repercussions.[24]

[18] *Pretty v. the United Kingdom* App no. 2346/02 (ECHR, 29 April 2002) [22].
[19] ibid [22].
[20] ibid [20].
[21] ibid [17].
[22] [1993] AC 789 (HL).
[23] *Pretty,* [17].
[24] ibid [22].

3.3. Other Countries' Viewpoints and Legislation on Euthanasia

Many countries like the Netherlands, the United States, Japan, Australia, Spain and Canada have all debated the legitimacy of euthanasia and further explored statute-law and case-law related to euthanasia, among which the legislation in the Netherlands and the United States is the most typical.

3.3.1 The Netherlands

In the Netherlands, the word "euthanasia" only refers to the deliberate termination of the life of a person on his or her request by another person.[25] According to the Dutch Penal Code, euthanasia is a crime. According to Article 293, anyone who takes another person's life at his explicit and earnest request will be punished by imprisonment to a maximum of 12 years.[26] In 1984, the Royal Dutch Medical Association stated that euthanasia might be acceptable in certain circumstances:

> *(1) The request for euthanasia must come from the patient and be entirely free and voluntary, well-considered and persistent;*
> *(2) the patient must experience intolerable suffering (physical or mental), with no prospect of improvement and with no acceptable solutions to alleviate the patient's situation;*
> *(3) euthanasia must be performed by a physician after consultation with an independent colleague who has experience in this field.*[27]

In 2000, the Netherlands passed Review Procedures for Termination of Life on Request and Assisted Suicide Act, adding Section 2 to the former Article 293 of the Dutch Penal Code: a medical practitioner who performs an act referred to in Section 1 in accordance with the principle of duty of care set out in Section 2 and informs the municipal pathologist of the act in accordance with Section 2 of Article 7 of the Burial Act shall not be guilty. Therefore, the Netherlands became the first country to legalize euthanasia.

3.3.2 The United States

Although passive euthanasia is considered legal throughout the United States, active euthanasia is still a controversial topic. The only legally practiced form of active euthanasia is physician-assisted dying (PAD). PAD was first legalized in the United States in 1994 when Oregon voters passed the Death with Dignity Act (DWDA).[28] Seven other states and the District of Columbia have also enacted legislation similar to DWDA, including Washington (in 2008), Vermont (in 2013), Colorado (in 2016), California (in 2016), Hawaii (in 2019), Maine (in 2019) and New Jersey (in 2019).

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[25] Gevers (n 3) 326.
[26] The Dutch Penal Code, art 293.
[27] Gevers (n 3) 328.
[28] Skidmore and Kurpius (n 7) 128.

4. The Proceedings of the Case

4.1. Diane Pretty: The Factual Background of the Case

The applicant Diane Pretty, a 43-year-old woman, resides with her husband of twenty-five years, their daughter and granddaughter. She suffers from motor neuron disease (MND), an incurable degenerative disease that leads to severe weakness of the arms and legs and of the muscles involved in the control of breathing, eventually resulting in death. The applicant's condition deteriorated rapidly after it was diagnosed in 1999 and the disease is at an advanced stage: she is paralyzed from the neck down and has to be fed by a tube, but her intellect and capacity to make decisions are unimpaired. No treatment can prevent the progression of the disease. As the final stages of the disease are distressing and undignified, the applicant wishes to control how and when she dies. However, she is unable to commit suicide without assistance and it is a crime to assist another to commit suicide.[29] So, the applicant requested to give an undertaking that her husband would not be prosecuted if he assisted her in committing suicide.[30]

4.2. Judicial Proceedings

Based on Diane Pretty's health condition and personal wish, the applicant's lawyer requested the Director of Public Prosecutions (DPP) to give an undertaking that her husband would not be prosecuted if he assisted her in committing suicide. Unfortunately, the request was refused and the Divisional Court also refused an application for judicial review. The applicant further appealed to the House of Lords in November 2001, but they dismissed her appeal and upheld the judgment of the Divisional Court.

On 21 December 2001, the case originated in an application against the UK lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mrs. Diane Pretty,[31] who alleged that the refusal of the Director of Public Prosecutions to grant immunity from prosecution to her husband if he assisted her in committing suicide and the prohibition in domestic law on assisting suicide infringed her rights under Article 2, 3, 8, 9 and 14 of the Convention.

The applicant and the Government each filed observations on the admissibility and merits.[32] The Court considers that the whole application raises questions of law that are sufficiently serious that their determination should depend on an examination of the merits. No other ground for declaring it inadmissible has been established. The application must therefore be declared admissible.[33]

4.3. Conclusions of the European Court of Human Rights

As a result, the Court finally unanimously:

[29] *Pretty,* [7].
[30] ibid [10].
[31] ibid [1].
[32] ibid [5].
[33] ibid [33].

(1) *Declares* the application admissible;

(2) *Holds* that there has been no violation of Article 2 of the Convention;

(3) *Holds* that there has been no violation of Article 3 of the Convention;

(4) *Holds* that there has been no violation of Article 8 of the Convention;

(5) *Holds* that there has been no violation of Article 9 of the Convention;

(6) *Holds* that there has been no violation of Article 14 of the Convention.[34]

Detailed explanations would be further illustrated in Part III.

Part III Legal Issues

5. Article2: The Right to Life vs. The Right to Die

ARTICLE 2 Right to life

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

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defense of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.[35]

5.1. Basic Connotations and Point at Issue

Article 2 of the ECHR proclaims the right to life of individuals in European countries. The right to life refers to unshakable respect and protection for a man's life. Each person, organization and political power must not interfere with a man's right to life.

There are certain exceptions mentioned in Article 2. A man's right to life cannot be protected under these conditions. This would be further illustrated in 5.2.

Nevertheless, the concept of the right to life is vague, causing a long-lasting debate on whether the right to die can be included in the right to life. The answer to this issue can determine the distribution of interests even the fate between parties. To discuss this question, we must follow the principle of legal interpretation, as well as using other perspectives for reference if it helps.

[34] *Pretty*.
[35] ECHR, Art.2.

5.2. Legal Interpretation of Article 2

Contextually, it remains controversial whether the word "life" includes a negative aspect — the right to die, which implies that a person must have the "right to choose" toward life. Specifically, he or she has the freedom to determine when and how to die. In the previous judgment of the Court, it held 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"[36]. The current court does not consider "life" to include the concept of "die", and it interpreted "die" as a matter of self-determination under Article 8 of ECHR,[37] separating the issue from the debate on Article 2. In *Pretty* case judgment, the court reasoned that Article 2 must not involve a negative aspect. Compared to Article 11 of ECHR (freedom of association) which includes a negative aspect because the word "freedom" can be interpreted to consist of "freedom not to", the right to life itself cannot be interpreted to include a negative aspect without distortion of language.[38] However, this does not mean a person's right to determine death cannot be protected. The Convention protects self-determination in Article 8. Further discussions will be illustrated in 7.

In this part, the discussion would focus on whether "the right to life" includes "the right to die" itself, regardless of the court's previous opinion on their relations. However, given that the definition of "life" falls within the scope of philosophy and other fields, it will be further discussed in 5.3.

If we assume the word "life" does not consist of "die", Article 2 cannot be applied here accordingly, and therefore consistent with the previous court's decision to discuss the death issue under Article 8. However, if it is the reverse, it does not mean assisted suicide can be justified under Article 2, either. Further judgment on exceptions needs to be excluded. Only if interpreting the word "life" as including the right to die as well as excluding exceptions listed in Article 2.2, can assisted suicide be justified under Article 2. However, it is obvious that the United Kingdom government's deprivation of Mrs. Pretty's right to die does not belong to any of these exceptions.

Then, we come back to the main issue: to define the "Right to Life", further aspects of information need to be considered. These shall be listed and illustrated in 5.3.

5.3. Other Perspectives for Reference: to Define "Right to Life"

5.3.1. "Right to life in terms of medical science

Why do people seek medical treatment? For a simple reason, people wish to live better. There are two underlying purposes in the medical profession: Preservation of life, and providing relief from the suffering. Now in the modern society where living conditions have been greatly improved, the duty of the doctors, is not to unnecessarily prolong life by artificial methods anymore, but to serve the "best interest" of the patient. From the perspective of medical science, if the patient is not allowed to die with

[36] *Pretty,* para.39.
[37] *Haas v. Switzerland*, App no. 31322/07 (ECHR, 20 January 2011) para.54.
[38] *Pretty*, para.39.

dignity and the inevitable death is prolonged by the doctor, then the doctor has not acted in the patient's "best interest".[39]

In conclusion, "the right to die", in terms of medical science, is highly relevant to "the quality of life", therefore it belongs to the concept of the right to life. Protection of the right to life, is not only about the length of life, but also a matter of dignity and quality of a man's life.

5.3.2. The theory of human rights: the origin of the "right to life"

The concept of "right to life" is a part of the theory of Human Rights. "Human Rights" was initially advocated by Enlightenment thinkers in the eighteenth century. Kant's theory of human rights is representative. According to Kant, people have unlimited noble value solely relying on themselves (Human Rights), which means Human Rights is absolute without depending on God or authority. Therefore, life has self-sufficiency value simply because it belongs to "human" (right to life), which means the right to life is absolute and cannot be lawfully deprived under any circumstances as well.

It is also noted by Kant that, "People are ends rather than means", the life of people is ends instead of means. Acknowledging the right to "end life" is equivalent to considering life as an exchange, weakening the nobility of life.

In conclusion, according to Kant's perspective of human rights, all deprivations of life, no matter on what basis and under what name, is all a violation of the right to life.

5.3.3. "Right to life" in terms of morality and religion

Catholic Bishops' Conference of England and Wales pointed out that, the Catholic faith that human life was "a gift from God received in trust". Actions with the purpose of killing even with consent, would be deemed a disrespect of human worth. This argument was recognized by modern pluralist and secular societies.[40] They also pointed out that, those who attempted suicide were often subjected to psychiatric illnesses like depression, suggesting that their decision to end their life could never be considered a rational and responsible decision.[41]

The House of Lords Select Committee on Medical Ethics held the opinion that, any legal permission for assisted suicide would result in massive erosion of the rights of the vulnerable. The Committee questioned the validity of "consent" itself.[42] Given that the "consent" of the vulnerable is often vague, irrational and highly subject to distortion and threat, and it is almost impossible for the government to

[39] Tanya Minocha, 'Right to Die as Right to Live' (2019) 14 Supremo Amicus 300.
[40] *Pretty*, para.29.
[41] Ibid, para.30.
[42] Ibid, para.31.

confirm the real nature of the "consent", the state must strictly prohibit any act of assisted suicide, in order to prevent death against the will of the vulnerable.

5.3.4. Restriction on abuse of power: the initial purpose of "right to life"

After the Enlightenment, democratic countries now incorporated the right to life into their constitutions. As a public right, the constitutional right to life, like other constitutional basic rights, is first used to fight against the state's power. The essence of the right to life is to defend against all actions that infringe on the value of the right to life, preventing the state from using the right to life as a means to achieve its goals. In the modern world, the changes in society require that the right to life should not be limited to passive defense rights. It has developed into a positive right, requiring the state to actively take action to effectively protect people's right to life, which is a result of improved governing ability and higher social requirements.

5.3.5. Different arguments on the composition of the "right to life"

Firstly, the theory of "right to live", which means the law only protects people to stay alive, rather than allowing people to end their life. This theory is based on the concept of invaluable human rights, prohibiting any kind of attack on a person's right to live.

The advocate of the theory of "right to live" may suggest that, a person can never decide his right to choose life. No one ever determined their birth, pure and simple. Then how could this same person to decide his death, when birth and death are two sides to the same coin?

Secondly, the theory of the "right to choose life". It refers to a person's freedom to choose the way he or she exists in life. This theory interprets "life" from a relatively broad perspective, different from the previous concept of regarding "life" as "live" only. However, it remains controversial whether this interpretation can be seen as a reasonable amplified interpretation or an inappropriate interpretation that cannot be adopted. However, when it comes to the teleological interpretation, the purpose of the "right to life" could actually change with social requirements. In the Age of Enlightenment, when basic human rights were greatly violated under the control of the absolute monarchy, the main requirement was to restrict power violation and keep innocent people from dying, so as the intention of the "right to life". Nevertheless, after stepping into the modern era, the basic right of "live" is mostly satisfied, but another requirement comes out—the right to choose.

The advocates of the theory of the "right to choose life" argued that, a democratic state's power comes from the surrendered power of its people, while it is the duty of the state to protect these surrendered rights in order to maintain its authority. However, rational individuals do not give up all their rights. There are certain rights that a rational person would not give up, for example, the right to choose die. It

must belong to individuals themselves, for it would have no benefit to them to surrender it to the public power.

In summary, the concept of "life" is broad, profound and endless. The source listed above must not bind the logic and will of exploration. Further point of view is highly encouraged, as long as they are well-recognized instead of simply coming out of one's mind.

6. Article 3: What is the state's obligation?

ARTICLE 3 Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.[43]

6.1. Basic Connotations and Point at Issue

Article 3 of ECHR states the prohibition of torture and inhuman or degrading treatment or punishment, which is a value of a democratic society closely bound up with respect for human dignity.[44]

Mrs Pretty, in this case, claimed that the United Kingdom government failed to fulfill its positive obligation to protect her from suffering inhuman and degrading treatment under Article 3 of ECHR.

To interpret this Article, there are two main controversial issues: the definition of "inhuman and degrading treatment", and the concept of "obligation". What kind of act could be deemed as "inhuman and degrading treatment"? States have what kind of obligation to protect their people from suffering such ill-treatment? These issues would be further discussed in the following paragraphs.

6.2. Legal Interpretation of Article 3

The nature of inhuman treatment is that, a treatment that was "applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering",[45] while a treatment is considered to be "degrading" when it "humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance".[46] More detailed information on judging whether a treatment can be deemed as "inhuman or degrading" could be found in the ECHR Guideline of Article 3, para.18 and para.22.

[43] ECHR, Art.3.
[44] Guide on Article 3 of the European Convention on Human Rights, para.2 (31 August 2022).
[45] *Labita v. Italy* App no. 26772/95 (ECHR, 6 April 2000), para. 120.
[46] Guide on Article 3 of the European Convention on Human Rights, para.19 (31 August 2022).

The concept of "ill-treatment" is more a matter of severity than the judgment of nature.[47] In order to determine whether the threshold of severity has been reached, other factors may be taken into consideration, in particular:

> *(a)the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3 of the Convention;*
> *(b)the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; and*
> *(c)whether the victim is in a vulnerable situation.*[48]

However, it does not mean that an act would be deemed as "ill-treatment" simply because it meets the severity. It has to be an "intentional act" at the same time. As a matter of fact, bodily injuries and physical and mental suffering experienced by an individual following an accident which is merely the result of nature, chance or negligent conduct cannot be considered as the consequence of "treatment" to which that individual has been "subjected" within the meaning of Article 3, unless the suffering is caused or exacerbated by the government.[49] Nevertheless, it can be concluded that a "treatment" must be caused by human behaviour rather than pure nature.

The other relevant issue is that, states have what kind of obligation to protect their people from ill-treatment? In *Pretty* case, the issue under debate is whether the state has a positive obligation to protect Mrs. Pretty from suffering. In *X and Others v. Bulgaria* case, the Court has acknowledged that States have positive obligations under Article 3 of the Convention, but only under certain circumstances.[50] In *Pretty* case judgment, the court held with sympathy that the suffering of Mrs. Pretty was a natural illness that was not caused or exacerbated by the United Kingdom government. Since the government had no relevance to Mrs. Pretty's suffering, no positive obligations arose. "An undertaking not to prosecute or to provide a lawful opportunity for any other form of assisted suicide" does not fall within the scope of the positive obligation mentioned above.[51]

7. Article 8: Self-Determination vs. Public Will

ARTICLE 8 Right to respect for private and family life

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security,

[47] Ibid, para.5.
[48] *Khlaifia and Others v. Italy* App no. 16483/12 (ECHR, 15 December 2016), para.160.
[49] *Nicolae Virgiliu Tănase v. Romania* App no. 41720/13 (ECHR, 25 June 2019), para.121-123.
[50] *X and Others v. Bulgaria* App no. 22457/16 (ECHR, 2 February 2021).
[51] *Pretty,* pp.158.

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.[52]

7.1. Basic Connotations and Point at Issue

Article 8 encompasses the right to respect for private and family life, home and correspondence.[53]

The first point at issue is whether the right to die falls within the scope of private and family life. If the answer is positive, and there exists a state's intervention, the second issue is that if the intervention could be justified under Article 8.2. The argument could refer to the principle of proportionality if it helps.

7.2. Legal Interpretation of Article 8

In order to invoke Article 8, an applicant must show that his or her complaint falls within at least one of the four interests identified in the Article, namely: private life, family life, home and correspondence.[54] In *Pretty v. the United Kingdom* case, Mrs Pretty claimed that her private life was intervened by the United Kingdom Government, preventing her from exercising her right to avoid an undignified end of her life.

7.2.1. The concept of "Private Life"

The first issue is to define the concept of "private life", and therefore judge whether the applicant's claimed right falls within the scope of "private life".

In general practice, the Court has defined the scope of Article 8 broadly,[55] deeming that private life is a broad concept incapable of exhaustive definition.[56] It covers the physical and psychological integrity of a person and may "embrace multiple aspects of the person's physical and social identity".[57] Article 8 protects the right to personal development, whether in terms of personality or personal autonomy.[58]

In sum, there is a general acknowledgment in the Court's case-law under Article 8 of the importance of privacy and the values to which it relates. These values include, among others, well-being and dignity,[59] personality development[60] or the right to self-determination,[61] physical,[62] physical and psychological integrity.[63]

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52 ECHR, Art.8.
53 Guide on Article 8 of the European Convention on Human Rights, para.2 (31 August 2022).
54 Ibid, para.1.
55 Ibid.
56 *Niemietz v. Germany* App no. 13710/88 (ECHR, 16 December 1992), para.29.
57 *Denisov v. Ukraine* App no. 76639/11 (ECHR, 25 September 2018), para.95.
58 *Bărbulescu v. Romania* App no. 61496/08 (ECHR, September 5, 2017).
59 *Hudorovič and Others v. Slovenia* App nos. 24816/14 and 25140/14 (ECHR, 10 March 2020) para.112-116.
60 *Von Hannover v. Germany* App no. 59320/00 (ECHR, 24 June 2004) para.95.
61 *Pretty*, App no. 2346/02 (ECHR, 29 April 2002) para.61.
62 *J.L. v. Italy* App no. 5671/16 (ECHR, 27 May 2021) para.118.
63 *Vavřička and Others v. the Czech Republic* App nos. 47621/13 and 5 others (ECHR, 8 April 2021) para.261.

7.2.2. Justification of an Intervention

The second issue is whether a state's intervention could be justified under Article 8.2. The positive conclusion must evaluate each element listed below, rather than choosing one or two only.

a. In Accordance with the Law

The intervention could be justified only if it is "in accordance with the law". This expression does not only necessitate compliance with domestic law but also relates to the rule of law (general principles of law).[64] The national law itself, however, must be clear, foreseeable, and adequately accessible, or else it could still be considered a violation of Article 8 despite its legal basis.

In *Pretty v. the United Kingdom* case, the intervention of the government was based on section 2(1) of the Suicide Act 1961.

b. Furthering a Legitimate Aim

A legitimate aim must be "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",[65] according to Article 8.

It is for the respondent Government to demonstrate that the interference pursued a legitimate aim.[66] In *Pretty* case, it is debatable whether the United Kingdom's intervention in Mr. Pretty's assisted suicide act was out of a legitimate aim. Why the government insisted on prohibiting assisted suicide regardless of Mrs. Pretty's special condition and requirements? What is the initial concern of the government? What would happen if the government does not interfere? The answer, however, lies in the essence and logic of the modern democratic system, which would be illustrated in 7.3, and further exploration shall be highly encouraged.

c. Necessary in a Democratic Society

The core of this issue is a balance between the interests of the Member State against the rights of the applicant. To decide whether an intervention is "necessary", the court must discuss amongst other things, whether it is "proportionate" to the legitimate aim pursued.[67] For example, to shoot a thief simply because he stole an apple is not proportionate, while regulating motor vehicles to run on motorways in order to keep them from hurting pedestrians is proportionate. Detailed applications of the principle of proportionality would be further discussed in Part V.

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[64] *Big Brother Watch and Others v. the United Kingdom* App nos. 58170/13, 62322/14 and 24960/15 (ECHR, 25 May 2021) para.332.
[65] ECHR, Art.8.
[66] *Mozer v. the Republic of Moldova and Russia* App no. 11138/10 (ECHR, 23 February 2016) para.194.
[67] *Dudgeon v. the United Kingdom* App no. 7525/76 (ECHR, 22 October 1981) para.51-53.

It is the duty of the respondent State to demonstrate the existence of a pressing social need behind the interference.[68] The United Kingdom government needs to prove the proportionality of its intervention.

In the judgment of *Pretty* case, the court did not find the United Kingdom's ban on assisted suicide disproportionate. It reasoned that, given that the Suicide Act was intended to protect the life of the vulnerable, the seriousness and nobility of this regulation's purpose prevails a single person's autonomy. It then concluded that the act of the United Kingdom government could be justified under Article 8.2.

The court's previous decision cannot bind further reasoning and novel ideas. It might be helpful to look into the inner logic of the government and the court's decision, which would be elaborated in 7.3.

7.3. Other Perspectives for Reference

7.3.1. *Leviathan*: The Logic of Public Power (Hobbes, 1651)

In the book *Leviathan*, the author Hobbes described a world without public power, where there would be "continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short".[69] In pursuit of order and safety, people decided to surrender a crucial part of their rights to a public authority, in exchange for protection of these basic rights. The very nature of Hobbes' view is the justification of public power: social order would not have existed but for the establishment of government, whether a democratic or an autocratic one.

7.3.2. Utilitarianism: Chasing for "Maximum Happiness" (Bentham, late 18th century)

In ethical philosophy, utilitarianism is a family of normative ethical theories that prescribe actions that maximize happiness and well-being for all affected individuals.[70] The rationality of a certain act is estimated based on its result. If the result benefits the happiness of the majority, the act would be deemed rational regardless of its minor negative impact.

The Utilitarianism is heavily criticized, nevertheless. It merely focuses on the outcome, while neglecting the legitimacy of the means itself. Furthermore, it merely focuses on the positive outcome, while neglecting the negative impact. In modern society, where special care for the vulnerable has become a crucial element for social development and spiritual value, sacrificing certain individuals in order to reach a better outcome, might be deemed inappropriate.

7.3.3. Limited Liberty (J. S. Mill, 1859)

[68] *Piechowicz v. Poland* App no. 20071/07 (ECHR, 17 April 2012) para.212.
[69] Thomas, Hobbes (2006). 'Leviathan'. Rogers, G. A. J., Schuhmann, Karl (A critical ed.). London: Bloomsbury Publishing.
[70] Duignan, Brian. [1999] 2000. "Utilitarianism" (revised). Encyclopædia Britannica. Retrieved 5 July 2020.

In the book *On Liberty*, J. S. Mill concluded the Introduction by discussing what he claimed were the three basic liberties in order of importance:

> *The freedom of thought and emotion. This includes the freedom to act on such thought;*
> *The freedom to pursue tastes (provided they do no harm to others), even if they are deemed "immoral";*
> *The freedom to unite so long as the involved members are of age, the involved members are not forced, and no harm is done to others.*[71]

According to Mill, the liberty of an individual is sovereign, as long as it does not interfere with the liberty of others.

7.3.4. Social Contract Theory: Protecting the "Public Will" (Rousseau, 1895)

Social contract theory (*Du Contrat Social*) argues that individuals have consented, either explicitly or tacitly, to surrender some of their freedoms and submit to the authority (of the ruler, or to the decision of a majority) in exchange for protection of their remaining rights or maintenance of the social order.[72] The decision made by individuals is considered to be the "Public Will", which is guaranteed by the state's public power. As a result, the freedoms surrendered in the decision, however, can only be determined by the authority rather than the individuals themselves.

The logic behind the legitimate state's intervention is that, an act for the purpose of protecting the Public Will can be justified, despite it might pose harm to certain individuals' certain rights at the same time.

7.3.5. Self-Determination (Modern Concept)

Although it is debatable whether the right of self-determination is *jus cogens* (强制国际法规则), self-determination has undoubtedly attained the status of a "right" in international law. Formal statements by governments, the adoption by consensus of numerous United Nations resolutions, and the fact that more than half of the world's states have accepted the right of self-determination through their adherence to one or both of the United Nations covenants on human rights would seem to confirm the existence of self-determination as a norm of international law.[73]

While it seems clear that self-determination has attained the status of a right, the scope of that right must be explored.[74] When it may endanger the community or another, one's right to self-determination is limited. At the same time, one must have fully recognized the potential consequences of this self-

[71] Mill, John Stuart (1860). 'On Liberty' (2 ed.). London: John W.Parker & Son.
[72] Castiglione, Dario (2015). "Introduction the Logic of Social Cooperation for Mutual Advantage – the Democratic Contract", Political Studies Review. 13 (2): 161–175.
[73] Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 Va J Int'l L 1.
[74] Ibid.

determination act.[75] In the *Pretty* case, the issue under debate is whether Mrs. Pretty's death could be self-determined. The criteria, then, are whether her assisted suicide death poses no harm to society, and whether her act is a sober decision.

8. Article 9：Freedom of Thought, Belief and Religion

ARTICLE 9 Freedom of thought, belief and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[76]

8.1. Basic Connotations and Point at Issue

The freedom of thought, conscience, and religion is a fundamental right that is enshrined in various national, international, and European texts, in addition to the European Convention on Human Rights. In this part, we will set out the meaning, purpose and causes of this Act.

From the text of this article, we can learn the following: All individuals possess the fundamental right to engage in independent thinking and to embrace ideas and viewpoints based on their conscientious, religious, or other personal beliefs. Subject to specific restrictions, individuals also enjoy the right to publicly demonstrate or express their religious or other beliefs, including through acts of worship, observance, practice, and education. It is imperative that legislative measures, policies, and programs uphold and honor the right to freedom of thought, conscience, religion, or belief. However, the implementation of the above-mentioned rights is not unlimited, and Governments have the power to intervene when exceptional circumstances arise.[77]

Only a few political and philosophical notions can match the grandeur of the concept of freedom of thought. With its roots stretching back to Roman times, this notion can be arguably considered the slogan of the Enlightenment, which emphasizes the importance of having the courage to think for oneself rather than blindly accepting authorities. Freedom of thought serves as a cornerstone for the establishment of liberal legal orders and the scientific method, as well as the advancement of democracy and the disenchantment of the world. As a result, it has profoundly transformed the *conditio humana*. From a more specific perspective, freedom of thought is widely recognized as one of the fundamental pillars of democratic societies. It is particularly valued by European judges who view religious freedom as an

[75] Irving Ladimer, 'Self-Determination for Life and Death' (1996) 15 Med & L 83.
[76] ECHR, Art.9.
[77] https://www.equalityhumanrights.com/en/human-rights-act/article-9-freedom-thought-belief-and- religion.

essential element in the formation of believers' identities and their worldviews. In fact, the European Court of Human Rights has consistently elevated the status of freedom of religion to that of a substantive right under the European Convention, initially through indirect means and later through more direct measures.[78]

Freedom of thought is also one of the core human rights. Since its adoption in the Universal Declaration of Human Rights (UDHR) in 1948 and the Covenant on Civil Political Rights (CCPR) in 1966, it has been reiterated in most major instruments. However, the content and meaning of this right are not well-defined. Neither case law nor substantive commentary from Committees, Councils, or Rapporteurs elaborates upon its scope and limits. Furthermore, legal scholarship does not devote much attention to it. In fact, it is difficult to locate a single case at the international level in which it was the decisive issue. Freedom of thought may be the only human right without real application. Transforming this article into a living right not only requires converting the political-philosophical idea into a legal right, but also translating the abstract and general human right into individual cases.[79]

8.2. Legal Interpretation of Article 9

Some scholars assert that the Freedom of thought, belief and religion has a two-sided structure. It comprises an internal side of thought, conscience, and religion (sometimes referred to as the forum internum), as well as an external side of actions manifesting thoughts, religious, or conscientious beliefs (forum externum). The forum internum serves as a metaphorical term for a person's "inner space" or parts of their mind. The external dimension includes actions in the world that publicly demonstrate religious or conscientious beliefs, such as worship. The significant aspect of the external forum is that it gives priority to outward actions due to their intrinsic connection to religion and belief. As a result, behaviors that are deemed acceptable, along with their corresponding social outcomes, may be permitted when they are based on religious or conscientious grounds, while similar behaviors lacking such a foundation may be restricted.[80]

As a result, the forum internum is considered off-limits for state interventions. The protection provided is unconditional and absolute, although external manifestations can be restricted for various purposes, The inner side of the forum internum enjoys an extraordinary level of protection, taking priority over virtually all other interests of individuals or society, regardless of their legitimacy and urgency. This underscores the importance of this right but also necessitates a well-grounded justification. Traditionally, the argument has been made that the internal side of the forum internum is not directly relevant to social life, which is the main focus of legal regulation. Above all, the distinction between the internum and

[78] Council of Europe: European Court of Human Rights, 'Guide on Article 9 of the European Convention on Human Rights - Freedom of thought, conscience and religion', 31 December 2020.
[79] Bublitz, j c, 'Freedom of thought in the age of neuroscience' [2014] 100(1) Archiv für Rechts- und Sozialphilosophie 1-25.
[80] Christoph bublitz, The Law and Ethics of Freedom of Thought (1st edn, Palgrave Macmillan Cham 2021) 5180, *SAS v France* App no 43835/11 (ECHR, July 1, 2014) [57].

externum is drawn between an individual's private sphere outside of government regulation and the social sphere. In this case, it is clear that Pretty's euthanasia is not a simple thought or value judgment, but an act of publicly demonstrating her faith to society. Therefore, this part mainly focuses on the limit of government intervention in the act of demonstrating faith, in other words, the negative obligation of the state to freedom of thought, belief and religion.

According to article 18(3) of the CCPR, the freedom to manifest religion or beliefs may be limited as prescribed by law and when necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. However, the limitations must be necessary to achieve the desired purpose, and must be proportionate to the need on which the limitation is predicated. In addition, states must not interfere in the internal affairs of a religious community, they should maintain their neutrality strictly.

Applicants who express dissatisfaction with the inclusion of a penalty in national legislation regarding an intended action, and assert their entitlement to the protection guaranteed by Article 9, can qualify as "victims" under the terms of Article 34 of the Convention. This is applicable when they are compelled to alter their behavior or risk prosecution, or when they belong to a group of individuals directly impacted by the legislation in question. For example, the ECHR recognized that a Muslim woman who desired to wear a full-face veil in public due to religious beliefs could be considered a "victim" purely because engaging in such conduct was a punishable offense, resulting in a fine or mandatory citizenship course. Consequently, the applicant faced a difficult decision: either comply with the prohibition and abstain from dressing in accordance with her religious beliefs, or refuse to comply and face legal action.[81]

8.3. Other Perspectives for Reference

In this part, we will focus on the application of Article 9 of the Convention in the *Pretty* case, which was a relatively marginalized topic throughout the entire process of the case, but still held its significance.

Any analysis of human rights in this case must contend with an inherent challenge: How does a law that simply prohibits others from assisting her impact Mrs. Pretty's personal autonomy? Adopting a naturalistic perspective, one could argue that Mrs. Pretty's liberty was already limited by the unfortunate circumstances of her immobility, which prevented her from actively pursuing the necessary measures to bring about her own death. However, it is the law that restricts others from acting according to her request, limiting her freedom to carry out her choice to commit suicide. Therefore, it is the law, not destiny, that limits her freedom to commit suicide.[82]

[81] Ibid.
[82] Antje du bois-pedain, 'The human rights dimension of the Diane Pretty case' [2003] 62(1) The Cambridge Law Journal 189.

In Mrs. Pretty's opinion, Article 9 of the Convention protects the right to freedom of thought, conscience, and religion. This provision could potentially cover the act of self-killing if it is motivated by strongly held personal beliefs regarding its moral appropriateness and validity. In relying on this aspect of her desired action, Mrs. Pretty essentially seeks recognition of her personal autonomous choice. She therefore wishes to substantiate her argument based on the rights provided for in the Covenant.

However, in the view of the Full Court, Mrs. Pretty's application of Article 9 of the Convention was unnecessary, as corroborated by Lord Bingham's speech:

It is unnecessary to recite the terms of article 9 of the convention, to which very little argument was addressed. It is an article that protects freedom of thought, conscience and religion and the manifestation of religion or belief in worship, teaching, practice or observance. One may accept that Mrs. Pretty has a sincere belief in the virtue of assisted suicide. She is free to hold and express that belief. But her belief cannot find a requirement that her husband should be absolved from the consequences of conduct which, although it would be consistent with her belief, is proscribed by the criminal law. And if she were able to establish an infringement of her right, the justification shown by the state in relation to Article 8 would still defeat it.

Other judges also noted that Mrs. Pretty's belief that she had the right to demonstrate her belief in assisted suicide through her own suicide may be mistaken. Article 9 was never intended to give individuals a right to perform any acts in pursuance of whatever beliefs they may hold, e.g. to attack places where experiments are conducted on animals. The article does not yield support for the specific proposition for which it is invoked. In any event, section 2 is a legitimate, rational and proportionate response to the wider problem of vulnerable people who would otherwise feel compelled to commit suicide. Even without considering these controversies, it is still not a wise choice to solely rely on Article 9, rather than combining it with Article 8, in defending Mrs. Pretty.[83]

9. Article 14：Protection from Discrimination

ARTICLE 14 Protection from discrimination

The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[84]

[83] *Pretty,* [38],[63].
[84] ECHR, Art.14.

9.1. Basic Connotations and Point at Issue

The right to equality is often seen as a fundamental right, perhaps the fundamental right. Equality is "the stuff of legend", even the "sovereign virtue".[85] Equality affirms that all human beings are born free and equal. Equality presupposes that all individuals have the same rights and deserve the same level of respect. All people have the right to be treated equally. This means that laws, policies and programs should not be discriminatory, and also that public authorities should not apply or enforce laws, policies and programs in a discriminatory or arbitrary manner. The language utilized in the non-discrimination clause of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) is relatively more understated compared to other conventions.

In many cases, Article 14 of the convention does not provide comprehensive protection against discrimination in all aspects of life. Other laws, such as the Equality Act 2010, offer more general protection in this regard. However, the Act safeguards individuals from discrimination when enjoying the human rights outlined in the European Convention of Human Rights. Article 14 of the Act is built upon the principle that every person, irrespective of their identity, possesses the same human rights and should have equal access to them. Article 1 of Protocol No. 12 lists specific instances of discrimination, which also extends the scope of protection against discrimination to "any right set forth by law".

It is worth noting that the protection against discrimination provided by the Human Rights Act is not independent or standalone. To invoke this protection, it is necessary to demonstrate that discrimination has impacted the enjoyment of one or more of the other rights mentioned in the Act. However, it is not obligatory to establish that another human right has been violated.[86]

The principle of non-discrimination and equality is indeed a core aspect of international human rights law. It can be found in Article 2 and 26 of the ICCPR, in Article 1 and 7 of the Universal Declaration of Human Rights and in Article 20 and 21 of the Charter of Fundamental Rights of the European Union.[87] There are, moreover, several specialized instruments, most notably the CEDAW, the ICERD and the Convention on the Rights of Persons with Disabilities.[88] When reasoning, The European Court of Human Rights in Strasbourg frequently takes into consideration these instruments. Furthermore, references to national law by either party can significantly influence the court's decisions.

9.2. Legal Interpretation of Article 14

In actual cases, the application of Article 14 of the Convention by the European Court of Human Rights has not been satisfactory. As a leading equality law scholar said in 2001, the ECHR approach to equality

[85] Ronald dworkin, Sovereign Virtue (Harvard University Press 2000).
[86] The equality and human rights commission, 'Article 14: Protection from discrimination' (3 Jun 2021).
[87] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, 391–407.
[88] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106, Annex I.

is "less than satisfactory".[89] The European Court of Human Rights (ECHR) often opts to decide cases based on Articles other than Article 14, even when non-discrimination is crucial to the case. There is a potential limitation on the application of Article 14 due to the requirement that it only applies within the spheres where convention rights are enjoyed. However, Article 14 has a narrower scope compared to independent equality provisions such as Article 26 of the ICCPR or Section 15 of the Canadian Charter of Rights and Freedoms. Some scholars refer to this as a "weakness" in Article 14, and even describe it as "parasitic".[90] Notably, there has been a lack of development in understanding discrimination beyond clear-cut cases of direct discrimination, with limited cases on indirect discrimination or positive action until recent times. The possibility of justifying discrimination and the presence of the margin of appreciation serves to further weaken the non-discrimination principle.

In terms of the discrimination test, the weakness of the ECHR is particularly evident. Until recently, the jurisprudence of Article 14 has been primarily focused on a formal model of equality, allowing for the potential application of stricter scrutiny to certain forms of discrimination. The court has traditionally adopted a formal interpretation of equality, which involves assessing whether similarly situated individuals or circumstances are treated differently. In formal models of equality, the objective is to identify a rational or reasonable explanation for any disparities in treatment.

Such a formal model of equality can be contrasted with substantive conceptions of equality. Substantive conceptions of equality take into account the idea that certain individuals, often due to their membership in a specific group, experience systematic disadvantage, discrimination, exclusion, or oppression. In contrast to examining the distinctions made by the law on paper, a substantive conception of equality focuses on the actual effects of the law. The question at the center of a substantive conception of equality is whether the law perpetuates disadvantage, discrimination, exclusion, or oppression, rather than solely considering whether the law makes distinctions. A substantive equality model recognizes that inequality can often be covert or the result of an accumulation of various factors. Therefore, a substantive equality model might draw conclusions about the presence of prejudiced motives, even if they are not explicitly stated. It takes into account the impact of structural inequality, where it is not possible to identify one specific perpetrator responsible for the discrimination. By departing from the assumption of symmetry inherent in formal equality, a substantive model of equality focuses on groups that face systematic discrimination. This means that it does not adopt a "color blind" or "gender neutral" approach to distinctions, but instead looks favorably upon measures that promote substantive equality for previously disadvantaged groups.

[89] Aileen mccolgan, 'Women and the Human Rights Act' [2020] 51(3) Northern Ireland legal quarterly 417-433.
[90] Ibid.
[90] Noel whitty and others, Civil Liberties Law: The Human Rights Act Era (1st edn, Oxford University Press 2005) 404.

Another weakness in traditional Art 14 jurisprudence has been the limited understanding of the scope of "discrimination". Historically, it has mainly prohibited only explicit and explicit forms of discrimination, overlooking covert or subtle manifestations of discrimination. This narrow interpretation has hindered the effect of Art 14 in addressing all forms of discrimination.

Judgments from both domestic and ECHR frequently highlight the significance of distinguishing between the claimant and someone in a comparable position, thus establishing a requirement for a comparator[91]. However, according to Fredman, the comparator approach has several flaws and can sometimes undermine discrimination claims. In a formal equality model, the comparator often assumes a male, white, able-bodied, heterosexual Christian as the norm. This approach fails to account for situations where a suitable comparator is unavailable, such as cases involving pregnancy or workforces with de facto sex segregation. Furthermore, the comparator approach merely determines whether there is a difference in treatment without considering whether the difference in treatment is proportional to the difference in the situation.[92]

This is evident in the Chamber decision in the case of *Burden and Burden v. UK*. The applicants, who were sisters, complained that despite living together, they did not enjoy the special legal privileges accorded to married couples or civil partners. The ECHR chose not to focus on the question of comparison but instead on the issue of justification. However, upon referral to the Grand Chamber, it arrived at the same conclusion, but with a greater emphasis on determining if the sisters were in a suitable analogous situation.[93]

9.3. Other Perspectives for Reference

In this part, we will focus on the application of Article 14 of the Convention in the Diane Pretty case, which includes both disability discrimination as well as sex discrimination.

a. Disability Discrimination

It was argued that Mrs. Pretty was a victim of discrimination due to her inability to end her life without assistance, while others who were not disabled could do so on their own. This distinction based on (dis)ability violated her right to equal treatment. The state's application of a blanket ruling to her case went against the ruling in *Thlimmenos v. Greece*[94] and failed to provide a reasonable and objective justification for treating her differently from others in significantly divergent situations. The government claimed that the vulnerable needed protection, but Mrs. Pretty contended that she was not vulnerable and did not require protection, therefore the differential treatment was unjustified.

[91] A McColgan Discrimination Law: Text, Cases and Materials (Oxford: Hart, 2005) p 19.
[92] See S fredman, Introduction to Discrimination Law (Oxford University Press 2002) 8-10.
[93] Ibid.
[93] *Burden and Burden v. The United Kingdom* App no. 13378/05 (ECHR, 12 December 2006) [61]-[66].
[94] *Thlimmenos v. Greece* App no 34369/97 (ECHR, 06 April 2000).

At the same time as Mrs. Pretty's case was being heard by the ECHR, the case of Ms. B was being decided by the Family Division of the English High Court. However, the outcome of Ms. B's case was completely different. Like Mrs. Pretty, Ms. B was a competent adult who had become tetraplegic due to a devastating illness and wished to end her life in a dignified and painless manner. Unlike Mrs. Pretty, however, Ms. B was being kept alive through the use of a ventilator and desired to have this life-sustaining treatment withdrawn rather than seeking active assistance to die.[95] Following the significant ruling in Bland by the House of Lords, the High Court determined that Ms. B had the right to have her request honored in order to fully uphold her competence and personal autonomy. Shortly after this decision, Ms. B passed away. In contrast, Mrs. Pretty, who did not rely on a ventilator, demonstrated in her courageous battle that the distinction between an action and a non-action in these matters is arguably unjustifiable, which brings more inequality to the case.

However, the House of Lords doesn't support the application of Article 14 of the Convention in the present case. Firstly, they deny that Article 14 of the Convention could be engaged independently and assume Article 14 cannot be engaged because Article 8 has not been violated, just as Lord Bingham argues: If, as I have concluded, none of the articles on which Mrs. Pretty relies gives her the right which she has claimed, it follows that Article 14 would not avail her.[96] Moreover, the House of Lords attempted to refute Pretty's argument by pointing out that it is based on a misconception, given that the Act in no way intended to confer a right to commit suicide, but merely refrained for reasons of social policy from imposing a threat of prosecution and punishment on persons attempting to commit suicide while still remaining opposed to the act as such, as evidenced by the very prohibition of others to render their assistance contained in section 2(1).[97]

It is worth considering that sometimes a burden cannot be avoided in order to achieve a legislative objective that justifies the restriction on the disadvantaged group. Instances of unequal treatment of similar cases and equal treatment of significantly different cases are *prima facie* discriminatory - however, discrimination will only be conclusively established if the burden is imposed arbitrarily. This was the outcome of the case brought to the highest court by the British government, which argued that an exceptionless prohibition on assisted suicide was necessary to effectively protect the vulnerable. In other words, because protecting vulnerable individuals from unwise or third-party-influenced suicides is an extremely important objective, and allowing for any exceptions might threaten the achievement of this objective, it is acceptable for individuals like Mrs. Pretty to bear the burden of not being able to commit suicide at all.[98]Another aspect to address is the concern articulated by opponents of suicide. They contend that permitting any type of assistance in the act of self-termination, even if cautiously regulated and

[95] *Ms B v An NHS Hospital Trust* [2002] EWHC 429 (Fam), 94.
[96] *Pretty*, at [34] and [35].
[97] *Pretty*, at [35].
[98] See the summary of the UK Government's arguments in Pretty v. United Kingdom, ibid., para. 86.

restricted to a specific subset of individuals, will inevitably diminish the sanctity of life and give rise to a morally debased society where life is viewed as expendable. But to some scholars, their concern about euthanasia is just an absurd slippery slope theory.[99]

b. Sex Discrimination

The discussion of the discrimination issue in the Pretty case was limited to differentiating between the disabled and able-bodied individuals, without considering any potential discrimination based on Mrs. Pretty's gender. However, some scholars argue that refusing Mrs. Pretty's request can be seen as a form of gender-based discrimination.

For instance, it has been argued by Hazel Biggs that although death is a universal experience, women's relationship to it differs from men's due to their roles as caregivers and sufferers. First, women, rather than men, tend to be the primary caregivers for those who are dying. This gives them a more immediate experience of the challenges associated with the dying process, leading to their stronger advocacy for the legalization of euthanasia. Secondly, women generally have longer life expectancies than men and, after caring for their male spouses, they are left to care for themselves as they age and become frailer. The desire to avoid living in a communal home in their later years or burdening their families with the emotional and financial costs of their care over an extended period of time may prompt more women to seek an early end to their lives.[100]

In light of these allegations, it is necessary for the House of Lords to examine whether the current laws on assisted suicide result in gender-based discrimination. This is because there is a likelihood that women are more likely to make requests for assistance but may face refusals. However, it is equally important for the House of Lords to ensure that the right to suicide is not abused. The potential for abuse and coercion is a real concern, especially for women who may be seen as having less economic or social value in their lives.[101]

Part IV Critical Thinking

10. Human Right Interpretation (Treaty interpretation) at the ECHR

The process of treaty interpretation is very much 'an active process of constructing *a* meaning rather than finding *the* meaning which lies latent with the text', so the principle and modes of treaty interpretation

[99] Margaret otlowski, Voluntary Euthanasia and the Common Law (Oxford University Press 1997) 230
[100] Sally sheldon, Feminist Perspectives on Health Care Law (Routledge-Cavendish 1998) 279-295.
[101] Ibid.
[101] Susan millns, 'Death, Dignity and Discrimination: The Case of Pretty v United Kingdom' [2002] 10(3) German Law Journal.

matter a lot, and it is thus indispensable for us to acquire some basic knowledge on means of treaty interpretation of ECHR when tackling the legal issues of our present case.

Although the ECHR is a highly specialized and characteristic court with its human rights background, it is widely acknowledged that the ECHR has adopted all VCLT general rules and formulations of treaty interpretation since it adopted the Vienna Convention on the Law of Treaties (the VCLT).[102] Section 3 of the VCLT (Art.31-33) specifically governs the interpretation of international treaties, including the general rules of interpretation (Art.31), supplementary means of interpretation (Art.32), and the interpretation of treaties authenticated in two or more languages (Art.33). In the following paragraphs, we will concentrate on means of treaty interpretation in Art.31 and Art.32.

Besides, in its legal practice, the ECHR has also operated with some specific techniques of interpretation, such as the 'evolutive interpretation', 'living instrument', 'special character', and 'Cross-fertilization'. Such techniques also constitute an integral part of its human rights interpretation methods.

10.1. VCLT interpretation: General Rules

Above all, Art.31 of the VCLT sets forth the general rules of treaty interpretation, namely, textuality and contextuality.

- **Textuality**

Art 31(1): *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*[103]

The means of textuality highlights the ordinary meaning of the wording of the treaty. As a general legal principle, the "ordinary meaning" can be in large regarded as a reasonable person's understanding of common social practices. Meanwhile, when emphasizing the treaty makers' intention, the means of textuality entails the principle of good faith, which means that treaties are designed for good ends.

Art 31(4): *A special meaning shall be given to a term if it is established that the parties so intended.*[104]

Moreover, since the means of textuality emphasizes the intention of the treaty makers, when the treaty makers intentionally attach a special meaning to a term to enlarge or limit its meaning as of its ordinary meaning, the means of textuality requires the interpretation to follow the specific intention of the treaty makers. This rule can be regarded as a carve-out from the reasonable person standard required by the textuality approach.

[102] Liliana E. Popa, Patterns of Treaty Interpretation as Anti-Fragmentation Tools (2017), 217.
[103] Vienna Convention on the Law of Treaties, Art.31(1).
[104] Ibid, Art.31(4).

- **Contextuality**

Art.31(2):

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[105]

As opposed to common understanding, the term "context" in "contextuality" has a relatively narrower scope: 'context' literally refers to the sentences, articles, chapters, or text of the treaty. Contextuality is a means of interpretation focusing on the consistency and coherence in the interpretation of a treaty. As a result, treaty interpretation under the means of contextuality is more subject to the judge's discretion, and its standard is also less objective compared to that of the means of textuality.

While attaching a narrow meaning to the term "context", the means of contextuality itself actually covers a broad spectrum. The means of contextuality insists that all relevant features and phases of the agreement, claim, decision, and social process should be considered before an interpretation is chosen and applied. It adopts a holistic view of treaty interpretation and is in essence a historical method.

10.2. VCLT Interpretation: Supplementary Means

Art.32 of VCLT: *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable. [106]

Supplementary means of treaty interpretation can only be applied when treaty interpretation, according to textuality and contextuality as well as evolutionary interpretation and subsequent practices, would leave the meaning vague or make the meaning unreasonable. In this sense, supplementary means of treaty interpretation only serve as carve-outs to the general rules of treaty interpretation and can only be used in a few exceptional cases.

Supplementary means of treaty interpretation comprises preparatory work of the treaty and circumstances revolving its conclusion. These documents or occurrences are more consequential to the meaning of the

[105] Ibid, Art.31(4).
[106] Ibid, Art.32.

treaty compared to the text of the treaty, relevant international law, and subsequent practices to apply the treaty by the parties, and hence, these documents or occurrences are treated as secondary to the treaty interpretation.

10.3. ECHR Interpretations: Complementarity of VCLT Interpretation

- **Dynamic Interpretation**

Dynamic interpretation can resort to the evolutive interpretation provided by Art.31(3)(c) of VCLT.

Art.31(3)(c): *There shall be taken into account, together with the context:*

...

(c) any relevant rules of international law applicable in the relations between the parties.

Evolutive interpretation addresses that a treaty should be interpreted in light of the changing applicable rules of international law. It reinforces the dynamic nature of international law as a system and places the interpretation of a treaty in conformity with this flowing system. Nevertheless, the evolutionary methodology can only be applied when the following two conditions are fulfilled:

(i) The wording or contents of the treaty must have an evolutive character, usually revealed in its generosity or parties' evolutive intent;

(ii) It should be in line with the parties' original intention or the objective or purpose of the treaty.[107]

When the ECHR deals with human rights provisions that are drawn in generic and vague terms, it appears to show flexibility in its reception of international law into its conceptual framework. Such a situation would involve a dynamic interpretation, which allows 'contemporary realities to be taken into account and a departure from the circumstances which prevailed at the time of the drafting of the Convention'.[108] This 'evolutive', 'dynamic' interpretation originates from a principle that, 'in permitting an extension of interpretative parameters, encourages active protection of human rights'.[109] Therefore, the ECHR has frequently turned to the interpretative guidance at Article 31(3)(c) of the VCLT, it reinforces the dynamic nature of international law as a system and places the interpretation of a treaty in conformity with this *living institution*.

Generally speaking, the evolutionary methodology can only be applied when the following two conditions are fulfilled:

(i) The wording or contents of the treaty must have an evolutive character, usually revealed in its generosity or parties' evolutive intent.

(ii) It should be in line with the parties' original intention or the objective or purpose of the treaty.[110]

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[107] Ibid, Art.31(3)c.

[108] Magdalena Forowicz. The reception of international law in the European Court of Human Rights (OUP 2010), 11.

[109] Clotilde Pegorier. Ethnic cleansing: A legal qualification. (New York: Routledge:2013), 29.

[110] Liliana E. Popa, Patterns of Treaty Interpretation as Anti-Fragmentation Tools (2017), 269-274.

- **Cross-Fertilization**

Cross-fertilization refers to the phenomena of using precedents of other international courts and tribunals, borrowing and changing views between them, especially those of ICJ. This is especially the case when the court deals with certain difficulties in interpreting the Convention's human rights provisions, for the expression of certain concepts of human rights is often vague and silent.[111] (i.e., 'interim measures of protection').

The application of Cross-fertilization implies that the ECHR chose a flexible and dynamic interpretation of the provisions of the Convention at issue in the light of the law of treaties, international law precedents and general principles of international law of which the ECHR Convention forms a part. Nonetheless, when considering this, what should also be considered is the special nature of the Convention as an instrument for human rights protection, which allows the space for its own developed doctrines.

11. Proportionality Doctrine

11.1. The Property and the Evolution of Proportionality

The principle of Proportionality is the most used methodology applied by courts and judges to resolve the conflicts between public interest and individual rights (or interest). Proportionality Assessment (PA) requires that an action undertaken must be proportionate to its objectives. For instance, one should not shoot sparrows with cannons or crack nuts with a sledgehammer.

PA originates from German police law, with the essence of limiting the use of police force *vis-à-vis* the citizens. Now it has evolved into a multi-purpose, best-practice, and standard mode of right adjudication across the globe. The doctrine originated in German police law to limit police force against citizens and has evolved into a versatile mode of right adjudication worldwide. PA recognizes that while everyone enjoys human rights, these rights are not absolute and can be subject to interference for public interest reasons. However, such interference must be reasonable and proportionate, ensuring a fair balance between public interest and individual rights.

11.2. The Adoption of Proportionality in ECHR: A Three-Part Test

Similar to other European international courts (i.e. ECJ), ECHR employs a three-part test in its jurisprudence, namely, suitability, necessity and *stricto sensu*.

But it is also noteworthy that the Court does not apply the different phrases and terms of the proportionality norm in the same explicit way as the ECJ. Consequently, it is essential for us to examine and identify the substantial norms of proportionality from the ECHR judgments.

[111] Ibid.

a. Suitability

Suitability is the first step of PA applied by the ECHR. It is a test of causation, suggesting that means must be suitable to achieve the proposed aim.

But what kind of measure can be assessed as 'suitable' under PA? In ECHR cases, 'suitability' is often interpreted as whether the interference a public authority takes is relevant and sufficient under the human rights exception articles (i.e. Article 10(2)).[112]

b. Necessity

Similar to the suitability test, the second step, the necessity test is also a means-end test. However, the necessity test further requires that the means chosen are not only causally linked to the aims but also the only way to achieve them, or where there are more alternatives, that the chosen alternative must be the one that is the least onerous and least restrictive of the infringed human right.

The ECHR usually refers to 'necessity' in the context of Article 10 (2) of ECHR: "necessary in a democratic society".[113] Furthermore, the court holds that such a phrase implies that interference can only be justified when there exists a 'pressing social need' as a matter of both principle and facts.[114]

c. *stricto sensu*

The *stricto sensu* test (proportionality in the narrow sense) is a balancing test as well as an excessive burden test, which implies that a measure must not impose an excessive burden on the individual:

In the formulation of *stricto sensu* assessment, the ECHR stresses that a "fair balance" must be struck between the demands of the general interest of the Community and the requirements of the protection of the individual's fundamental rights.[115] Furthermore, such balance will not be found if the person concerned has had to bear an individual and excessive burden.

11.3. The drawback of Proportionality

Although widely applied, the Proportionality Doctrine has been criticized for its drawbacks:

- Abstract and Vague Assessments: The assessments under PA can be abstract and lack precise and objective standards, making it challenging to strike a well-rounded balance.
- Lack of Precision: The lack of precision may lead to subjective interpretations and potential abuse of PA.

[112] Therefore the phrase 'relevant and sufficient' can be viewed as a ECHR suitability test.
[113] ECHR, Article 10 (2).
[114] *Olsson v. Sweden*, APP no. 13441/87 (ECHR, 17 April 1991)) para. 67.
[115] See *Sporrong and Lönnroth v. Sweden* App no. 7152/75 (ECHR, 13 September 1982).

- Results-Oriented Analysis: The PA may appear results-oriented, potentially allowing public authorities to justify all their actions based on presumed aims and outcomes.

Despite these drawbacks, however, the Proportionality Doctrine remains the prevailing and indispensable approach for interest balancing applied by courts worldwide, which necessitates a sound understanding by judges, lawmakers and lawyers.

12. The Consent Regime in Criminal Law

People's consent to pain, injury, or death has long been a highly contentious matter in criminal law and moral philosophy. In recent times, this issue has gained significant attention in public, legislative, and academic discourses both within Europe and internationally. This renewed focus can be attributed to a number of high-profile criminal trials involving victims who had given their consent in different situations, such as sadomasochism, cannibalism, experimental medical treatment, and mercy killing. In this section, we will examine the historical development of the criminal law consent system, its underlying objective, and its significance in relation to euthanasia.

12.1. History of the Defense of Consent

The defense of consent, has its roots in Roman law, dating back to the 6th century. The first recorded mention of the consent rule in England can be traced back to the early 14th century (citation needed). By the 17th century, consent had become firmly established as a legal "maxim" (citation needed). In "Maxims of Reason: Or, the Reason of the Common Law of England," it is stated that a person invited into a house to dine is not considered a trespasser under the principle of "*volenti non fit injuria*".[116]

Originally, consent was seen as a complete defense, allowing individuals to consent to virtually anything. As stated in a 14th-century case, "the law will allow a person to bind themselves on a certain day, even if it is impossible, as long as they don't expect the Tower of London to move to Westminster.

However, Changes in the individual's ability to consent to personal harm emerged in the 17th century as a direct result of the state's monopolization of the punishment system. In the earlier stages of criminal justice, the victim played a central role in prosecuting and resolving non-public offenses. However, with the establishment of normative and centralized judicial structures, the victim was largely excluded from the criminal process. Instead of viewing crime as an infringement on the victim's interests, the state shifted the focus to the disruption of society as a whole. This led to the reclassification of many historically "private" offenses as "public". As a consequence, the state, or the king, became the ultimate

[116] Edmund wingate, Maximes of Reason, or, The Reason of the Common Law of England (1658).

victim and the sole prosecutor of criminal acts. Consequently, individuals lost the power to consent to actions that the state considered harmful.[117]

With the rise of liberalism and capitalism, the law has increasingly emphasized individual autonomy, and the consent of the victim has once again become a valid reason for acquittal. For instance, according to the American Model Penal Code, consent serves as a defense if it "negates an element of the offense or prevents the infliction of harm or evil that the law defining the offense seeks to prevent". Consequently, valid consent renders crimes such as rape, kidnapping, theft, burglary, and various other serious offenses inapplicable, as they presuppose the absence of consent. However, this principle has limited applicability in cases involving bodily harm. Section 2.11(2) invalidates an individual's consent to personal harm in all instances except for three specific circumstances: first, when the injury is not severe; second, when the injury or its risks are reasonably anticipated in lawful athletic contests, competitive sports, or other coordinated activities not prohibited by law; and third, when the consent establishes a justification for the behavior under Article 3 of the MPC.[118]

12.2. Consent and Euthanasia

Euthanasia is a subject that is not only plagued by legal uncertainty but also by difficult and ultimately unsolvable questions of moral philosophy. In most legal systems, if a person kills another person at their request, they will be held accountable for murder, as consent is not considered a valid defense. However, there are some exceptions in cases where the killing is part of a suicide pact or when a doctor administers a drug to alleviate pain but shorten life.

During the trial of Dr. Adams (*R. v. Adams*, 1957), Judge Delvin, a former justice of the Crown Court, remarked that the administration of drugs to alleviate pain would not be considered a legal cause. He noted that this area is ambiguous and is tolerated by prosecuting authorities who choose to overlook it. The first attempt to legalize medical aid for dying can be traced back to the United States, a country with a long history of grappling with this issue. The earliest bill was introduced in the State of Ohio in 1906, making it the first attempt of its kind anywhere in the world. Euthanasia remains illegal in many common law jurisdictions. For example, the intentional act of administering measured doses of lethal drugs to induce a painless death, either through injection or the use of a machine, is not legally permitted in the United Kingdom (*R. v. Cox*, 1992). Even if that's the case, it is argued that when evaluating the seriousness of mercy killing, within the framework of an individualistic philosophy, consideration should be given to the patient's attitude towards the act. A clear distinction must be made between euthanasia done with the patient's consent or explicit request, and euthanasia carried out without their consent.

[117] By the 18th century, all crimes and misdemeanors were regarded as public wrongs. See Blackstone, william, Blackstone's Commentaries on the Laws of England (Univ Chicago 1979).
[118] Vera bergelson, 'The Right to Be Hurt - Testing the Boundaries of Consent' [2006] 75(2) George Washington Law Review 175.

Euthanasia can only be considered comparable to assisted suicide, which is often treated more leniently than other forms of homicide, when it is done with the request or consent of the deceased.[119]

With regard to the relationship between Consent and Euthanasia, two noteworthy cases are *Baxter v. Montana* and *Bouvia v. Superior Court*. Robert Baxter, a terminally ill patient, sought the option of ingesting a lethal dose of prescribed medication at his own discretion. The Supreme Court of Montana ruled that, in accordance with Mont.Code.Ann. § 45-2-211, a terminally ill patient's consent to physician aid in dying can serve as a statutory defense against a charge of homicide for the assisting physician. Similarly, Elizabeth Bouvia, also residing in Helena, Montana, suffers from cerebral palsy and is quadriplegic with limited movement in her right hand and a few muscles in her face and head. Additionally, she experiences constant pain from degenerative arthritis, which is not completely alleviated even with morphine. Bouvia is dependent on tube feeding and is also terminally ill.

Based on The Terminally Ill Act, terminally ill patients have the right to have their end-of-life wishes fulfilled, even if it requires direct participation by a physician through the withdrawal or withholding of treatment. Therefore, as a terminally ill patient, Elizabeth Bouvia has the right to have her end-of-life wish followed.

Similar to the case of Baxter, there is a counterargument that physicians cannot help Elizabeth Bouvia die by actively removing the feeding tube, as this action could be considered aggravated assault. However, we can also refer to the defense presented in the *Baxter* case.[120]

"[I]f the State prosecutes a physician for providing aid in dying to a mentally competent, terminally ill adult patient who consented to such aid, the physician may be shielded from liability pursuant to the consent statute. This consent defense, however, is only effective if none of the statutory exceptions to consent apply. Section 45-2-211(2), MCA, codifies the four exceptions: Consent is ineffective if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; (b) it is given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; (c) it is induced by force, duress, or deception; or (d) it is against public policy to permit the conduct or the resulting harm, even though consented to."[121]

[119] Oluyemisi bamgbose, 'Euthanasia: another face of murder' [2004] 48(1) Int J Offender Ther Comp Criminol 116.
[120] Ibid.
[120] Chen wang, 'Discussion of the Euthanasia' [2016] Proceedings of the 2016 International Conference on Education, Sports, Arts and Management Engineering 1139.
[121] *Baxter v. Montana*, MT DA 09-0051, 2009 MT 449, 5.

Since Elizabeth Bouvia was 25 years old, bright, articulate, and mentally competent, and she wanted to remove the feeding tube voluntarily, the first three exceptions do not apply. The fourth exception, "against public policy", typically refers to cases involving physical aggression that disrupts public peace and endangers others. However, the act of a physician removing a feeding tube from a terminally ill patient is not comparable to violent behavior that violates public policy. Furthermore, the courts have ruled that consent cannot be deemed ineffective when defendants directly commit acts of aggression. In the present case, although the physician may remove the feeding tube, it does not mean that he is directly involved in the final decision or action. The physician can reconnect the tube whenever Elizabeth Bouvia needs it. It is Bouvia's own act of starving herself to death that constitutes the final act. Therefore, the physician's actions do not fall under the fourth exception.

Based on the discussion above, Elizabeth Bouvia has the right to have her end-of-life wishes respected under The Terminally Ill Act. Additionally, the physician who removes the feeding tube from Elizabeth Bouvia can rely on the case law of Baxter as a statutory defense against a charge of homicide.[122] This case is significant in determining the legality of euthanasia and deserves further study and reflection.

13. State Responsibility under ECHR: Positive and Negative Obligations

13.1. Negative Obligations of State

Negative obligations entail the duty of a state to **refrain from actions** that could interfere with human rights. This implies an obligation **not to act**. For example, the state fulfills its negative obligation by not returning smuggled migrants to countries where they could face persecution.[123]

This negative obligation represents the foundational and traditional aspect of state responsibility in both domestic and international human rights contexts. It serves as the bedrock of safeguarding fundamental human rights: generally, an individual's human rights, particularly their freedoms, are safeguarded as long as governmental authorities do not arbitrarily intervene.

13.2. Positive Obligations

13.2.1. The Definition of Positive Obligations

The notion of positive obligations refers to obligations that a state **must adopt measures** or **take deliberate actions** to ensure that human rights are respected, protected and promoted; or, to be more specifically, to adopt reasonable and suitable measures to protect the rights of the individual. Such methods can be both legislation activities and practical measures.

[122] *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297, 1986).

[123] 'Positive and negative obligations of the State' (UNODC), <https://www.unodc.org/e4j/zh/tip-and-som/module-2/key-issues/positive-and-negative-obligations-of-the-state.html>

Positive obligations are additional to negative obligations. On one hand, negative obligations alone are inadequate to secure human rights in contemporary societies. Moreover, the fulfillment of a negative obligation might necessitate affirmative actions. This could involve, for instance, enacting laws, regulations, and standard operating procedures to prohibit pushback policies concerning migrant smuggling vessels near the state's maritime borders.[124]

In ECHR cases, the court tends to give a broad interpretation of ECHR rights. Besides, the court has interpreted express positive obligations and developed implied positive obligations related to the prohibition of torture, the right to a fair trial, the right to an effective remedy and freedom of expression, shedding light on what can be interpreted as a positive obligation.[125]

In our present cases, the question of whether Britain bears a positive obligation to provide a means for citizens to end their lives to safeguard their right to die (ECHR Article 2) while sparing them from suffering remains a topic of debate. For a detailed discussion, please review Chapter XXX of the background guide.

13.2.2. The Application of Positive Obligation

The concept of positive obligation has been embraced by ECHR, which has exerted a far-reaching effect that the court could apply, in its procedural aspect, to any provision – in particular any standard-setting provision – of the ECHR Convention.[126] This means, that a given provision of the Convention while not being explicit, can be interpreted as creating a positive obligation in the same category. In this case, the ECHR endeavors to link every positive obligation to a clause of the Convention.[127]

There is a noteworthy trend: a departure from certain specific rules within the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA). This departure is particularly apparent with regard to Article 8 of ARSIWA,[128] which is often viewed as the general rule of attribution. Instead of solely assessing the attributability of an act, the ECHR prefers to interpret a human rights clause as a positive obligation (which signifies the state's positive obligation to assist individuals in realizing that human right) and consider whether a state has contravened such obligation. It is a matter of the relationship between general international law and *lex specialis*: the distinctive nature of human rights

[124] Ibid.
[125] Jean-Francois Akandji-Kombe, Positive obligations under the European Convention on Human Rights (Human rights handbooks, No.7)(2007), 5-18.
[126] Positive obligations under the European Convention on Human Rights, 7.
[127] Rosana Garciandia, 'State responsibility and positive obligations in the European Court of Human Rights: The contribution of the ICJ in advancing towards more judicial integration', [2020], Leiden Journal of International Law, PL177.
[128] The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

renders them sufficiently specialized to warrant their own *lex specialis* (though this argument remains open to debate).

Annotated Bibliography

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Suggested Readings

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Cases and judgment, more articles and academic opinions could be found on the website listed below.

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