End-of-life issues and the European Court of Human Rights. The value of personal autonomy within a 'proceduralized' review

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1. *Introduction*

End-of-life issues may arise in very different situations. The scope of the present analysis is limited to situations in which termination of life is sought in the person's alleged best interest: cases which, broadly speaking, are covered by the notion of euthanasia (from the ancient Greek *ευθανασία,* good death, 'death that benefits the person who dies'[1]).

The European Court of Human Rights (ECtHR) has dealt with these issues in a handful of cases. The aim of the present contribution is to provide a reasoned analysis of the judgments and decisions adopted by the ECtHR, in order to identify general trends of the ECtHR's attitude towards end-of-life choices.

Useful tools to examine the position of the ECtHR are the distinctions that can be drawn within the wider notion of euthanasia. Commonly, the term euthanasia is used to indicate the intentional termination of life by someone other than the person concerned.[2] In this stricter sense, euthanasia is distinguished from assisted suicide, which consists

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[1] W Glannon, *Biomedical Ethics* (OUP 2005) 129.

[2] Euthanasia as the 'intentional termination of life by someone other than the person concerned, at the latter's request' is the definition adopted by Section 2 of the Belgium Act on Euthanasia 2002. It is commonly referred to as the 'Dutch definition of euthanasia (even if the Dutch Termination of Life on Request and Assisted Suicide Act 2002 does not refer to 'euthanasia', but to 'termination of life on request'): Y Joly, BM Knoppers (eds), *Routledge Handbook of Medical Law and Ethics* (Routledge 2016) 120.

in providing assistance to someone who actively terminates his or her own life.[3]

Within the 'restricted' notion of euthanasia, further distinctions can be made, either according to the means by which the act is carried out, or according to the role played by consent. Thus, active euthanasia is generally taken to mean a deliberate act to end life,[4] whereas passive euthanasia is used to refer to a deliberate omission causing death (eg, the withdrawal or withholding of life-saving or life-sustaining treatment).[5] Voluntary euthanasia refers to the termination of life at the involved person's request, while non-voluntary euthanasia implies the lack of an express request (eg because the person is incompetent and unable to express his/her wishes).[6]

Within the Council of Europe (CoE), only three States (the Netherlands, Belgium and Luxembourg) allow for active euthanasia in their law.[7] Switzerland does not allow for euthanasia, but it allows doctors to prescribe lethal drugs[8] and considers assistance to suicide unlawful only when carried out for 'selfish motives'.[9] While a minority of Member States allows assistance to suicide, the majority of them allow the withdrawal of life-sustaining treatments.[10]

[3] B Broeckaert, The Flemish Palliative Care Federation, 'Treatment Decisions in Advanced disease: A Conceptual Framework' (2009) 15 Indian Journal of Palliative Care 30. The distinction between the two practices by the 2002 Dutch law is the following: 'in the case of euthanasia, the doctor administers the so-called euthanatica; in the case of assistance with suicide the doctor supplies the drugs which the patient thereupon ingests' (Regional Review Committes, 2005 Annual Report 5. Cited in S Hennette-Vauchez, 'Droits des patients et pouvoir médical – Quel paradigme dominant dans la juridicisation de la fin de vie?' in J-M Larralde (éd), *La libre disposition de son corps* (Bruylant 2009) 182 sub 20).

[4] Section 2 of the Belgium Act on Euthanasia 2002 defines euthanasia as 'intentionally terminating life by someone other than the person concerned, at the latter's request': Joly, Knoppers (n 2) 120.

[5] See P Lewis, *Assisted Dying and Legal Change* (OUP 2007) 5. Some Author contests the equivalence between passive euthanasia and withdrawal of life-sustaining treatment: C Lantero, 'Euthanasie et suicide assisté' (2015) 26 Journal International de Bioéthique et d'Ethique des Sciences 232.

[6] Joly, Knoppers (n 2) 113; Glannon (n 1) 129.

[7] See the comparative analysis in *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011) paras 30-31 and 55, and Lantero (n 5) 234 ff.

[8] *Haas* (n 7) paras 19-28.

[9] Art 115 of the Swiss Federal Criminal Code.

[10] *Lambert and Others v France* App no 46043/14 (ECtHR [GC], 5 June 2015) para 147.

The panorama is thus fragmented, and it is in this context that the ECtHR's judgments must be examined. As of today, the ECtHR has dealt with assisted suicide and passive euthanasia.

2. *Articles 2 and 8 ECHR*

In its judgments dealing with end-of-life issues, the ECtHR main focus has been on Articles 2 and 8 of the European Convention on Human Rights (ECHR).[11] A brief introduction to the scope of these provisions allows understanding how they embody potentially competing interests, which are called into question by end-of-life choices.

Article 2 ECHR, ranking as one of the most fundamental provisions of the Convention, protects the right to life. This right is absolute, and strict interpretation is required for the limited circumstances in which deprivation of life may be justified.[12]

According to the Court's case law, the provision 'enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'.[13] Thus, Article 2 imposes positive obligations on the Member States,[14] such as the obligation to effectively criminalize offences against the person,[15] the obligation to protect an individual whose life is at risk,[16] and, under certain circumstances, even the obligation to protect individuals against themselves.[17]

[11] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

[12] *McCann and Others v the United Kingdom* App no 18984/91 (ECtHR, 27 September 1995) para 147.

[13] *LCB v the United Kingdom* App no 23413/94 (ECtHR, 9 June 1998) para 36.

[14] On positive obligations see: A Mowbray, *The Development of Positive Obligations Under The European Convention on Human Rights by the European Court of Human Rights* (Hart 2004); JF Akandij-Kombe, *Positive Obligations under the European Convention on Human Rights: a Guide to Implementation of the European Convention on Human Rights* (Council of Europe, Human Rights Handbooks, Ser 7 2007).

[15] *X & Y v The Netherlands* App no 8978/80 (ECtHR, 26 March 1985).

[16] *Osman v the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) para 115; *Kılıç v Turkey* App no 22492/93 (ECtHR, 28 March 2000) paras 62 and 76.

[1717] The Court has acknowledged a positive obligation to protect the individual against his own suicidal attempts in cases concerning detainees (*Keenan v. the United Kingdom* App no 27229/95 (ECtHR, 3 April 2001) para 91; *Trubnikov v Russia* App no

Article 8 ECHR protects, *inter alia*, the right to respect for private life. The Court has always declared that the concept of 'private life' is a broad term not susceptible to exhaustive definition.[18] Thus, the notion is in constant evolution and it covers, *inter alia*, aspects of an individual's physical and social identity[19] (such as gender identification, name, sexual orientation and sexual life[20]) and the right to establish and develop relationships with other human beings and the outside world.[21] It also covers the physical and psychological integrity of a person,[22] and choices about one's own body: the Court's case law on consensual sadomasochistic activities[23] and refusal of medical treatment[24] indicates that the notion of private life includes 'the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned'.[25]

This right is not absolute, but subject to potential limitations, as the essential object of the provision is the protection against interferences

49790/99 (ECtHR, 5 July 2005) para 78; *Renolde v France* App no 5608/05 (ECtHR, 16 October 2008) paras 86-100; *Ketreb v France* App no 38447/09 (ECtHR, 19 July 2012) para 71, and in cases concerning army members (*Kılınç and Others v Turkey* App no 40145/98 (ECtHR, 7 June 2005); *Ataman v Turkey* App no 46252/99 (ECtHR, 27 April 2006); *Gündüz and Others v Turkey* App no 4611/05 (ECtHR, 11 April 2011), ie situations where individuals are vulnerable and face situations of distress and pressure under the control of State authorities.

[18] *X & Y v The Netherlands* App no 8978/80 (ECtHR, 26 March 1985) para 22, and, more recently: *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992) para 29; *Peck v the United Kingdom* App no 44647/98 (ECtHR, 28 January 2003) para 57.

[19] *Mikulić v Croatia* App no 53176/99 (ECtHR, 7 February 2002) para 53.

[20] *B v France* App no 13343/87 (ECtHR, 25 March 1992) para 63; *Burghartz v Switzerland* App no 16213/90 (ECtHR, 22 February 1994) para 24; *Dudgeon v the United Kingdom* App no 7525/76 (ECtHR, 22 October 1981) para 41; *Laskey, Jaggard and Brown v the United Kingdom* Apps no 21627/93 21826/93 21974/93 21627/93 21826/93 21974/93 (ECtHR, 19 February 1997) para 36.

[21] *Niemietz* (n 18) para 29*; Von Hannover v Germany (no 2)* Apps no 40660/08 and 60641/08 (ECtHR [GC], 7 February 2012) para 97.

[22] *X and Y* (n 18).

[23] *Laskey* (n 20) paras 35-36*; KA and AD v Belgium* Apps nos 42758/98 45558/99 (ECtHR, 17 February 2005) paras 78 and 83.

[24] *Acmanne and Others v Belgium* App no 10435/83 (Eur Comm HR, 10 December 1984) p 253; *Glass v the United Kingdom* App no 61827/00 (ECtHR, 9 March 2004) paras 82-83; *Storck v Germany* App no 61603/00 (ECtHR, 16 June 2005) paras 143-44; *Jehovah's Witnesses of Moscow v Russia* App no 302/02 (ECtHR, 10 June 2010) para 135; *Shopov v Bulgaria* App no 11373/04 (ECtHR, 2 September 2010) para 41.

[25] *Pretty v the United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) para 62.

having arbitrary nature.[26] Thus, interferences with Article 8 ECHR are allowed if not arbitrary, ie if they comply with the requirements listed in the second paragraph of the provision: the interference must be 'in accordance with the law', in pursuit of one of the legitimate aims listed, and 'necessary in a democratic society' (which means that there must be reasonable proportionality between the means employed and the aims sought to be achieved)[27].

It is self-evident that the termination of life in the person's best interest raises issues which are relevant under both Articles 2 and 8 ECHR, and that a contrast may arise between the safeguard of life and respect for individual autonomy. The following analysis of the ECtHR's body of decisions aims at highlighting the progressive development of a position on end-of-life issues and on the balance between the competing interests at stake. The analysis is divided in two parts, the first concerning cases on assisted suicide and the second concerning cases on passive euthanasia. The division is not only thematic but also chronological, as the first cases the ECtHR was confronted with were the ones relating to assisted suicide.

3. *The assisted suicide cases*

3.1. *Pretty v United Kingdom (2002)*

The first case[28] in which the Strasbourg Court declared admissible, and thus examined, a claim relating to the termination of life in the person's best interest was that of *Pretty v UK*.[29] The applicant was a woman, suffering from an incurable degenerative disease, who wished to end

[26] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979) para 31; *Kroon and Others v the Netherlands* App no 18535/91 (ECtHR, 27 October 1994) para 31.

[27] *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 49.

[28] A previous application concerning assisted suicide had been rejected as inadmissible on procedural grounds: *Sanles Sanles v Spain* (dec) App no 48335/99 (ECtHR, 26 October 2000).

[29] *Pretty* (n 25). The decision has been commented on extensively: see D Rietiker, 'From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in the Light of the Recent Haas v Switzerland Judgment' (2012) 25 Harvard Human Rights J 115 ff, and the analyses recalled therein sub fn 230.

her life but was physically unable to commit suicide. Her husband was willing to assist her, but under Section 2 of the 1961 Suicide Act he could face prosecution for doing so.

Before the ECtHR, Mrs Pretty argued that Article 2 protects 'the right to life and not life itself', and that this right should be read as including the 'right to choose whether or not to go on living'.[30] The Court firmly denied the proposed interpretation of Article 2 ECHR, and stated that the provision 'is unconcerned with issues to do with the quality of living' and cannot 'without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die'.[31]

On the other hand, the Court declared that it was 'not prepared to exclude' that preventing a person from exercising a choice to avoid what she considers will be an undignified end of life may constitute an interference with the right to respect for private life under Article 8 ECHR.[32] Thus, notwithstanding the indirect formulation and the use of the term "choice', the Court accepted that the wish to be assisted in suicide falls within the notion of 'private life', and that any interference with the exercise of this 'choice' must be justified under the terms of Article 8(2) ECHR.[33]

3.2. *Haas v Switzerland (2007) and Gross v Switzerland (2013)*

After *Pretty*, the Court was confronted with end-of-life issues in two applications against Switzerland concerning assisted suicide.

Under Swiss law, assisted suicide constitutes a criminal offence only when carried out for selfish motives.[34] Assisted suicide is thus a tolerated practice, often realized through the prescription of lethal drugs, self-administered by the patient under the logistical support of dedicated associations.[35] Doctors are under no obligation to assist patients in suicide; but, if they opt for assistance, they must guarantee the fulfillment

[30] *Pretty* (n 25) para 35.
[31] ibid para 39.
[32] ibid para 67.
[33] G Puppinck, C de La Hougue, 'The Right to Assisted Suicide in the Case Law of the European Court of Human Rights' (2014) 18 Intl J Human Rights 738.
[34] See above (n 11).
[35] For a criticism of the 'suicide tourism' see Lantero (n 5) 238.

of preconditions concerning the gravity of the disease and the patient's capacity to form an independent and reasoned choice.[36]

3.2.1. *Haas v Switzerland (2007)*

Mr Haas had been suffering from a serious bipolar affective disorder for more than 20 years, and was persuaded that for this reason he could no longer live in a dignified manner.[37] He could not obtain a prescription of lethal drugs because of his psychiatric condition. Before the ECtHR, he invoked Article 8 ECHR, complaining of a violation of his 'right to choose the time and manner of his death'.[38]

The ECtHR quoted *Pretty* but, instead of referring to a 'choice', it considered that what was a stake was a "right": the 'individual's right to decide by what means and at what point his or her life will end'. [39] The ECtHR declared that, when an individual is capable of freely reaching a decision and acting in consequence, this right 'is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention'.[40]

To assess whether this right had been infringed in the concrete case, the ECtHR addressed the issue of whether a 'fair balance […] between the competing interests of the individual and of the community' had been struck.[41] The Court declared that in this balancing exercise Member States enjoy a wide margin of appreciation, in view of the lack of a 'common consent' within the Member States of the Council of Europe with regard to 'an individual's right to decide how and when his or her life should end'.[42]

It then referred to Article 2 of the Convention,[43] and declared that this provision requires national authorities to prevent an individual

[36] The medical ethics guidelines on the care of patients at the end of life were adopted on 25 November 2005 by the Swiss Academy of Medical Sciences. For a description, see *Haas* (n 7).

[37] *Haas* (n 7) para 7.

[38] ibid para 32.

[39] ibid para 51.

[40] ibid para 51.

[41] ibid, quoting *Keegan v Ireland* App no 16969/90 (ECtHR, 26 May 1994) para 49.

[42] *Haas* (n 7) para 55.

[43] ibid para 54.

from taking his or her own life 'if the decision has not been taken freely and with full understanding of what is involved'.[44]

On these grounds the ECtHR deemed that the need for a medical prescription to obtain lethal drugs was consonant with the positive obligations under Article 2 the Convention,[45] and Swiss authorities had complied with their obligations under Article 8 ECHR.[46]

The reasoning is interesting for, at least, two reasons. [47] First, the ECtHR explicitly declared that Article 8 ECHR protects the 'right to decide about the end of one's own life', as a manifestation of the individual's private life. Secondly, it identified the cases in which this right must 'give way' to the State's duty under Article 2 ECHR, thus addressing the relationship between obligations under Articles 8 and 2 ECHR.[48] In following judgments, the substantive stance on the balance of interests at stake would leave space to a procedural review.

3.2.2. *Gross v Switzerland (2013)*

Mrs Gross was an elderly woman, who wished to end her life in order to avoid the suffering connected to the progressive decline of her physical and mental faculties. She could not obtain a prescription for lethal drugs because she did not suffer from an incurable illness, and her appeals to obtain an exemption had been rejected. Before the ECtHR, she invoked Article 8 ECHR, complaining of a violation of her 'right to decide by what means and at what point her life would end'.[49]

Having recalled *Pretty* and *Haas*, the Court found that Mrs Gross' wish to obtain a lethal drug fell within the scope of her right to respect for private life under Article 8 of the Convention.[50] Then, it examined the claim under the perspective of the positive obligation to provide 'sufficient guidelines defining if and, in the case of the affirmative, un-

[44] ibid.
[45] ibid para 58.
[46] ibid para 61.
[47] For a wider commentary, see eg G Puppinck, C de La Hougue (n 33).
[48] On this point see also Rietiker (n 29) 123.
[49] *Gross v Switzerland* App no 67810/10 (ECtHR, 14 May 2013) para 38.
[50] ibid para 60.

der which circumstances medical practitioners were authorised to issue a medical prescription to a person in the applicant's condition'.[51]

By a strict majority of four votes to three, the Court held that, since the Swiss medical ethical guidelines applied only to patient suffering from an incurable and deathly illness and did not have the formal quality of law, the situation of people in Mrs Gross' state was not regulated by Swiss law. This lack of regulation was likely to cause 'a chilling effect on doctors', and a 'considerable degree of anguish' on people in the applicant's state.[52]

The Court concluded for a violation of Article 8 ECHR,[53] while carefully pointing out that such conclusion related only to the absence of clear and comprehensive legal guidelines.[54]

This judgment has been deprived of its legal effect by a Grand Chamber ruling, in which the application has been struck out because Mrs Gross had in the meanwhile died without her representative informing the Court.[55] The conclusions remain, nevertheless, relevant, as they show the ECtHR's tendency to adopt a procedural perspective on end-of-life issues.

3.3. *Koch v Germany (2012)*

A procedural approach was also displayed by the ECtHR in the case of *Koch v Germany*.[56] Mr Koch's wife, quadriplegic after an accident, wished to end her life but could not obtain a prescription for lethal drugs under German law. After having helped her to commit suicide in Switzerland, Mr Koch had complained before German courts of the refusal to provide his wife with the lethal substance. His complaint had been rejected without examination of its merits because of his lack of locus standi.

[51] ibid para 63.
[52] ibid paras 65-66.
[53] ibid para 67.
[54] ibid para 69.
[55] *Gross v Switzerland* App no 67810/10 (ECtHR [GC], 30 September 2014).
[56] *Koch v Germany* App no 497/09 (ECtHR, 19 July 2012). For a commentary of the decision underlying the procedural approach displayed therein, see: M Afrouckh, 'Premier Constat de Violation de la Convention dans une Affaire de Suicide Assisté' (2012) 35 La Semaine Juridique 1516.

Before the ECtHR, Mr Koch alleged that the domestic courts' refusal to examine the merits of the complaint infringed both his late wife's and his own rights under Article 8 of the Convention.[57]

The ECtHR acknowledged Mr Koch's locus standi with regard to his own right to private life, in light of 'the exceptionally close relationship' with his wife and 'his immediate involvement in the realisation of her wish to end her life'.[58] However, it avoided taking a stance on the content of this right (was it a 'right to help close family members to commit suicide'?), and declared that 'Article 8 of the Convention may encompass a right to judicial review even in a case in which the substantive right in question had yet to be established'.[59]

The ECtHR found that the domestic courts' refusal to examine the merits of the claim had not served any legitimate interests under paragraph 2 of Article 8 ECHR,[60] and concluded that it had violated Mr Koch's right to respect for private life.[61]

4. *The passive euthanasia cases*

4.1. *Lambert v France (2015)*

The *Lambert* case[62] concerned the withdrawal of treatments sustaining the life of an unconscious patient: thus, a case of passive, non-voluntary euthanasia.[63]

The phenomenon is regulated in France by the French Public Health Code (PHC), as amended by the 2005 Leonetti Act.[64] Under the PHC, treatments must not be continued with 'unreasonable obstinacy'

[57] *Koch* (n 56) paras 27 and 63.

[58] ibid para 50. On the opposite, the Court declared his complaint inadmissible insofar as it related to his deceased wife's right: ibid para 82.

[59] ibid para 53.

[60] ibid para 67.

[61] ibid paras 65-72.

[62] *Lambert* (n 10) para 54.

[63] Some Author contests the equivalence between passive euthanasia and withdrawal of life-sustaining treatment under French law: Lantero (n 5) 232.

[64] Recently, these provisions have been subject to further amendments (Law n 87 of 2 February 2016), which, however, have not substantially affected the legislative framework*: Afiri and Biddarri v France* App no 1828/18 (ECtHR, 23 January 2018) para 31.

and where they appear to be 'futile or disproportionate or to have no other effect than to sustain life artificially', they may be discontinued or withheld.[65] When an individual is unable to express his/her wishes in this regard, the decision is taken by doctors under a 'collective procedure',[66] in which the patient's previously expressed wishes and that of the patient's family are taken into account.[67]

Mr Lambert was tetraplegic and had been in a permanent vegetative state for years. His treating clinicians had observed increasing signs of resistance to treatment and had initiated the collective procedure. While Mr Lambert's wife had agreed to the withdrawal, his parents and two siblings had opposed and applied domestic courts, which concluded that the decision to discontinue artificial nutrition and hydration was in accordance with the law.[68]

Before the ECtHR, Mr Lambert's parents and siblings alleged, *inter alia*, that the withdrawal would breach the State's positive obligations under Article 2 ECHR. The application was examined by the Grand Chamber of the ECtHR, to which jurisdiction was relinquished.[69]

On the basis of a distinction between 'euthanasia' and 'therapeutic abstention', the ECtHR deemed that the issue at stake under Article 2 ECHR was not the respect for the prohibition to take life, but compliance with the State's positive obligation to protect life.[70] In order to establish whether France had complied with such obligation, the Court developed a twofold reasoning.

First, it recalled *Glass*, whereby it had assessed the need to read the Convention 'as a whole', and, specifically, to read Article 8 in light of Article 2 ECHR.[71] Applying *a reverso* this principle, the ECtHR assessed that 'reference should be made, in examining a possible violation of Article 2, to Article 8 of the Convention and to the right to respect

[65] Art L 1110-5 PHC: see the analysis of the French legislation in *Lambert* (n 10) para 53.

[66] Art L 1111-4 PHC: ibid.

[67] *Lambert* (n 10) para 54.

[68] ibid para 50.

[69] The Chamber to which the application had been assigned relinquished jurisdiction in favor of the Grand Chamber under art 30 of the European Convention on Human Rights and Rule 72 of the Rules of Court: Press Releases issued by the Registrar of the Court: ECHR 290 (2014) 7 October 2014.

[70] *Lambert* (n 10) para 124.

[71] *Glass v the United Kingdom* App no 61827/00 (ECtHR, 9 March 2004) para 75.

for private life and the notion of personal autonomy which it encompasses'.[72]

Then, the ECtHR drew from its case law [73] three criteria that domestic authorities must respect when it comes to administering or withdrawing treatments: I) the existence of a regulatory framework compatible with the requirements of Article 2; II) the fact that the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel, has been taken into account; III) the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests.[74]

The ECtHR assessed that the French legal framework was 'sufficiently clear, for the purposes of Article 2 of the Convention, to regulate with precision the decisions taken by doctors in situations such as that in the present case'.[75] It verified that the different opinions of the parties involved had been taken into account,[76] and that judicial review had been conducted with a view to establish Vincent Lambert's wishes by a court having full powers to review the lawfulness of the doctors' decision.[77]

Thus, the Court did not pronounce on the balance of interests at stake: its reasoning was *de facto* limited to verifying the respect of procedural guarantees. This choice was justified by a comparative analysis, according to which 'no consensus exists among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appear to allow it'.[78] From this alleged lack of consensus, the ECtHR derived the conclusion that the State had a wide margin of appreciation as to the balance between the right to life and respect for private life and personal autonomy,[79] as well as to the organization of the decision-making pro-

[72] *Lambert* (n 10) para 142.

[73] The ECtHR recalled the cases concerning the objection to the administering or withdrawal of treatment made by a conscious patient or by his representative: see *Burke v the United Kingdom* App no 19807/06 (ECtHR, 11 July 2006) para 1 under the section 'The Law'.

[74] *Lambert* (n 10) para 143.

[75] ibid para 160.

[76] ibid paras 161-168.

[77] ibid paras 169-180.

[78] ibid para 147.

[79] ibid paras 147-148.

cess (including the designation of the person who takes the final decision).[80] The only aspect on which the ECtHR found a European consensus was 'the paramount importance of the patient's wishes in the decision-making process, however those wishes are expressed'.[81] Accordingly, the ECtHR took into consideration the fact that domestic authorities had tried to identify Mr Lambert's wishes.

4.2. *The application of the Lambert criteria*

The ECtHR has recently applied the *'Lambert* criteria' in two inadmissibility decisions: *Gard and others v UK*,[82] and *Afiri and Biddarri v France*.[83]

The first decision was taken by a Chamber, the second by a Committee of three judges.[84] Both cases involved passive euthanasia of minor patients whose parents opposed the withdrawal of treatments: thus, they were both cases of non-voluntary passive euthanasia, but, differently from Lambert, the patients were legally represented by their parents and had never reached the age for expressing a legally valid consensus of their own.

4.2.1. *Gard and others v UK (2017)*

The *Gard* case concerned the withdrawal of treatments sustaining the life of an infant whose brain was irreversibly damaged by a rare and apparently incurable disease.[85] His parents wished for him to undergo experimental treatments and opposed the doctors' opinion according to which any further therapy would be futile and would only prolong his suffering.[86]

Under UK law, in the event of a dispute between doctors and parents as to the treatments to be administered to a minor patient, it is for

[80] ibid para 168.
[81] ibid para 147.
[82] *Gard and Others v the United Kingdom* App no 39793/17 (ECtHR, 27 June 2017).
[83] *Afiri* (n 64).
[84] The competence of Committees and Chambers is regulated by arts 28 and 29 of the ECHR.
[85] *Gard* (n 82).
[86] ibid paras 1-6.

the courts to solve the matter in light of the 'child's best interest" criterion.[87] Applying this criterion, domestic courts had upheld the doctors' opinion and rejected the parents' appeals.[88]

Before the ECtHR, baby Gard's parents complained under Article 2 ECHR of the fact that the hospital was blocking access to life-sustaining treatments, and under Article 8 ECHR of the disproportionate interference with their parental rights.[89]

With regard to the complaint under Article 2 ECHR, the ECtHR denied that the State has a duty to allow access to experimental treatment.[90] Then, it examined *proprio motu* a complaint which had been raised only at domestic level: namely, that baby Gard's right to life would be violated if treating clinicians were to withdraw life-sustaining treatments against his parents' will. The ECtHR applied the *Lambert* criteria,[91] and declared the complaint manifestly ill founded.[92]

With regard to the complaint under Article 8, the ECtHR acknowledged that there had been an interference with the applicants' parental rights.[93] However, it found that the interference was lawful and proportionate to the legitimate aim pursued (the protection of 'health and morals' and 'rights and freedoms' of a minor).[94]

In assessing the proportionality of the interference, the ECtHR recalled the absence of a European consensus 'as to the relative importance of the interest at stake or as to the best means of protecting it'.[95] Accordingly, it confined itself to verifying if the decision taken by domestic authorities had overstepped the margin of appreciation, and this was done on the basis of 'procedural' parameters: the ECtHR found that domestic decisions 'were meticulous and thorough; ensured

[87] Re A (Children) (Conjoined Twins: Surgical Separation) [2001] 2 WLR 480; An NHS Trust v MB (A Child represented by CAFCASS as Guardian ad Litem) [2006] 2 FLR 319 (both cited in *Gard* (n 82) paras 43-44. Specifically on withdrawal of treatment: An NHS Trust v MB (A Child represented by CAFCASS as Guardian ad Litem) [2006] 2 FLR 319, in *Gard* (n 82) para 45.

[88] *Gard* (n 82) paras 7-39.

[89] ibid paras 55-56.

[90] ibid paras 77-78, 87.

[91] ibid para 80.

[92] ibid para 98.

[93] ibid para 110.

[94] ibid paras 111-125.

[95] ibid para 122.

that all those concerned were represented throughout; heard extensive and high-quality expert evidence; accorded weight to all the arguments raised; and were reviewed at three levels of jurisdiction with clear and extensive reasoning giving relevant and sufficient support for their conclusions at all three levels'. [96]

4.2.2. *Afiri and Biddarri v France (2018)*

The *Afiri and Biddarri* case concerned the withdrawal of treatments of a 14-years-old girl, who was in a permanent vegetative state after a cardiac arrest caused by an autoimmune disease. Her parents, Ms Afiri and Mr Biddarri, had repeatedly opposed the doctors' proposal to withdraw treatments, and the collective procedure prescribed by French law had been initiated. [97]

Under Articles 2 and 8 ECHR, Ms Afiri and Mr Biddarri complained of the collective procedure, namely of the fact that the final decision as to the withdrawal of treatment is left to doctors even when the parents oppose to it.[98]

The ECtHR, sitting as a Committee of three judges, examined the claim under Article 2 by referring to *Lambert*.[99] It specifically recalled the conclusion that the State's margin of appreciation is wide with regard to the organization of the decision-making process, including the designation of the person who takes the final decision to withdraw treatment.[100] It noted that, throughout the whole process, the parent's opinion had been taken into account and domestic courts had tried to determine the patient's own wishes (although without success).[101] In light of the overall respect of the *'Lambert* criteria', the ECtHR concluded that domestic authorities had complied with their positive obligations under Article 2 ECHR.[102]

[96] ibid para 124.
[97] See the analysis of the French legislation in *Lambert* (n 10) para 53.
[98] *Afiri* (n 64) para 21.
[99] ibid paras 26-27.
[100] ibid para 38, referring to *Lambert* (n 10) para 168.
[101] *Afiri* (n 64) paras 39 and 44.
[102] ibid para 47.

5. *General trends emerging from the Court's decisions on end-of-life issues: Procedural review and personal autonomy*

The number of cases in which the ECtHR has dealt with end-of-life issues is still limited: thus, it is impossible to talk of a veritable case law. However, two general trends may be identified in the ECtHR's attitude towards end-of-life choices: a tendency to limit the scope of its own review to a procedural dimension, while attributing a central relevance to the value of personal autonomy.[103]

5.1. *Procedural review*

In dealing with end-of-life choices, the ECtHR shows a tendency to limit its own review to the respect of procedural guarantees.

In *Haas*, the ECtHR assessed the need for domestic law to regulate assisted suicide with sufficient clarity, but with freedom of substantive content. In *Koch*, it assessed the need for domestic courts to examine the merits of a claim whose substance, however, was not defined. In *Lambert*, it developed three criteria, which do not imply that the opinion of a certain party should prevail, nor that a certain outcome is guaranteed.[104]

Thus, while the ECtHR acknowledges that end-of-life choices imply a balance between the interests protected by Article 2 and those protected by Article 8 ECHR,[105] its review is often confined to the respect of procedural guarantees by the domestic authorities in charge of the balance.

This procedural perspective is part of a wider 'procedural turn' in the ECtHR's case law highlighted by scholars.[106] One of its rationales

[103] It is important to bear in mind that the following conclusions are derived from a handful of cases, which do not cover all the potential situations in which end-of-life issues may arise. Furthermore, these conclusions might lose their validity, particularly following a change of attitude by the CoE's Member States, because the Convention is a living instrument which must be interpreted in light of present-day conditions (*Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para 31; *Marckx v Belgium* (n 26), para 41).

[104] *Afiri* (n 64) para 35; *Lambert* (n 10) para 162.

[105] *Haas* (n 7) para 53; *Lambert* (n 10) para 142.

[106] On this procedural turn, see the contributions collected in J Gerards, E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (CUP 2017), and par-

may be considered the principle of subsidiarity, according to which the machinery of complaint to the ECtHR is subsidiary to national systems,[107] and national authorities are best placed to take substantive decisions with regard to sensitive cases, where conflicting interests of rather similar weight are at stake and moral issues are involved.[108] A further, connected, rationale is the lack of consensus among Member States with regard to assisted suicide and passive euthanasia, which 'requires' the ECtHR to leave them a wide margin of appreciation as to the balance of interests.[109]

It should be noted that domestic systems also display a tendency to 'proceduralize' choices abound end of life, avoiding universal solutions grounded on a clear substantive stance while laying down procedures within which the choice in the concrete case is to be taken. The domestic regulation of passive euthanasia described in *Lambert* for adult patients,[110] and the one described in *Gard* for minor patients,[111] do not provide substantive answers as to the prevailing value: they lay down a 'dialectic" procedure in which doctors or courts take the final decision, after having considered the different opinions involved. The phenomenon is linked to the absence of a common moral code or religion, typical of multicultural societies. [112] Within this 'relativism of values', voices are raised against the excessive power that tends to be left in the hands of health professionals.[113]

ticularly: E Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' ibid 17 and sources quoted sub fn 2; J Gerards, 'Procedural Review by the ECtHR: A Typology' ibid 127 and sources quoted sub fn 2.

[107] Among many other judgments, see *Cocchiarella v Italy* App no 64886/01 (ECtHR [GC], 29 March 2006) para 38. For an analysis of subsidiarity in the Convention system: A Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15(2) Human Rights L R 313–341.

[108] Brems (n 106) 24.

[109] *Lambert* (n 10) paras 147-148; *Haas* (n 7) para 55.

[110] See, in particular, the analysis of the 'Legislation and practice in Council of Europe member States' in *Lambert* (n 10) paras 72-76.

[111] See the analysis of the 'Relevant domestic law and practice' and of the 'International Law and Practice' in *Gard* (n 82) paras 40-54.

[112] D Roman, *A corps défendant. La protection de l'individu contre lui-même* (Dalloz 2007) 1285. Criticizing the current belief that no common moral standards can be found: J Rachel, 'Can ethics provide answers?', in JH Howell, WF Sale (eds), *Life Choices. A Hasting Center Introduction to Bioethics* (Georgetown UP 2007) 6-11.

[113] S Hennette-Vauchez, 'Droits des patients et pouvoir médical – Quel paradigme dominant dans la juridicisation de la fin de vie?', in Larralde (n 3) 177.

In this context, the ECtHR faces a difficult task: that of setting common standards for the protection of human rights within a society in constant change, whereby social issues divide the States as well as, internally, their population.[114] What emerges from the above analysis is certainly a tendency to proceduralize the review: however, this tendency is not absolute. In all its judgments on end-of-life choices, the Court has attributed a paramount importance to a substantive value: that of personal autonomy. Thus, it can be said that the procedural review of the ECtHR on end-of-life situations is 'substance-flavoured'.[115]

5.2. *Personal autonomy*

The notion of personal autonomy has emerged progressively in the Court's case law, first being referred to in judgments on consensual sado-masochistic activities[116] and on the protection of individuals against their own suicidal attempts.[117] In *Pretty*, the Court expressly connected personal autonomy to the notion of 'private life', by declaring that '[a]lthough no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention […] the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'. [118]

In all the ECtHR's judgments on end-of-life choice, personal autonomy has played a significant role. As a principle of interpretation, personal autonomy has allowed for the creation of the 'right to decide about the end of life' under Article 8.[119] As a substantive value, it has allowed to limit the extent of the State's obligation to protect life: when in *Pretty* the Court assessed that Article 2 requires national authorities to prevent an individual from taking his life 'if the decision has not been taken freely and with full understanding of what is involved',[120] personal

[114] J Andriantsimbazovina, 'Harmonie ou disharmonie de la protection des droits de l'homme en Europe? Quelques considérations sur la jurisprudence de la Cour européenne des droits de l'homme depuis 2006' (2006) 42 Cahiers de Droit Européen 737.

[115] The terminology is borrowed from Brems (n 106) 35.

[116] *Laskey* (n 20) para 44.

[117] *Keenan* (n 17) para 92.

[118] *Pretty* (n 25) para 61.

[119] M Levinet, 'Le principe de libre disposition de son corps dans la jurisprudence de la Cour Européenne des Droits de l'Homme', in Larralde (n 3) 78-82.

[120] *Haas* (n 7) para 54.

autonomy was implicitly considered as a counter-interest to be balanced against the right to life. This notion was then expressly developed in *Lambert*, where the Court declared that 'reference should be made, in examining a possible violation of Article 2, to Article 8 of the Convention and to the right to respect for private life and the notion of personal autonomy which it encompasses'.[121]

Personal autonomy also provides a substantive dimension to the procedural review under the 'Lambert criteria': the Court requires that account is taken of the patient's wishes, even when the patient is unable to express himself.[122]

The central relevance attributed to personal autonomy by the ECtHR is clear, and it is strictly related to the paramount importance attributed to the patient's wishes by the domestic law of the Member States of the Council of Europe,[123] as well as by international instruments.[124] Indeed, the only aspect on which the ECtHR acknowledges the presence of a European consensus is 'the paramount importance of the patient's wishes in the decision-making process, however those wishes are expressed'.[125]

6. *Conclusive remarks*

Some conclusive remarks can be made on the basis of the general trends described above.

Lambert can be considered as the current leading case on passive euthanasia. This derives, first and foremost, by the fact that it has been issued by the Grand Chamber of the ECtHR on the basis of a relinquishment of jurisdiction, whose purpose is the promotion of consistency in the ECtHR's case law.

[121] *Lambert* (n 10) para 142.
[122] *Lambert* and *Afiri and Biddarri.*
[123] *Lambert* (n 10) para 147.
[124] Art 3 of the 'Declaration on the Rights of the Patient', adopted by the World Medical Association in Lisbon, September/October 1981, is worded as follows: 'a)The patient has the right to self-determination, to make free decisions regarding himself/herself. The physician will inform the patient of the consequences of his/her decisions. b) A mentally competent adult patient has the right to give or withhold consent to any diagnostic procedure or therapy'.
[125] *Lambert* (n 10) para 147.

In addition, the leading force of *Lambert* has been strengthened by the subsequent use of its principles to ground inadmissibility decisions. In *Gard*, the application was declared inadmissible on the basis of the 'Lambert criteria' even if the complaint concerning the withdrawal of treatment had not been raised before the ECtHR. In *Afiri and Biddarri*, the inadmissibility decision was taken by a Committee of three judges, which means that the decision could 'be taken without further examination'.[126] These elements indicate that the 'Lambert criteria' are meant to be of a general nature: the overall idea emerging from the use of decisions in these cases is that *Lambert* is a sufficiently leading judgment to allow similar cases to be decided with a mere decision.

Admittedly, the Gard case was peculiar: it concerned the termination of the life of an infant, who (unlike Mr Lambert and unlike the 14-years old daughter of Ms Afiri and Mr Biddarri) had never reached a degree of maturity allowing him to formulate wishes about the withdrawal of treatments. One may argue that in such a case the principle of respect for autonomy cannot provide legitimation to the active termination of life.[127] In fact, the domestic decisions referred to 'quality of life' consideration, rather than to the free will of the patient.[128] The ECtHR, however, applied the 'Lambert criteria", and even felt the need to recall that in end-of-life choices there is a European consensus as to the 'paramount importance of the patient's wishes'.[129] In this perspective, attention was paid to the fact that baby Gard's position had been represented by a guardian appointed by courts for this purpose. Thus, what can be inferred from the *Gard* decision is a confirmation of the position expressed in *Lambert*: personal autonomy has a pivotal importance in end-of-life choices; and the different ways of dealing with the problem of a non-ascertainable will are compatible with the Convention if they respect the 'Lambert criteria'.

What can be added to these conclusions is that the relevance attributed to personal autonomy is not carried to its further consequenc-

[126] ECHR, art 28(1)(a).

[127] A Kon, 'Neonatal Euhtanasia Is Unsupportable: The Groeningen Protocol Should Be Abandoned' (2007) 28 Theoretical Medicine and Bioethics 453; E Kodish, *Pediatric Ethics: A repudiation of the Groeningen Protocol* (Lance 2008) 892; both quoted in Joly, Knoppers (n 2) 128.

[128] See the domestic decisions referred to in *Gard* (n 82) paras 27 and 44.

[129] ibid para 147.

es, neither by the Member States nor by the ECtHR. While it is acknowledged that a European consensus as to 'the paramount importance of the patient's wishes' exists,[130] only a few Member States derive from this premise its logical consequence: ie, that the wishes of an adult patient capable of expressing his will should always prevail, not only when it comes to refusing or withdrawing treatments, but also when it comes to assistance to suicide or active euthanasia.

This lack of consensus is paradoxical, considering the consensus which *de facto* exists about passive euthanasia (the same Court has noted that the majority of States appear to allow the withdrawal of artificial life-sustaining treatment)[131]. There is no reason for not setting limits to personal autonomy when it comes to the refusal of life-saving and the withdrawal of life-sustaining treatments, while setting stringent limits when euthanasia or assistance in suicide are involved.[132]

From the ECtHR's perspective: if Member States agree on the paramount importance of the patient's wishes, then, when the life of an adult and competent patient is in question, they should probably *not* be afforded a wide margin of appreciation as regards the balance between life and personal autonomy. However, the ECtHR is correctly mindful of the current lack of consensus as regard the admissibility of active euthanasia and assisted suicide: however inconsistent this lack of consensus might be, until such a moment when a sufficiently strong tendency in another direction will emerge, the ECtHR will have to bow to it, by reason of the subsidiary nature of its review.

[130] *Lambert* (n 10) para 147.

[131] ibid.

[132] On the unreasonableness of providing a different legal treatment for euthanasia and for the withdrawal of life-sustaining treatments see: C Wee, 'Confucianism and Killing versus Letting Die', in W Teays (ed), *Global Bioethics and Human Rights: Contemporary Issues* (Rowman & Littlefield 2014) 249.