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IN MEMORIAM

CRÓNICA

ARTÍCULOS

LIFE OR DEATH? HAVING THE WILL TO TERMINATE LIFE: RECOGNISING AND BUILDING THE RIGHT TO DIE WITH DIGNITY IN INTERNATIONAL HUMAN RIGHTS LAW*

¿VIDA O MUERTE? TENER LA VOLUNTAD DE PONER FIN A LA VIDA: RECONOCER Y CONSTRUIR EL MARCO DEL DERECHO A MORIR CON DIGNIDAD EN EL DERECHO INTERNACIONAL DE LOS DERECHO HUMANOS

Emma Segelke **

Abstract: International human rights law fails to protect people who wish to have a dignified death by not recognising the existence of the right to die yet implicit in dignity-based human rights. This paper explores the issues of euthanasia and assisted suicide both in the context of international human rights law and of jurisprudence. It attempts to build an international human rights law framework, called the right to die *with dignity* (RTD) framework, charged with giving people in distressing health conditions access to end-of-life practices. The paper is a legal paper above all else, tasked with investigating how existing dignity-based human rights could be used as legalisation enablers. However, it also inscribes itself in the field of the philosophy of law considering that the philosophical normativity of the framework as well as its reconciliation with natural law theory and sanctity of life arguments are great matters of interest.
Keywords: Euthanasia, European Convention on Human Rights, dignity, self-determination, slippery slope.

Resumen: El derecho internacional de los derechos humanos no protege a las personas que desean tener una muerte digna al no reconocer la existencia del derecho a morir, que aún está implícito en los derechos humanos basados en la dignidad. Este artículo explora las cuestiones de la eutanasia y el suicidio asistido tanto en el contexto del derecho internacional de los derechos humanos como de la jurisprudencia. Intenta construir un marco legal internacional de derechos humanos, llamado marco del derecho a morir con dignidad (DTR), encargado de brindar a las personas en condiciones de salud difíciles acceso a prácticas para el final de la vida. El artículo es, por encima de todo, un documento jurídico, cuya tarea es investigar cómo los derechos humanos existentes basados en la dignidad podrían usarse como facilitadores de la legalización. Sin embargo, también se inscribe en el campo de la filosofía del derecho considerando que la normatividad filosófica

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del marco, así como su reconciliación con la teoría del derecho natural y los argumentos de la santidad de la vida, son cuestiones de interés.
Palabras clave: Eutanasia, Convenio Europeo de Derechos Humanos, dignidad, autodeterminación, pendiente resbaladiza.

I. INTRODUCTION

> «Making someone die in a way that others approve, but he or she believes a horrifying contradiction of his or her life, is a devastating, odious form of tyranny»[1].

The concept of a «good death» has for centuries held man spellbound. It is now epitomised in the word «euthanasia» formed by the combination of two ancient Greek

[1] DWORKIN, R., *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, 1st ed, New York (Vintage Books by the Knopf Doubleday Publishing Group), 1994, p. 217.

words: «eu» (good) and «thanatos» (death)[2]. The significance of a good death can be attributed to Roman emperors like Hadrian, who was one of the first prominent political figures known to have had recourse to euthanasia[3]. At the time of Imperial Rome, values such as courage, strong-mindedness and honour crystallised in death, hence the importance of having a «good death»[4]. Intriguingly, this Roman conception has re-emerged since the beginning of the 1990s when authors from diverse backgrounds started to question society's stance towards death in light of medical advances. A movement fighting for the legalisation of euthanasia came to being and swiftly gained popularity in European countries[5]. It was given, in this author's opinion, the incorrect name of «the right to die movement». As a matter of fact, it is not so much a right *to die* that euthanasia proponents advocate for, but rather a right *to die with dignity*. Instead of viewing the right to die as antonymous to the right to life, it should be viewed as a novel right arising from a shift in society's value orientation[6]. Curiously, treaty bodies have yet to recognise its existence both in treaty law and in caselaw. This paper will seek to fill this legal lacuna by answering the following research question: how could international human rights law uplift the dignity of human beings until the end of their lives while protecting them from abuse of their right to die?

Although «euthanasia» and «assisted suicide» cannot be used interchangeably as the former relates to a lethal injection given by a *third party* to a suffering consenting individual while the latter concerns the patient's *self-injection*, in this paper they will be treated together.[7] What ought to be differentiated are the varied euthanasia practices:

Active euthanasia involves a positive action while passive euthanasia is legally classified as an omission[8]. What will be referred to in the paper as «withdrawing of life support» should be viewed as a lesser form of passive euthanasia. By and large, voluntary active euthanasia (VAE) means that the patient autonomously requests that his life be terminated; non-voluntary active euthanasia (NVAE) happens when a patient, unable to consent, is «killed» nonetheless presumably for his own good; and involuntary active

[2] NEMTOI, G., «The Right to Life versus the Right to Die», *Logos Universality Mentality Education Novelty: Law*, n.8, 2020, p. 3.

[3] *Ibidem,* p. 3.

[4] FLEMMING, R., «Suicide, euthanasia and medicine: reflections ancient and modern», *Economy and Society*, n.34, 2005, p. 317.

[5] Noteworthily, Spain has recently legalised euthanasia in 2021.

[6] GRIFFITHS, J., *et al*, *Euthanasia and the Law in Europe*, 2nd ed, Oxford and Portland, Oregon (Hart Publishing), 2008, p. 523.

[7] *Ibidem*, p. 2. Most of the time in this paper it is not relevant to make the distinction between «euthanasia» and «assisted suicide» since they only mainly differ in the «means» conducive to death not the end-result nor the patient's ability or intention to resort to end-of-life practices. Besides, in any case, a third-party is involved, either by injecting, or providing the lethal drug. When the distinction needs to be made, it will be clearly stated.

[8] DUGUET, A., «Euthanasia and Assistance to End of Life Legislation in France», *European Journal of Health Law*, n.8, 2001, p. 109.

euthanasia (IAE) occurs when the patient is «killed» *regardless* of his wishes[9]. These two last practices are out of the scope of discussion. The sole focus of this paper will be on voluntary active euthanasia (VAE) mainly in the European context following the European Court of Human Rights (ECtHR)'s jurisprudence. More particularly, Dutch law will be used as a case study throughout the paper as it is a country with a unique stance on euthanasia and legalised it a long time ago compared to other European countries (in 2002).

This article will argue that international human rights law could uplift the dignity of human beings until the end of their lives by creating a safeguarded right to die with dignity framework based on existing dignity-based human rights. It will have the following structure: the first section (II) demonstrates how vulnerable people will be protected from abuse of their right to die by devising an eligibility template; the middle part (III) directly argues that the right to die with dignity can be implicitly inferred from existing dignity-based human rights; and the final section (IV) endeavours to challenge the European Court of Human Rights' philosophical conception of dignity in relation to the right to life and reconcile the framework with natural law theory and sanctity of life arguments.

II. EUTHANASIA AND ASSISTED SUICIDE FOR WHO? AVOIDING THE SLIPPERY SLOPE AT THE OUTSET

The right to die with dignity is a distressing right with troubling and irreversible implications. Unless its framework is properly safeguarded and its access clearly delimited at the outset, recognising its existence under international human rights law will open the floodgates and create a «slippery slope»[10]. However, if such a right can be inferred in order to uplift the dignity of human beings until the end of their lives, it should be equally available to *all* human beings, following the principle of universality of human rights[11] and the right to non-discrimination[12]. Needless to say, this is problematic. Should everybody have the right to access the RTD framework, even «vulnerable people»? This first section will attempt to answer this legal conundrum by suggesting a template to determine whether someone should be allowed to rely on his right to die.

First, although the right to die should be available to everyone, this does not mean that everyone should be able to enforce it; rather, its accessibility ought to be based on a

[9] BISWAS, T., SENGUPTA, A., «Euthanasia and its Legality and Legitimacy from Indian and International Human Rights Perspectives», *Asia-Pacific Journal on Human Rights and the Law*, n.2, 2010, p. 18.

[10] The fear of a «slippery slope» is shared by advocates of the slippery slope argument, «a philosophical and legal concept which states that one exception to a law is followed by more exceptions until a point is reached that would initially have been inacceptable»: PEREIRA, J., «Legalising euthanasia or assisted suicide: the illusion of safeguards and controls», *Current Oncology*, n.18, 2011, p. 40.

[11] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 (ECHR), article 1 states that the parties shall secure to *everyone* in their jurisdiction the rights […] – my own emphasis.

[12] *Ibidem,* article 14 ECHR.

meticulous procedure[13]. A few eligibility rules have already been formulated in numerous jurisdictions including the United States, the Netherlands, Canada, and Belgium among others. In order to guarantee that the RTD framework will protect vulnerable people from abuse, these rules must be combined so as to devise an eligibility template. Drawing from these jurisdictions, it seems that five common rules can easily be discerned: (1) is the suffering unbearable and the disease terminal or incurable? (2) Is the patient mentally competent at the time of deciding to terminate his life? (3) Does he voluntarily consent? (4) Would he be able to dignifiedly die but for the framework? (5) Would this particular patient suffer more than another?

1. Adult patients suffering from severe physical pain

A. Adult patients suffering from a terminal/incurable disease

First, considering that all the countries which have legalised euthanasia primarily offer it to patients with terminal diseases[14], and that people who travel to Switzerland's infamous «death clinics» are generally suffering from an incurable illness[15], adult patients (aged eighteen years old or above) suffering from terminal or incurable diseases can be legitimately perceived as the ones the RTD framework will be destined to. This is not surprising considering that these patients endure atrocious pain which provides the first justification for their inclusion into the framework. However, some opponents to euthanasia and assisted suicide argue that their suffering should not serve as a justification to allow them to access their right to die with dignity but, conversely, is so intolerable that it turns them into irrational beings incapable of reasonable thought and genuine consent. Yet, despite the fact that patients may wish to end their lives in order to alleviate suffering, there are no issues neither of competency nor of consent since physical diseases have a somatic and not a psychological origin which would justify their exclusion from the framework[16].

Moreover, since this paper's ultimate goal is to show how international human rights law could preserve the dignity of patients until the end of their lives, the key question is: would they be able to live and die in dignity if it were not for the framework? Tragically, patients explain that losing their physical capacity impaired their dignity and even deprived

[13] SCHRAMME, T., «Preventing Assistance to Die: Assessing Indirect Paternalism Regarding Voluntary Active Euthanasia and Assisted Suicide» in CHOLBI, M., VARELIUS, J., *New Directions in the Ethics of Assisted Suicide and Euthanasia*, Switzerland (Springer), 2015, p. 37.

[14] SCHURMANNS, J., *et al* «Dutch GP's experience of burden by euthanasia requests from people with dementia: a quantitative survey», *British Journal of General Practice*, n. 1, 2020, p. 2.

[15] GENTLEMAN, A., « Inside the Dignitas House », *The Guardian*, 18 November 2009. Accessible at: <https://www.theguardian.com/society/2009/nov/18/assisted-suicide-dignitas-house>. [Accessed on 22/06/2024].

[16] It is also worth noting that competency can be medically assessed.

their life of its value[17]. Many of them even report that acute dignity loss is the primary reason for resorting to euthanasia, not the relief of pain[18]. Therefore, it seems that adult patients suffering from terminal or incurable diseases would not be able to live nor die with dignity without the framework and can be reasonably considered as eligible candidates.

Finally, since Dutch law states that it is not so much a question of whether the disease is terminal or incurable (as there can be cases of misdiagnosis or possible future scientific achievements), but about how unbearable the pain is felt by the patient, the foregoing analysis could also be applied to adult patients suffering from non-terminal and non-incurable diseases. Certainly, they might also be potential eligible candidates.

B. Adult paralysed patients

One paralysed person declared: «my life would be worthless if I could not do everyday things like going to the loo on my own»[19], showing that paralysed people may experience the same level of suffering and dignity loss as terminally ill patients. In fact, some psychologists found that dignity emanates from corporality, which might explain why the loss of bodily capacity provokes this sense of living undignifiedly[20]. Objectively then, becoming paralysed seems to have a direct impact the dignity of a human being. However, this dignity loss might be accrued to those people whose livelihoods depends on their ability to use their physical capacities. For instance, for soldiers or sportspeople[21], the feeling of paralysis may be subjectively heightened. Since the origin of the disease is physical, not psychological, the same rationale as for terminally ill-patients should be adopted and adult paralysed patients could be viewed as eligible candidates to access the framework.

Furthermore, this author further suggests that paralysed people may be unjustifiably discriminated against by the current state of international law which forbids them from receiving assistance to commit suicide[22]. Truly, their incapacitating condition raises a very interesting legal issue involving the right to non-discrimination, guaranteed by article 14 of the ECHR, since an arbitrary distinction may be created between those physically capable of

[17] RODRIGUEZ PRAT, A., *et al*, «Patient Perspectives of Dignity, Autonomy, and Control at the End of Life: Systematic Review and Meta-Ethnography», *Public Library of Science (PLOS) One*, n. 3, 2016, p. 10.

[18] RAUS, K., STERCKX, S., «Euthanasia for Mental Suffering» in CHOLBI, M., VARELIUS, J., *New Directions in the Ethics of Assisted Suicide and Euthanasia*, Switzerland (Springer), 2015, p. 87.

[19] RODRIGUEZ PRATT, A., «Patient Perspectives of Dignity, Autonomy, and Control at the End of Life: Systematic Review and Meta-Ethnography», cit., p. 7.

[20] STREET, AF., KISSANE, D., «Constructions of dignity in end-of-life care», *Journal of Palliative Care*, n. 17, 2001, p. 93.

[21] See the controversial story of 23-year-old Daniel James: LAURANCE, J., «Agony of helping a son to kill himself», *The Independent,* 27 May 2011. Accessible at <https://www.independent.co.uk/life-style/health-and-families/health-news/agony-of-helping-a-son-to-kill-himself-2289710.html>. [Accessed on 19/06/2024].

[22] PEDAIN, A., «The Human Rights Dimension of the Diane Pretty Case», *Cambridge Law Journal*, n. 62, 2003, p. 197.

terminating their lives and those who are not. Some authors go so far as to claiming that this right is the «key human right to unlock judicial activism»[23]. This claim, albeit persuasive, remains limited considering that article 14 ECHR is only justiciable when another human right is preliminary affected. For this reason, this provision shall be disregarded in the forthcoming analysis on dignity-based human rights.

2. Adult patients suffering from dementia

Adult patients suffering from severe psychological pain (e.g., depressed people) are not within the ambit of this article because indeterminacy issues regarding the level and duration of their suffering as well as their competency and capacity to consent would make their admission problematic. Admitting people suffering from the medical condition of dementia in the framework is another matter. As a matter of fact, some people hold really strong beliefs, usually derived from their dignity, that if they ever were diagnosed with dementia, they would want to be euthanised as soon as the disease starts penetrating their mind. This was made clear by a patient who forcefully declared – «if you cannot even produce a thought, what is the point to live? If you were to stand there in your former self, would you want to see yourself in that position? I would not»[24].

The most frequent cause of dementia is Alzheimer's disease which prevents patients from remembering key memories and even sometimes from recognising family members. There is no doubt that this type of suffering is intolerable as the *self* is directly attacked. However, because this disease makes patients vulnerable and childlike, one has to be extra-careful before admitting people suffering dementia into the framework. What is problematic is that people afflicted with dementia might not be able to enjoy the exact same level or degree of human rights as people not suffering from the disease[25]. For instance, their right to autonomy and what it entails might have to be diminished for their own sake. However, it is really tricky to determine when this right can legally start being «reduced» and replaced by a right to «beneficence», not legally recognised as a human right under international human rights law.

Legal philosopher Dworkin defines the right to beneficence as «a right that decisions be made in someone's best interests following her / his preferences»[26]. This corresponds to the right's language of the duty of care arising from one's moral responsibility to care for one's family. This author suggests that «replacing» someone's right to autonomy by

[23] *Ibidem*, p. 197.

[24] RODRIGUEZ PRATT, A., «Patient Perspectives of Dignity, Autonomy, and Control at the End of Life: Systematic Review and Meta-Ethnography», cit., p. 7. This patient innocently introduced a philosophical debate called «the then-self versus the now-self debate» which is outside of the scope of the paper.

[25] DWORKIN, R., *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, cit., p. 219.

[26] *Ibidem,* p. 225.

a right to beneficence should only be permitted when the person in question has almost-completely lost his or her mental faculties. But how do we know when someone is truly mentally competent?

Under Dutch Law, a prime example of a country which legalised euthanasia a long time ago and got the chance to witness its repercussions, competency is assessed by «the capacity to grasp information and to choose between different options»[27]. Dworkin further elaborates by declaring that the correct competency test is done by comparing a person's choices when suffering from the disease of dementia with the choices he or she made before contracting it. In his view, if the past choices are in line with the present choices, then the right to autonomy should not be forfeited for the right to beneficence. But then again, should we really *kill* people suffering from dementia who made the decision to die when their competency was intact but who now wish to remain in this vegetative state?

If one takes an «integrity meaning» of autonomy, what ought to prevail is the patient's past competent wishes, not his contemporary incompetent desires since they do not originate from a mind capable of making autonomous decisions[28]. Theoretically then, before reaching advanced stages of the disease, a person could consent to prospectively access the framework. The problem with writing prior consent though, legally called «advance directives», is that these documents are replete with uncertainty as consent is not *fixed* but can change with time. Consent is therefore the main barrier preventing people suffering from dementia from accessing the framework. Considering that consent is one of the most important safeguards, the foregoing analysis should remain at the theoretical stage and be discarded for the sake of operationalising the RTD framework.

To sum up, since the RTD framework will be built upon dignity-based human rights, it flows that only terminally ill, unbearably physically suffering patients[29], and paralysed people should be able to access it. The case for patients suffering from dementia is trickier as consent ought to be firmly safeguarded but the general rule would be to refrain from considering them as eligible candidates. Now that the eligibility template and parameters of the RTD framework have been devised, the analysis can move on to «build» it thanks to dignity-based human rights namely: the right to life, the prohibition against degrading and inhumane treatment, and the right to private life including the right to self-determination.

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[27] MILLER, D., *et al*, « Advance euthanasia directives: a controversial case and its ethical implications», *Journal of Medical Ethics*, n. 45, 2019, p. 86.

[28] DWORKIN, R., *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, cit., p. 226.

[29] Although psychologically suffering patients (like those suffering from chronic-depression) might also have their dignity affected and might wish to access the RTD-framework, the present author is cautious about including them given possible indeterminacy issues (regarding the duration and severity of their suffering) and their possibilities of recovery which are harder to estimate for mental diseases than for physical ones.

III. BUILDING A COHERENT AND CONSISTENT RIGHT TO DIE WITH DIGNITY FRAMEWORK BASED ON DIGNITY-BASED HUMAN RIGHTS

«Dignitas» or «the worth of human beings» is a source of human rights law, but it is just as much an objective and an ideal to strive for. Dignity is both everywhere and anywhere, omnipresent and invisible. It is «an essence inherent in all human beings»[30] (intrinsic dignity) but also « something to be earned»[31] (personal dignity) especially when death approaches. It is argued that there exists yet another type of dignity, called «relational dignity», stemming from our relationships with other people which could form «a strong basis for legal reform»[32]. But how can such a theoretical concept be practically enforced to uphold the right to die?

The answer to this question is twofold: first, because the notion of «human dignity» might be «too abstract to be of any practical use»[33], it ought to be construed under existing so-called dignity-based human rights, the most appropriate ones being: the right to life (article 2 ECHR), the right to be free from degrading treatment (article 3 ECHR) and the right to private life including the right to self-determination (article 8 ECHR)[34]; second, in default of being enforceable, dignity could provide a strong normative claim. Dignity will, as a consequence, simultaneously provide a legal avenue and theoretically justify the framework.

This section will first attempt to justify and explain how dignity-based human rights could be used to build the RTD framework. First, it will analyse if the right to life and the right to be free from degrading treatment, commonly viewed as «peremptory norms», could qualify as smart legalisation avenues. It will demonstrate, through a thorough analysis of the landmark case heard by the European Court of Human Rights (ECtHR), *Pretty v UK*[35], the extent to which these two fundamental rights could support the creation of the RTD framework.

Mrs Diane Pretty was suffering from amyotrophic lateral sclerosis, most commonly known as the motor neuron disease, an incurable painful disease which leads to a loss of muscular control and eventually to complete physical demise. This illness paralyses the body but spares the brain, making the patient fully aware of the degradation of his condition. As a consequence, affected patients need assistance to commit suicide if they so wish. At an

[30] WICKS, E., «The Meaning of "Life": Dignity and the Right to Life in International Human Rights Treaties», *Human Rights Law Review*, n. 12, 2012, p. 212.

[31] ALLMARK, P., «Death with dignity», *Journal of Medical Ethics*, n. 28, 2002, p. 256.

[32] REICHSTEIN, A., «A Dignified Death for All: How a Relational Conceptualisation of Dignity Strengthens the Case for Legalising Assisted Dying in England and Wales», *Human Rights Law Review*, n. 19, 2019, p. 736.

[33] SCHACHTER, O., «Human Dignity as a Normative Concept», cit., p. 121.

[34] Article 8 ECHR epitomises numerous values such as privacy, autonomy, and self-determination.

[35] *Pretty v the United Kingdom,* Application No. 2346/02, ((ECtHR), 29 April 2002).

advanced stage of the disease, Mrs Pretty requested that her husband ended her suffering once and for all. She wrote a letter to the Director of Public Prosecutions (DPP) in the UK to guarantee that he would be granted immunity from prosecution after having helped her terminate her life. Unfortunately for Mrs Pretty, the DPP refused to provide such a guarantee and she was left with no other choice than to bring her case to low national courts until reaching the highest instance of the country at the time (the House of Lords), and later on, the European Court of Human Rights[36].

1. The foundational right to life: an obvious forum to infer the existence of the right to die with dignity?

A. Strasbourg's strict construction of the right to life under article 2 ECHR

First, the right to life appears to be an obvious legalisation avenue for the right to die. Indeed, if we have a positive right to life, we must also have a «negative right to life» taking the shape of «a right to die». This logical assumption is supported by the case *Sigurdur A. Sigurjónsson v Iceland*[37] which recognised that freedom of association encompasses a negative aspect: not only are we free to join an association, but we are also free *not* to join an association. Then, if article 11 ECHR[38] accepts the existence of a corollary, why cannot the same hold true for article 2 ECHR[39]? By way of explanation, the Strasbourg Court asserted that[40]:

> «Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die [ ], the notion of freedom implies some measure of choice as to its exercise but the right to life is phrased in different terms».

It would seem that the Court bases its reasoning on language technicalities to distinguish between a «freedom» and a «right». In that sense, it seems that while a freedom can be exercised or not, a right is imperative. So, the core of the issue is the characterisation

[36] The facts and judgment's summary of this case can be found in the Press release issued by the Registrar, «Chamber Judgment in the case of Pretty v United Kingdom», *European Court of Human Rights*, 29 April 2002. Accessible at: <https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-542432-544154%22]}>. Accessed on [23/06/2024].

[37] *Sigurdur A. Sigurjónsson v Iceland*, Application No. 16130/90 ((ECtHR), 30 June 1993).

[38] European Convention on Human Rights cit., article 11 safeguards the right to freedom of association.

[39] *Ibidem,* article 2 states that «everyone's right to life shall be protected by law. No one shall be deprived of his life *intentionally*». My own emphasis. Note how the word «intentionally» conveys the idea that no one shall be able to decide to end his life.

[40] §39 *Pretty v UK*, cit.

of the right to life as either «mandatory or discretionary»[41]. This, in turn, requires examining the object and purpose of article 2 ECHR which, according to the Court, do not preserve the interest to live an autonomous life but a more «far-reaching ideal»[42]. By way of illustration, in the case *X v Germany*[43], the then-European Commission did not hesitate to hold that the right to life granted authorisation to force-feed a prisoner against his will. Already back then, autonomy, self-determination, and even freedom from inhuman treatment were neglected to protect the «supra-foundational» right to life. This uncompromising case is still relevant today to display that the purpose and object of the right to life have always been the protection of life as an intrinsic value. Truly, the right to life has always been construed as a narrow, positive and mandatory right.

What can be further deduced is that article 2 ECHR cannot be *waived*. This is particularly distressing when the patient truly desires to surrender his right because the possibility of living a meaningful life has vanished. More than distressing, it is ironic. As Tiensuu notes, « almost all human rights are accompanied by a derogation or limitation clause to enable third parties to waive them for external concerns, yet when the right-holder himself has a personal interest to relinquish his right to life, he is forbidden to do so»[44].

B. An international evaluation around the right to life: source of inspiration for the European Court of Human Rights?

As things legally stand, it appears tough to imply a right to die with dignity from the right to life provision, at least in the European context. But, what about other contexts and other treaty bodies like the Human Rights Committee (HRC) for example? Despite a somewhat broader provision, as guaranteed by article 6 of the *International Covenant on Civil and Political Rights* (ICCPR)[45], mainly due to the presence of the word «arbitrary» which could possibly allow for assisted suicide cases' exceptions, the right to life has been understood in a similar manner by both the ECtHR and the HRC. Perhaps, this is owed to the fact that, at the time of enactment, both chose to rely on natural law theory, as suggested by Zdenkowski[46].

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[41] ZDENKOWSKI, G., «The International Covenant on Civil and Political Rights and Euthanasia», *University of New South Wales Law Journal*, n. 20, 1997, p. 183.

[42] PEDAIN, A., «The Human Rights Dimension of the Diane Pretty Case», cit., p. 188.

[43] *X v Germany*, Application No. 10565/83, (European Commission of Human Rights), 9 May 1984.

[44] TIENSUU, P., «Whose Right to What Life? Assisted Suicide and the Right to Life as a Fundamental Right», *Human Rights Law Review*, n. 15, 2015, p. 263.

[45] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999. Article 6 states that «every human being has the inherent right to life. No one shall be *arbitrarily* deprived of his life». My own emphasis.

[46] ZDENKOWSKI, G., «The International Covenant on Civil and Political Rights and Euthanasia», cit., p. 182.

In regional systems however, this foundational right is significantly broader. For instance, the Inter-American Court of Human Rights (IACtHR) included the right not to be denied access to the conditions guaranteeing a dignified existence in its right to life analysis in the *Case of the «Street Children»*.[47] Similarly, article 4 of the *African Charter on Human and Peoples' Rights* (AfCHPR or «Banjul Charter») directly connects the right to life to the integrity of the person[48]. However, the broadest meaning can be found not in regional treaties, but in the *Universal Declaration of Human Rights* (UDHR), which stresses that «the full development of an individual's personality is an aspect of his right to life»[49]. Considering that the UDHR, albeit a soft law instrument, is now arguably considered customary international law,[50] the ECtHR could be convinced to finally widen its definition so as to include dignity considerations.

C. Does the right to die with dignity already exist?

While the practice known as «withdrawal of life support» is tolerated in many Western countries (e.g., Belgium, the Netherlands), positive actions amounting to «active euthanasia» and arguably «assisted dying», are still largely frown upon[51]. However, is it really adequate to maintain such a distinction between «two almost undifferentiable practices»[52]?

Following the relatively recent phenomenal case *Lambert and Others v France*[53], the distinction between passive and active euthanasia has started to erode. In this case, the ECtHR concluded that the decision to stop Mr Lambert's artificial feeding while he was still conscious did not infringe article 2 ECHR. Although this judgment appears to be straightforward, the consequences flowing from it are less clear-cut. Even though some enthusiasts contend that this decision opens the door to acknowledging the existence of

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[47] *Case of the «Street Children» (Villagran-Morales et al) v Guatemala,* Inter-American Court of Human Rights, 19 November 1999.

[48] Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights («Banjul Charter»*), 27 June 1981. Article 4 states that «every human being shall be entitled to respect for his life and the integrity of his person».

[49] UN General Assembly, *Universal Declaration on Human Rights,* 10 December 1948, 217 A(III).

[50] In Spain it is argued that although the UDHR is certainly soft law due to the instrument that incorporates it (the Assembly only has recommendatory capacity), practice has caused it to be consolidated as a customary norm. For more reasons behind this change, see TORRECUADRADA GARCÍA-LOZANO, S., «La Declaración de las Naciones Unidas sobre los Derechos de los pueblos indígenas – antecedentes, consecuencias y perspectivas», *Revista del Instituto de Estudios Internacionales de la Universidad de Chile*, núm. 42, 2011, pp. 7-32.

[51] The European Commission of Human Rights declared that only passive euthanasia could be allowed in *Widmer v Switzerland*, Application No. 20527/92, (European Commission of Human Rights), 10 February 1993.

[52] SHARMA, B., «The end-of-life decisions – should physicians aid their patients in dying?», *Journal of Clinical Forensic Medicine*, n. 11, 2004, p. 134.

[53] *Lambert and Others v France*, Application No. 460343/14 (ECtHR), 5 June 2015.

the right to die with dignity, albeit in a disguised manner[54], others struggle to distinguish this case from any other «withdrawal of life support» cases. No matter what this judgment implies for the future, what can be said as of now is that the law makes an illusory and unfair differentiation by *arbitrarily* condoning some manners of death (e.g., death by starvation) while rejecting others (e.g., death by injection). Yet, the result (i.e., the hastening of death) is the same in both instances.

This author views the difference between passive and active euthanasia as unsustainable. Legally speaking, it does not make much sense to deem withdrawal of life support practices as legal while completely banning euthanasia practices. In one situation, consent is not given but life is unpunishably ended. In the other, consent is given but life cannot be terminated without legal retaliations. International human rights law among that, whose purpose is to guarantee individuals' maximum level of rights during their lifetime, seems to trample their desires when their end is near. A claim based on passive euthanasia law might consequently convince the ECtHR that, since the right to life is not incompatible with the practice of withdrawing of life support, there is no reason for it to be incompatible with active euthanasia.

D. The living instrument doctrine: do present day conditions allow for inferring a right to die with dignity?

If international law's attitude and passive euthanasia caselaw fail to convince the ECtHR that the right to die with dignity should be inferred from the right to life provision, a re-evaluation of present day conditions might turn out more persuasive. Despite a narrow article 2 ECHR, the right to die with dignity may still be identified through the right to life provision thanks to the methodology which enables the Court to interpret Convention rights in an evolutive manner, namely, the living instrument doctrine[55].

First, the ratification of new treaties in the European system, from the end of the twentieth century until today, has created space to build the RTD framework. First, *the Oviedo Convention*[56] was created « in the view of expanding the human rights upheld by the ECHR»[57] and focused, for the first time, more explicitly on the dignity implications in the

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[54] CIMPU, G., «Ethical and Legal Discussions Concerning Euthanasia. Aspects from ECHR Case Law», *Annals Constantin Brancusi University of Targu-Jiu, Juridical Science Series*, n. 89, 2020, p. 95.

[55] The «living instrument» doctrine stems from the case of *Tyrer v UK*, Application No.5856/72 (ECtHR), 25 April 1978, and was reaffirmed in the case of *Selmouni v France,* Application No.25803/94, (ECtHR), 28 July 1999. We should be careful that this doctrine can backfire. Not only does the ECtHR risk entering into an illegitimate policy-making exercise, it also risks following trends which do not always symbolise progress.

[56] Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,* European Treaty Series, No.164, 4 April 1997.

[57] HENDRICKS, A., «End-of-life decisions. Recent jurisprudence of the European Court of Human Rights», *ERA Forum (Journal of the Academy of European Law),* n. 19, 2019, p. 561.

medical world. Then, with the coming into force of the *EU Charter of Fundamental Rights*[58], made binding by the Lisbon Treaty in 2007[59], European member states further confirmed their desire to expand the ambit of rights protected in the European system. To this author, these legal developments show that European organs already contemplated the possibility, and possibly even intended, to build the RTD framework. The temporal ratification of these two «dignity treaties» is no coincidence and gives evidence of a great societal evolution. Certainly, without a strong impetus for the legalisation of euthanasia around the world, these treaties would not have come to light.

Besides, throughout the last three decades, society's value orientation has arguably shifted. Europe has come to endorse those beliefs most relevant to euthanasia legislation and has moved «from a materialistic to a post-materialistic value-conception»[60]. This means that the emphasis is no longer put on material protection but on personal liberty and *immaterial* lifegoals. Everything seems to go back to *Pretty v UK* as it is undeniable that this case opened people's eyes regarding the need to amend the law[61]. Strasbourg judges, well-aware of changing societal perceptions have, since then, accepted that an «individual has the right to decide by what means and at what point his life will end», but only under the context of those *procedural obligations* arising from article 8 ECHR[62].This «right to decide» should thus not been taken to mean as the right to actually terminate one's life. Significantly, the judges did not reject the possibility that states may have a positive duty to ensure that their citizens could die in dignity[63].

Therefore, the evolution of ECHR caselaw indicates that present day conditions have changed since *Pretty v UK*[64]. This is completely in line with UK domestic caselaw since the cases of *R (Purdy)*[65] and *R (Nicklinson)*[66] support the fact that today's conditions greatly differ from 2002 conditions. In the latter case, Lord Neuberger claimed that «the current attitudes to assisted suicide come close to tolerating it in certain situations»[67] and Lord

[58] European Union, *Charter of Fundamental Rights of the European Union,* 26 October 2012, 2012/C326/02.

[59] DOUGLAS-SCOTT, S., «The European Union and Human Rights after the Treaty of Lisbon», *Human Rights Law Review*, n. 11, 2011, p. 645.

[60] GRIFFITHS, J., *et al*, *Euthanasia and the Law in Europe*, cit., p. 523.

[61] MILLNS, S., «Death, Dignity, and Discrimination: The Case of *Pretty v United Kingdom*», *German Law Journal*, n. 3, 2002, §31.

[62] §5 *Haas v Switzerland,* Application No.31322/07 (ECtHR), 20 January 2011.

[63] WICKS, E., «The Supreme Court Judgment in *Nicklinson:* One Step Forward on Assisted Dying; Two Steps Back on Human Rights», *Medical Law Review*, n. 23, 2014, p. 150.

[64] PEDAIN, A., «The Human Rights Dimension of the Diane Pretty Case», cit., p. 204, reminds us that domestically the case was decided in that way because the Lords were wary of over-liberalising the law after *Airedale Trust NHS v Bland* [1993] AC 789 House of Lords.

[65] *R (on the application of Purdy) v DPP* (2009) UKHL 45. The House of Lords held that following article 8 ECHR, transposed in the Human Rights Act (HRA), the DPP is under a duty to enact a policy of to-be-considered factors when determining whether someone will be prosecuted for accompanying someone die abroad.

[66] *R (on the application of Nicklinson) v Ministry of Justice* (2014) UKSC 38.

[67] *Ibidem,* §111.

Mance even declared that recognising the right to assisted suicide «could have benefits when compared with the current blanket prohibition»[68].

To conclude, perhaps the ECtHR is slowly envisaging the possibility of a right to die with dignity. Nevertheless, considering that the right to life is viewed as the most foundational and sacred human right, it might not be the most appropriate platform to build the RTD framework. Rather the right to die with dignity could be derived from the prohibition against degrading treatment.

2. The right to die with dignity derived from the prohibition against inhuman or degrading treatment

If an argument to infer the right to die with dignity is probably doomed to fail under article 2 ECHR and would necessitate a re-evaluation of present-day conditions as well as a textual amendment, an argument that this right can be derived from the prohibition against degrading treatment might have greater chances of success especially for people suffering from intense physical pain.

A. Pretty's unfounded interpretation of article 3 ECHR

If the Strasbourg Court justifies its article 2 ECHR's reasoning by the way it has always conceived the obligations arising from the right to life, its article 3 ECHR's reasoning is, in this author's opinion, unjustifiable. Indeed, the Court claimed that the state did not have a positive obligation arising from article 3 ECHR or, in other words, that the state did not have to stop a degrading treatment. In order to come to such a conclusion, the Court argued that developing such a positive obligation would over-extend the concept of «treatment».

Article 3 ECHR is a sharp provision which does not linger on any positive obligations either in general or in special circumstances. The aim of this article is simply to punish any type of «treatment» considered as «degrading» or «inhuman», these two terms defined on a case-by-case basis. While «degrading» or «inhuman» can be broadly interpreted and may include any act one would consider prejudicial and detrimental to his or her person, the term «treatment» cannot be stretched so as to include the situation of someone wanting to die but being prevented to do so. Being left in this situation is not for now recognised as a form of «degrading treatment».

Yet, there is nothing preventing the ECHR from interpreting the phrase 'degrading treatment' in a novel way and from broadening state's obligations under Convention rights. In the past, the Court did not hesitate re-categorising torturous acts within article 3 ECHR (from degrading to inhuman treatment to torture). Most notably in *Tyrer v UK*

[68] *Ibidem,* §186.

which involved the whipping of young delinquents, and in *Selmouni v France*, which was concerned about the legality of the injuries sustained by Mr Selmouni while in police detention. In the former case, the Court extended the scope of «degrading treatment» to include «birching» and «whipping» as they directly impacted the dignity of the victims. In the latter case, the Court clarified the difference in meaning between «degrading treatment» and «torture» which was a form of «deliberate degrading and inhumane treatment causing very serious and cruel suffering»[69]. The flexibility that the Court adopted in these two cases, noteworthily thanks to the use of the living instrument doctrine, makes it clear that there is no reason for it to be judicially constrained now.

Taking this into account, it is truly alarming that the Court rejected Mrs Pretty's article 3 ECHR claim as anyone would agree that the act of being forced by a third party to endure intense suffering amounts to a form of degrading and inhuman treatment[70]. This author views the Court's *inductive* judgment (keeping strongly in mind the desired conclusion before making the analysis to reach such a conclusion), as highly problematic as it shows biased value-judgments. What is also particularly distressing is that the Court did not mention the link between the right to freedom from degrading treatment and dignity in this part of the judgment.

B. The linkage between the right to be free from degrading treatment and dignity

At the heart of the right to be free from degrading treatment lies a right to be free from undignified existence. Herring reckons that this right is «the most appropriate provision to infer the right to die with dignity»[71]. One can easily discern the legal and philosophical appeals.

Legally, article 5 of the Banjul Charter states that «every individual shall have the right to the respect of his dignity and all forms of degradation [ ] shall be prohibited». Likewise, the EU Charter's «Dignity Chapter» classifies the right to be free from inhuman or degrading treatment as a central article. In caselaw, the link between dignity and degrading treatment was acknowledged too, for example in the US by Justice Brennan in the case of *Cruzan v Director*[72]. In his opinion, forcing the corporeal body to survive for as long as possible is a disgrace towards the dignity and humanity it purported to serve[73]. As a consequence, it seems that both regional treaties and judicial opinions signal that the prohibition against degrading treatment could form a strong legal basis for the RTD framework due to its strong dignity component.

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[69] §96 *Selmouni v France,* Application No.25803/94, (ECtHR), 28 July 1999.

[70] RODLEY, N., «Integrity of the person» in MOECKLI D. *et al* (eds), *International Human Rights Law*, 3rd ed., Oxford (Oxford University Press), 2018, p. 176.

[71] HERRING, J., «Escaping the shackles of law at the end of life: *R (Nicklinson) v Ministry of Justice* [2012] EWHC 2381», *Medical Law Review*, n. 21, 2013, p. 497: «to me a case for assisted dying based on despair, agony and pain will be more persuasive than one based on choice».

[72] *Cruzan v Director, Missouri Department of Health* (1990) 497 US 261.

[73] *Ibidem,* dissenting opinion at p. 311.

Moreover, this is further reinforced by an undisputed *philosophical* linkage between dignity and degrading treatment. As professed by the human rights jurist Oscar Schachter, the theoretical concept of dignity could be used as both a moral and legal ground for objecting to degrading treatment because it is undeniable that a person in harrowing conditions is stripped away from his dignity[74]. Perhaps the judges in *Pretty v UK* contemplated this inherently true finding, but they did not see it appropriate to discuss the possibility of relying on dignity as a legal ground in their article 3 ECHR reasoning which is, to say the least, a strange oversight. Legal philosopher Jeremy Waldron argues that dignity, on top of being «a status», may be the *foundation*, if not of all human rights, of at least of the prohibition against degrading treatment. He further sets forth that dignity could ultimately be «the underlying theory which discloses the significance of human rights in relation to our being human»[75] and gives them coherence.

As a result, depending on our philosophical understanding of the notion, either dignity is closely intertwined with freedom from degrading treatment, either it is its foundation. In any case, it is more than plausible that the right to die with dignity could be inferred from article 3 ECHR. Nevertheless, since the Court does not lean towards article 3 ECHR to discuss «dignity considerations», this article may not be a proper legalisation enabler.

3. The right to die with dignity derived from the right to private life

A. The right to die with dignity derived from the right to self-determination included under the scope of the concept of private life

For understandable reasons, the Court is close-minded when it comes to relaxing foundational human rights viewed as *ius cogens* norms. However, it appears much more inclined to use qualified rights in order to create novel rights. For instance, the Court displayed some openness in *Pretty v UK* vis a vis the role article 8 ECHR (i.e., the right to private life) could play regarding end-of-life issues.

A first possible avenue would be to use the right to self-determination as guaranteed under article 8 ECHR. This right is often considered the «selling argument» for legalising the right to die with dignity because euthanasia is viewed by many as «the culmination of self-determination»[76]. Nevertheless, the importance attached to it differs from system to system. The right to self-determination is complex to define as it is a right with tremendous political resonance, a very long and complex history and many declinations. Put simply,

[74] SCHACHTER, O., «Human Dignity as a Normative Concept», *American Journal of International Law*, n. 77, 1983, p. 849.

[75] WALDRON, J., «Is Dignity the Foundation of Human Rights?» in CRUFT R. *et al.*, *Philosophical Foundations of Human Rights*, Oxford (Oxford University Press), 2015, p. 136.

[76] CORNIDES, J., «"Forcible 'euthanasia': the ECtHR's Charlie Gard Decision», EJIL! Blog of International and European Law from 14 July 2017. Accessible at: <https://www.ejiltalk.org/forcible-euthanasia-the-ecthrs-charlie-gard-decision/>. [Accessed on 20/06/2024].

there are two forms of self-determination respectively known as *external* and *internal* self-determinations. Only the latter is of relevance to end-of-life issues and is defined as a «form of autonomy».[77] In this sense, this right is close to the French Revolution conception of *individual agency* where an individual becomes free to decide his or her own fate by assuming greater control over decisions affecting him or her.

In the European Court of Human Rights, although the right to self-determination falls under the scope of article 8(1) ECHR[78], it is only superficially protected. Indeed, when the right to self-determination is confronted with other rights, like the right to life, its importance is all of a sudden starkly diminished. According to the Court, not only is there no direct link between these two rights, but the foundational right to life, usually relied upon to discern other human rights[79], is «unable to create a right to self-determination»[80]. Looking more closely at other judgments from the Strasbourg Court, it appears that the capacity of living one's sexual tendencies is considered as more intrinsic to the right to self-determination than suicide[81]. It can reasonably be posited that the right to self-determination is poorly upheld by the Strasbourg Court, especially when it clashes with other human rights.

This sits uncomfortably with the «Banjul» and EU charters which both place dignity as the bedrock of the right to self-determination. Indeed, they make connections between self-determination, dignity, and life, reflecting a more indivisible and interdependent conception of human rights. Not only is dignity comprised in every right of the EU Charter's Chapter I, it is also reaffirmed under article 25 (the rights of the elderly) to display its significance in all stages of one's life[82]. The Banjul Charter possesses an even stronger conception of the right to self-determination markedly called the «right to existence»[83]. This quick comparison attempts to show that, for now, the right to self-determination and its dignity implications are too weakly conceived by the ECtHR to infer the right to die with dignity, which could not be more at odds with the conception embedded in both the EU and the Banjul charters.

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77 MCCORQUODALE R., «Group Rights» in MOECKLI D *et al* (eds), *International Human Rights Law*, Oxford (Oxford University Press), 2018, p. 352.

78 Council of Europe, «Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence», updated on 31 August 2022.

79 QURESCHI, W., «Legal Exceptions to the Inalienable Right to Life», *University of San Francisco Law Review*, n. 53, 2019, p. 266.

80 §39 *Pretty v UK,* cit.

81 In the case *Dudgeon v United Kingdom* Application No. 7525/76 (ECtHR) 22 October 1981, the right of a homosexual male to his private sexual life was considered a core aspect of his right to self-determination, whereas in *Pretty v UK*, the right to choose the conditions of one's suicide was considered to be at the periphery of this right, cit., §61.

82 Article 25 states that «the Union respects the rights of the elderly to lead a life of dignity».

83 Article 20 states that «all peoples […] shall have the *inalienable* right to self-determination». My own emphasis. This powerful wording evokes our Western conception of the right to life. It is far from surprising that African people insist upon dignity and self-determination considering that they have endured centuries of slavery at the hands of European people.

According to Ost, it is «only once this right gains universal importance that Western states will adopt a more lenient approach to euthanasia»[84].

While the right to self-determination is not highly regarded by the ECtHR which will most likely be unconvinced to use it as an inference mechanism, the article upholding it, article 8 ECHR, has been considered «the most fertile ground to develop positive obligations»[85]. It upholds a private conception of the right to decide for one's life and might turn out being a promising provision to infer the existence of the right to die with dignity.

B. The right to die with dignity derived from the broad meaning of the concept of «private life»

Probably influenced by established caselaw which determined that «private life» is a generic and non-exhaustible term[86] and more particularly by the fact that this concept covered «the integrity of a person»[87], the ECtHR conceded that an «individual's right to decide the time and manner of his death falls within the ambit of his private life under article 8»[88]. This principle was reaffirmed in *Haas v Switzerland* showing that the Court truly is prepared to hear end-of-life requests under article 8 ECHR. In fact, this article was the most prominent in almost all euthanasia cases, whether for its substantive content or for its procedural aspects[89]. Unsurprisingly, many academics view this right as the best vehicle to infer the existence of the right to die with dignity[90]. What remains problematic though is the way the European Court of Human Rights has been using article 8(2) ECHR to limit the effect of article 8(1) ECHR.

On top of the listed circumstances allowing for an infringement of art.8(1) ECHR, art.8(2) ECHR states that an interference with art.8(1) ECHR must be prescribed by law and necessary[91]. In *Pretty v UK*, the judges argued that although art.8(1) ECHR might have

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[84] OST, S., «Book review of Griffiths J, Weyers H, Adams M, *Euthanasia and the Law in Europe* (Hart, Oxford, 2008)», *Medical Law Review*, n. 118, 2009, p. 126.

[85] BURBERGS, M., «How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born» in BREMS, E., *et al* (eds), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* Cambridge, (Cambridge University Press, 2013), pp. 315-329.

[86] *Niemetz v Germany,* Application No. 13710/88 (European Commission of Human Rights), 16 December 1992.

[87] *X and Y v The Netherlands,* Application No. 8978/80 (European Commission of Human Rights), 26 March 1985.

[88] *Pretty v UK* cit., §61-62.

[89] See *Koch v Germany*, Application No.497/09 (ECtHR), 19 July 2012.

[90] FREEMAN, M., «Death, Dying, and the Human Rights Act 1998», *Current Legal Problems*, n. 52, 1999, p. 226; MILLNS, S., «Death, Dignity, and Discrimination: The Case of *Pretty v United Kingdom*», cit., §31 «it will be upon a re-assessment of the balance of interests under article 8 that any future legal advances will be founded».

[91] Art.8(2) ECHR does not state that it must also be «proportionate» but it is a well-established principle.

been breached, the breach was justified because the ban on euthanasia was *necessary* to protect the vulnerable members of the population[92]. The blanket prohibition was also not considered disproportionate since it was maintained that it effectively sacrificed the rights of very *few* individuals for the sake of protecting society at large. Nevertheless, can it ever be right to ask some human beings to prolong their suffering in the interest of society[93]?

Numerous authors think the Court's article 8(2) ECHR reasoning was flawed. For Merkouris, «it is at this point that the judgment becomes mercurial»[94]. What is odd in his opinion, is that the Court saw a «pressing social need» to protect vulnerable people when there was nothing «pressing» in the current situation. It is indeed hard to understand how granting Mrs Pretty the liberty to kill herself would have immediately jeopardised vulnerable people's right to life. Mrs Pretty was in such a specific situation that allowing her to die was very unlikely to signal that any prospective claimant should equally be allowed to die. What is really problematic then is that the law makes no exception when it is yet completely possible to design a process which would identify those people with «exceptional cases»[95]. Jonathan Herring supports this claim when he suggests that there should be some «wiggle room in assisted suicide cases»[96]. Therefore, the current international law is, in this author's opinion, unjustifiable because we cannot ask of individuals to linger on in atrocious conditions in order to protect strangers who may, at some point, feel an undue pressure to access the RTD framework.

At last, article 8(2) ECHR's reasoning in *Pretty v UK* can be labelled a «consequentialist judgment»[97] in conflict with international human rights law's deontological normativity[98]. This final philosophical argument states that since Strasbourg judges protect collective over individual interests, they must believe that one individual ought to sacrifice himself for the greater good[99], which is in essence a *consequentialist* and utilitarian vision at odds with its Convention's promise to protect the individual above all. Even the great opponent to assisted suicide, John Keown, admitted that in *Pretty v DPP*[100] (the case Diane Pretty brought

[92] *Pretty v UK,* cit., §73-74.

[93] MILLNS, S., «Death, Dignity, and Discrimination: The Case of *Pretty v United Kingdom*», cit., §27.

[94] MERKOURIS, P., «Assisted Suicide in the Jurisprudence of the European Court of Human Rights: A Matter of Life and Death» in NEGRI, S., *et al. Self-determination, dignity and end-of-life care: regulating advance directives in international and comparative perspective* (Martinus Nijhoff Publishers), 2012, p. 116.

[95] Lady Hale's judgment in *R (Nicklinson)* cit.

[96] Herring argues that this wiggle room should take the form of the defence of necessity, HERRING, J., «Escaping the shackles of law at the end of life: *R (Nicklinson) v Ministry of Justice* [2012] EWHC 2381», cit., p. 493. However, the present author believes that using human rights as a mechanism for legal change is more powerful.

[97] The consequentialists (utilitarians) like Jeremy Bentham believe outcomes matter more than the journey.

[98] The deontologists posit that principles not based exclusively on outcomes determine what is right and wrong.

[99] This resembles the ticking time bomb example where it is morally acceptable to kill one individual to protect a greater number of people.

[100] *R (on the application of Pretty) v Director of Public* Prosecutions [2001] UKHL 61.

to the House of Lords), the Lords should have more greatly «stressed the importance of the principle of "equality-in-dignity of human beings"»[101]. If it were you, would you agree to sacrifice your values and your chance for a peaceful death for the sake of protecting strangers? The authors of *The Philosophers' Brief* clearly would not[102]:

> «We want that final act to be in accordance with our personal convictions which we have tried to respect throughout our lives; not someone else's convictions which would be imposed upon us at our most vulnerable time».

Truly, aren't the actual vulnerable people those wishing to end their lives, not some abstract potential strangers?

IV. THEORETICAL INQUIRIES INTO THE CONCEPT OF DIGNITY – THE HIDDEN NOTION OF INTERNATIONAL HUMAN RIGHTS LAW CAPABLE OF NORMATIVELY JUSTIFYING THE EXISTENCE OF THE FRAMEWORK

For some, dignity is at the heart of what living a «meaningful life» entails. For others, it is a sub-aspect of a more holistic life. This final philosophical section will introduce two opposed philosophical points of view on the role dignity should play in assisted suicide cases in order to challenge the European Court of Human Rights' philosophical conception of dignity in relation to the right to life.

1. A misplaced Kantian meaning of dignity applied by the European Court of Human Rights in its interpretation of the right to life

A. Kant's conception of dignity as wholly intrinsic

The first conception is given by Kant when he makes the premise that « respecting human dignity means treating every human being as an end not a means »[103]. In common language, this means that individuals cannot be used in a way contradictory to their dignity. From this premise flows the idea that dignity is inherent in every human being, that it is not

[101] KEOWN, J., «No Right to Assisted Suicide», *Cambridge Law Journal*, n. 61, 2002, p. 10.

[102] DWORKIN, R., *et al*. «Suicide assisté: le mémoire des philosophes», cit., p. 21. Own translation: «nous voulons que ce dernier acte soit conforme à nos convictions personnelles, aux convictions que nous avons tenté de respecter au cours de notre vie, et non aux convictions d'autrui qui nous seraient imposées au moment où nous sommes le plus vulnérables».

[103] SCHACHTER, O., « Human Dignity as a Normative Concept », cit., p. 849. Refer to the original works of Kant: KANT, I., *Groundword for Metaphysics of Moral* (trans. And ed. Wood), 2002; KANT, I., *Critique of Practical Reason* (trans. Gregor), 1997; KANT, I., *Lectures on Ethics* (trans. And ed. Heath and Schneewind), 1997.

personal but wholly intrinsic, and that we are under a duty to respect it. To arrive at such a conclusion, Kant relies on his theory that dignity is «based on the metaphysical significance of our autonomous *moral capacity*»[104]. Indeed, for Kant, morality is absolute and ought to be the ultimate end of every individual's existence. Therefore, morality precedes dignity, and in order to preserve the latter, human beings must preliminarily preserve the former. But how can morality be preserved? Kant suggests that the only way to keep our moral virtue is to «free ourselves from material desires»[105]; but he admits that conscious individuals might not succeed in putting their material desires aside and therefore advances the existence of a «subject beyond the subject»[106] i.e., a «moral subject», charged of protecting our morality and dignity. This vision of dignity as merely a bridge between the conscious individual and his morality is the one put forward by Kant when asked what role dignity plays in life.

How would his philosophy apply to real life situations? Precisely how would Kant react to the controversial «dwarf tossing» case heard by the Human Rights Committee[107]? And to assisted suicide cases? Regarding the dwarf tossing case, where the claimants argued that they should be allowed to renounce their dignity in return for money, Kant would largely disapprove their claim as he views dignity as wholly intrinsic and not as a personal value. He would also state that the financial gain that they sought constituted «material desires» which prevented morality from being the absolute end and impaired their dignity. Curiously, this situation is not so different from that of people wishing to end their lives. Equally driven by «material desires», when these human beings make the decision to terminate their lives, their ultimate aim is not to reach absolute morality at all. Their terminal act does just the contrary since it deprives them of their moral autonomous capacity by putting an end to their existence, which should not, according to Kant, ever be permitted. Consequently, Kant would be strongly opposed to assisted suicide, which he would view as an affront to morality and dignity. Despite admitting that the conscious individual can reasonably desire to end his life if he finds himself in terrible conditions, he believes that this individual must resist this urge by invoking his moral subject and by making him the ruler of ethical decisions.

B. Montaigne and Dworkin's conception of dignity as personal

The second conception is given by Montaigne and Dworkin who, as opposed to Kant, doubt that the conscious individual can ever be detached from the moral subject and question the existence of the latter. Indeed, if the moral subject blocks the conscious individual from ending his suffering, then the «individual as a whole is enslaved by the concept of moral

[104] WALDRON, J., «Is Dignity the Foundation of Human Rights?», cit., p. 136. My own emphasis.

[105] TIENSUU, P., «Whose Right to What Life? Assisted Suicide and the Right to Life as a Fundamental Right», cit., p. 269.

[106] *Ibidem,* p. 271.

[107] *Manuel Wackenheim v France*, Communication No. 854, Human Rights Committee, 15 July 2002.

agency»[108], which is far from desirable. This concept along with the forcible «subject abstraction» requested by Kant are thus normatively improper in the euthanasia context. Not only do Montaigne and Dworkin query the existence of Kant's moral subject but also challenge his claim that dignity is wholly intrinsic. By asserting that in reality dignity is primarily attached to the conscious subject, they prove that it must possess *personal* ramifications.

Besides, if the idea that dignity means treating human beings as an end not as a means is true, it is equally true that dignity is the *mean* to lead a meaningful life according to our own values. These values are ineluctably subjective and form, in Dworkin's words, our *critical interests*[109]. But in order to comprehend what our critical interests are, we first need to be free. Our critical interests must then obviously derive from our right to self-determination, which is much more basic than Kant initially imagined[110]. Therefore, Montaigne and Dworkin rebut Kant's philosophical theories by declaring that the moral subject is a fallacy and that dignity is not wholly intrinsic but originates from the conscious subject's critical interests which themselves emanate from the individual's self-determination.

C. The European Court of Human Rights' Kantian Philosophy

Now that we have opposed Kant's dignity based on the moral capacity of the abstract subject to Montaigne and Dworkin's dignity based on the critical interests of the conscious individual, we must evaluate how these philosophical theories influenced the European Court of Human Rights.

In *Pretty v UK*, the Court seems to have used the same «abstraction reasoning» as Kant did. Although the Court shows empathy to the claimant and her condition, the judgment's wording detaches from the lived reality of the particular individual to attach instead to the collectivity made of all the vulnerable persons who are, or may one day be, in Mrs Pretty's shoes. This collective-based approach of the Court is, in this author's opinion, rather odd as the European Court generally tends to favour an individual-based approach where the individual prevails over the collective. Perhaps this can be attributed to the presence of a vulnerable group in this case corresponding to all the persons who would wish, for physical or psychological reasons, to access the RTD framework. Indeed, the emergence of the vulnerable group concept in the Court's jurisprudence, especially in cultural identity

[108] TIENSUU, P., «Whose Right to What Life? Assisted Suicide and the Right to Life as a Fundamental Right», cit., p. 277. Refer to the original works of Montaigne: MONTAIGNE, M., *Essais Tome II* (ed. Storwski), 1909; MONTAIGNE, M., *Essais Tome I* (ed. Storwski), 1906.

[109] DWORKIN, R., *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, cit., p. 201.

[110] DWORKIN, R., *et al*. «Suicide assisté: le mémoire des philosophes», *Raisons politiques*, n. 29, 2003, p. 40 (*translation: Assisted suicide: The Philosophers' Brief*).

cases[111], is telling on its final verdict. The Court seems to have been driven by a desire to protect vulnerable individuals in a parenting and benevolent manner. Yet, this benevolence is not what Mrs Pretty initially wished for and is on the contrary, telling on the abstraction method it resorted to in order to retreat from Mrs Pretty's individuality. Truly, the Court took the opportunity it was offered by Mrs Pretty's unfortunate complaint to entrench previously established Western conceptions on the sanctity of human life.

Besides, as Tiensuu convincingly affirmed, «if we can resort to the right to life to oppose the autonomous choices of a human being regarding his own life, as the Court did, then it must regard life as «a mere *abstraction* of existence»[112]. In the same way as Kant sees material desires as obstacles to make morality absolute, the Court sees the right to self-determination as a hindrance to the right to life and asks individuals to forsake their personal values. The Court seems to be asking individuals to act as *moral subjects* and presumes the existence of a subject beyond the subject. In this light, it is not surprising that it chose not to preserve Mrs Pretty's critical interests and preferred protecting the «objective dignity of all humanity above her personal dignity»[113].

Therefore, it can reasonably be concluded that the ECtHR's jurisprudence displays unmistakable similarities to Kantian philosophy which, in this author's view, misplaces the role of dignity in life. What is erroneous in both Kant and the Court's philosophies though is the over-emphasis on the inherence of dignity and life accompanied by the total overlook of the *personal* values we deliberately attach to them. Yes, life is intrinsic but protecting it for the sake of protecting an *abstract* concept which we (others) value as sacred is disrespectful towards the personal value one individual attaches to his own life.

2. Rebutting «sanctity of life» arguments

Sanctity of life advocates submit that life is inherently sacred. This conception can be divided into two conceptualisations, one religious aligned with natural law theory, and one secular deriving from legal positivism. The religious version of this conception is rooted in the notion of the *Imago Dei* which is the belief that God's image is imprinted on all humans and that removing life erases that image[114].

[111] PERONI, L., TIMMER, A., «Vulnerable Groups: The promise of an emerging concept in European Human Rights Convention law», *International Journal of Constitutional Law,* n.11, 2013, p. 1071.

[112] TIENSUU, P., «Whose Right to What Life? Assisted Suicide and the Right to Life as a Fundamental Right», cit., p. 253. My own emphasis.

[113] MILLNS, S., «Death, Dignity, and Discrimination: The Case of *Pretty v United Kingdom*», cit., §8.

[114] FOSTER, C., *Medical Law: A Very Short Introduction,* Oxford (Oxford University Press), 2013, p. 8.

A. Natural law vs legal positivism – Rebutting religious sanctity of life argument

First, the colossal theoretical conflict between natural law theory and legal positivism arises in the debate surrounding the legalisation of euthanasia. Perhaps the greatest challenge is not to imply this right via existing human rights but to theoretically reconcile it with the existent set of natural norms. Although natural law theory is more widely praised and was entrenched in human rights law, this author argues that it has become obsolete in relation to some issues including the legalisation of the right to die with dignity, which can only be justified by legal positivism.

In short, natural law theory points to the validity of human rights law in relation to an external moral code. Crucially, it posits that principles established by God are discoverable by reason and are absolute. Legal positivism, on the other hand, endorses the belief that «reality is relative to the knowing subject and the absolute is beyond human experience»[115]. Contrary to natural law theory, it states that «man can never truly know the essence of things»[116]. Surely, proponents of natural law theory's supported beliefs that our life is not ours but *belongs* to a higher order (God or nature)[117], contradict the values conveyed by euthanasia (i.e., self-determination and autonomy). However, legally speaking it is the *individual* who has a right to life, which means that life should be viewed as granted *to* an individual, not as God's property or anyone else's. Maintaining the belief that there exists a relation of subordination between an individual and a life arising from *his* existence is also poorly credible in our secular society and our positive national legal systems[118].

Besides, not only is the natural law theory's basis of the right to life outdated in the modern liberal society, it is also not uniformly applied. Indeed, under natural law theory «killing oneself frustrates nature's investment in human life»[119]. But isn't nature already «cheated when plastic keeps a heart beating»[120] or when heavy medication is ingested to remain alive? We are already allowed to interfere with life and thus to act as «God» ourselves. Man already is the arbiter of life and the law already is positivist. Those arguing that the RTD framework would be inconsistent with natural law theory should thus be reassured. Their concern that nature prevents people from killing themselves is misled: it is

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[115] As explained by leading legal positivist Hans Kelsen in 1920. See POTTER, A., «Will the Right to Die Become a License to Kill – The Growth of Euthanasia in America», *The Journal of Legislation*, n. 19, 1993, p. 56.

[116] POTTER, A., «Will the Right to Die Become a License to Kill – The Growth of Euthanasia in America», cit., p. 56.

[117] TIENSUU, P., «Whose Right to What Life? Assisted Suicide and the Right to Life as a Fundamental Right», cit., p. 268.

[118] *Ibidem,* p. 275.

[119] DWORKIN, R., *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, cit., p. 214.

[120] *Ibidem,* p. 215.

the *law* which binds us and needs to be frustrated. The response to euthanasia and assisted suicide will thus imperatively need to be embraced in legal positivism theory.

B. Rebutting secular sanctity of life arguments

Second, the secular account of the sanctity of life argument is prevalent too, notably in courts. This argument holds, in the same vein as the religious version, that the RTD framework will in the long run demean the concept of sanctity of life and lead to a devaluation of life[121]. This brings up a difficult philosophical question about the value of life which this author does not pretend to answer in a few lines. It will just be posited that, in the same way as our critical interests and our perception of dignity are subjective, value in life cannot be universally quantified.

In the end-of-life contexts «people will hold separate views on what devalues life»[122]. For stoics[123] and nihilists[124], the option to commit suicide as soon as the prospect of a life without dignity comes into sight is greatly preferable to lingering on until complete self-disintegration. Yet, for moralists and religious people, the need to make the most of what life has to offer eclipses any dignity loss. What we must ascertain is that people accessing the RTD framework will do so because they personally no longer value their lives. Therefore, although it might be impossible to avoid demeaning the *concept* of sanctity of human life, this notion could be used in reverse[125]: the sanctity of human life only has meaning when life is sacred in the eyes of its owner. The creation of the framework will thus not demean the sanctity of human life, but on the contrary, will contribute to make all lives sacred.

Furthermore, the second conception of the empirical slippery slope argument (the first one being the logical slippery slope argument),[126] referred to as the «legal and moral change» version, similarly highlights the risk of *moral erosion* subsequent to the framework implementation. Although the sanctity of life's aspect of this argument has just been addressed, one question is still pending. Will the RTD framework end up devaluing, if not all, at least *vulnerable* peoples' lives?

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[121] SHARMA, B., «The end-of-life decisions – should physicians aid their patients in dying?», cit., p. 134.

[122] Judge McLachlin in *Rodriguez v British Columbia (Attorney General)* (1993) 107 DLR.

[123] Seneca personifies this philosophy, as quoted in SHARMA, B., «The end-of-life decisions – should physicians aid their patients in dying?», cit., p. 135 – «if I must suffer without hope, I will depart, not because of the fear of the pain but because it prevents all for which I would live».

[124] Nietzsche declared, as quoted in DWORKIN, R., *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, cit., p. 212: «I want to die proudly when it is no longer possible to live proudly».

[125] DWORKIN, R., *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, cit., p. 216.

[126] LILLEHAMMER, H., «Voluntary Euthanasia and the Logical Slippery Slope Argument», *Cambridge Law Journal*, n. 61, 2002, p. 545-550.

Downie warned that the danger of accepting one life as not worth living is to deem other lives, especially vulnerable people's lives, as not worth living too[127]. Philosophically and psychologically, this is far from absurd. Williams explains that «when many steps have been taken, the initial objections to a rule now seem misplaced. The cumulative process has altered the perceptions of that process»[128]. Why then, did the legalisation of euthanasia in the Netherlands increase doctors' «desire not to endorse morally suspect practices»[129]? And why, if life really was devalued, did suicide rates not rise after legalisation[130]?

Perhaps it is due to man's moral judgment which, without too much surprise, did not drastically change after legalisation. John Griffiths brilliantly stresses that believing the RTD framework will change societal and legal attitudes towards death and the value of life is a «distrust of future generations»[131]. He further pushes us to picture our current modern society if our moral choices had not evolved since the eighteenth century[132]. Despite the speculative nature of this subsequent claim, it is quite likely that with fixed moral choices would come fixed societal norms implying that women, black people, and homosexual people would still be given lesser rights than Western white heterosexual men.

Nonetheless, no matter how powerful this declaration is, cynics will always find a way to reply that, considering that man or woman is inherently bad, he or she should never be authorised to create exceptions that might devalue life in any way. In fact, Potter claims that man or woman will end up using the RTD framework as a way to get rid of vulnerable people, «very much like Nazis» «euthanasia programs». She reminds us that the concept of death with dignity thrusted their genocide program which started with the idea that some lives were not as worthy of being lived as others[133]. She then dares to connect society's acceptance of such attitudes in the past to today's euthanasia proponents' held beliefs[134]. Her claim, albeit emotionally strong, falls short of recognising the key difference between the Nazis and euthanasia advocates. As Downie indicates, the Nazi program «did not slide but was galvanised from the beginning by a fascist ideology»[135]. What they ended up doing

[127] DOWNIE, J., *Dying Justice: A Case for Decriminalising Euthanasia and Assisted Suicide in Canada*, Toronto (University of Toronto Press), 2004, p. 106.

[128] WILLIAMS, B., «Which slopes are slippery?» in WILLIAMS B (ed), *Making Sense of Humanity and Other Philosophical Papers*, Cambridge (Cambridge University Press), 1995, p. 218.

[129] SMITH, S., «Evidence for the Practical Slippery Slope in the Debate on Physician-Assisted Suicide and Euthanasia», *Medical Law Review*, n. 13, 2005, p. 27.

[130] *Ibidem,* p. 27.

[131] GRIFFITHS, J., *et al*, *Euthanasia and the Law in Europe*, cit., p. 519.

[132] *Ibidem,* p. 519.

[133] POTTER, A., «Will the Right to Die Become a License to Kill – The Growth of Euthanasia in America», cit., p. 32.

[134] *Ibidem,* p. 32.

[135] DOWNIE, J., *Dying Justice: A Case for Decriminalising Euthanasia and Assisted Suicide in Canada*, cit., p. 108.

should rather be seen as «deterrence that the slippage will materialise»[136] because we are now more aware than ever of the dangers resulting from devaluing life.

To conclude, the theory of dignity provides a strong normative claim for the enforcement of the RTD framework. By relying on Montaigne and Dworkin's critical interests and by using legal positivism theory, the paper demonstrated that man or woman is not subject neither to his or her morality nor to nature or God, but only to his or her own values and to the law created by men and women for men and women. The chances of creating an empirical slippery slope and demeaning the value of life are dim provided that juridical safeguards are in place to protect vulnerable people.

V. CONCLUSION

Recognising the implicit right of human beings to end their lives with dignity is inevitable. If the right to life under article 2 ECHR is tough to imagine as an embedment of self-determination, so-called dignity-based rights such as the prohibition against degrading treatment (article.3 ECHR) and the right to private life (article.8 ECHR) could infer the existence of the right to die with dignity and form the basis of its framework. The ever-increasing number of euthanasia cases, the widely tolerated practice of withdrawing of life support, and the shifting value-orientation of society will ineluctably oblige the European Court of Human Rights to build such a structure.

In practice, the RTD framework will enable an eligible applicant to rely on one or more dignity-based human rights in front of human rights courts provided she/he is a national of a country party to at least one of the treaties purporting such rights. The courts will then decide on a case-by-case basis while keeping in mind that member states have a wide margin of appreciation to implement this right in accordance with their legal traditions. This means that, depending on the legal context and the case merits, one person should invoke the right to be free from degrading treatment (art.3 ECHR) while another should rather invoke the right to privacy (art.8 ECHR).

Although the Court has showed reluctance to uphold the right to die with dignity when it was opposed to the foundational right to life, a claimant should be comforted that the transition from an entrenched natural law theory conception of life and death to a more positivistic secular perception is underway[137]. Indeed, in the 2015 case *Lambert and Others v France*, the Court finally decided to put critical interests and quality of life above its sacredness[138]. States and vulnerable people should also be reassured that every case going

[136] *Ibidem,* cit., p. 108.

[137] POTTER, A., «Will the Right to Die Become a License to Kill – The Growth of Euthanasia in America», cit., p. 32.

[138] CIMPU, G., «Ethical and Legal Discussions Concerning Euthanasia. Aspects from ECHR Case Law», cit., p. 99.

through the framework will be judicially reviewed by a panel of legal experts. Perhaps in the future, regional review committees could relieve the courts from this burdensome exercise, but for now caution is in order, as demonstrated by territories which have recently legislated in favour of euthanasia like Spain in 2021[139].

Nevertheless, we should not fall into the opposite trap which would make it so hard to access the RTD framework that it, in effect, becomes inoperative. A few years after implementation, new evidence for the empirical slippery slope could be found and the legal situation may have to be reassessed. In the present though, it is safe to say the eligibility criteria and safeguards will only include a very low number of candidates. Contrary to highly hypothetical slippery slope arguments, the argument that the creation of the right to die with dignity framework will uplift the dignity of human beings until the end of their lives while protecting vulnerable people from abuse has more chances of success.

At last, the act of dying is undignified per se. Only can death gain meaning once an individual attaches his personal dignity to it[140]. In the end, the phrase «dying with dignity» is a subjective, blurry and idolised concept highly dependent on the values one upholds during his lifetime. For some people, a dignified death will have to be earned in the Roman way by exhibiting deeply held convictions and great courage on the deathbed; for others, the phrase is just a meaningless oxymoron[141]. Certainly, life must end in a way one views as appropriate, humane and dignified, and if human rights law needs to be amended to guarantee everyone a personal dignified death, the whole body of natural-derived norms imperatively ought to be modified so as to finally comply with international human rights law's promise to protect every human being.

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[139] With sixty-eight safeguards, the Victorian government in Australia boasts that «Victorian legislation is the safest in the world». MCDOUGALL, R., PRATT, B., «Too much safety? Safeguards and equal access in the context of voluntary assisted dying legislation», *BMC Medical Ethics*, n. 21, 2020, p. 3.

[140] ALLMARK, P., «Death with dignity», cit., p. 1.

[141] *Ibidem,* cit., p. 1.

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