

²⁸ Постанова від 16 квітня 2008 р., номер акта К 40/07.

²⁹ Постанова від 15 січня 2009 р., номер акта К 45/07.

Резюме

Шмит А. Проблематика правосуддя як предмета петицій до сейму Республіки Польща VIII скликання.

Дана стаття присвячена огляду законодавчого порядку регулювання звернення у формі петицій до відповідної комісії Сейму Республіки Польща та проаналізовано зміст багатьох петицій, поданих з метою вдосконалення положень законодавства про судоустрій та організацію роботи суддів, зроблено аналіз результатів їх розгляду.

Ключові слова: права людини і громадянина, петиція, суб'єкт петиції, Сейм, Комісія у справах петицій, судоустрій, відповідальність суддів.

Резюме

Шмит А. Проблематика правосудия как предмета петиций в Сейм Республики Польша VIII созыва.

Данная статья посвящена обзору законодательного порядка регулирования обращения в форме петиций в соответствующую комиссию Сейма Республики Польша и проанализировано содержание многих петиций, поданных с целью совершенствования положений законодательства о судоустройстве и организации работы судей. В статье сделан анализ результатов рассмотрения данных петиций.

Ключевые слова: права человека и гражданина, петиция, субъект петиции, Сейм, Комиссия по делам петиций, судоустройство, ответственность судей.

Summary

Schmitz A. Justice as a subject of petitions to the Sejm of the Republic of Poland of VIIIth convocation.

This article is devoted to the review of the legislative procedure for the regulation of appeal in the form of petitions to the confessional commission of the Sejm of the Republic of Poland and to the analysis of the content of many petitions, submitted with the aim to improve the provisions of the legislation on the judicial system and the organization of work of judges. The legal analysis of the results of their consideration were made herein.

Key words: human rights and citizen rights, petition, subject of petition, the Sejm, Petitions Committee, judicial system, judges' liability.

P. BUZÁS

*Péter Buzás**

(BIO)ETHICAL NORMS WITHIN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS CONCERNING ASSISTED SUICIDE

Introduction

In cases raising sensitive ethical and legal issues, such as assisted suicide, the moral interpretation of human rights bears great importance.¹ A purely rights-based approach would run “the risk of truncating or impoverishing our understanding of morality, because rights cannot account for the moral significance of motives, supererogatory actions, virtues, and the like”.² On the other hand, a morally grounded interpretation would result in a more nuanced decision that strikes a fair balance between the competing private and public interests.³

This article examines the ethical and bioethical norms referred to by the European Court of Human Rights (ECtHR) in its jurisprudence concerning assisted suicide, and the way these moral commands, that constitute an integral part of the relevant provisions of the European Convention of Human Rights (ECHR), are enforced by the Strasbourg court. Chapter 1 defines the term assisted suicide. Chapter 2 presents the two main moral norms, sanctity of human life and respect for autonomy, and the related moral arguments applicable to assisted suicide. Chapter 3 analyzes the relevant provisions of the ECHR that serve as the intermediary between the previous moral norms and the language of law. Finally, Chapter 4 and 5 examine the enforcement of the moral norms within the case-law of the ECtHR regarding assisted suicide. The article concludes that the Strasbourg court has developed a delicate reasoning in which both the sanctity of human life and respect for autonomy is taken into account in order to strike a fair balance between these competing private and public interests.

© P. Buzás, 2017

* *Péter Buzás* JD is currently the head of Unit of Freedom of Information at the National Authority for Data Protection and Freedom of Information. His professional expertise covers various aspects of the information rights. He has been a lecturer at ELTE Institute of Postgraduate Legal Studies since 2014. He teaches several courses on data protection, data security, and freedom of information. He is currently enrolled with his Ph.D. studies. His field of interest is the intersection of human rights and bioethics within the jurisprudence of the ECtHR. Mr. Buzás is the author of several academic articles and presentations on bioethics and human rights, data protection, and freedom of information.

1. The Notion of Assisted Suicide

In 2003, a survey on the regulation of euthanasia showed that there is a widespread confusion among the member states of the Council of Europe regarding the definition of different end-of-life treatments.⁴ Academics, legislators and courts usually use “assisted suicide” as a broad term covering several distinct interventions. Therefore, assisted suicide may be defined in both a narrow and a broad sense.

The narrow concept of the term means “aiding and abetting suicide”. Assisted suicide traditionally refers to cases where a medical professional provides to the person concerned the necessary means for and information on suicide, or both.⁵ For instance, the physician may write the prescription necessary for obtaining a lethal substance. The individual who intends to end his or her life then obtains the substance and administers it without further assistance. Therefore, death is caused directly by the actions of the person concerned, not the physician.

The broad concept of assisted suicide covers cases in which individuals intend to end their lives with the active assistance of a medical professional or a family member, for instance via euthanasia. The person concerned remains usually passive during the intervention due to medical or other conditions. Therefore, death is caused directly by the actions of the third party.⁶

Examples of both the narrow and broad concepts of assisted suicide may be found in the jurisprudence of the ECtHR. The cases of *R.*,⁷ *Pretty*,⁸ and *Koch*⁹ concern assisted suicide in the broad sense. On the other hand, the Strasbourg court dealt with the “traditional” concept of this intervention in the *Haas*¹⁰ and the *Gross*¹¹ judgments.

2. (Bio)ethics of Assisted Suicide

Within the academic discourse, the same moral arguments are referred to in connection with assisted suicide in the narrow sense as well as the broad concept. From a moral standpoint, there is no difference between providing information or other assistance to the person willing to commit suicide, and to directly being involved with the death of a person upon his or her request.¹² This conclusion is further supported by the fact that the ECtHR does not make a distinction between the two concepts in its judgments. Thus, the court adjudicates each case along the same moral – and legal – arguments. In this respect, the two most frequently applied moral norms are the sanctity of human life and respect for autonomy.

According to the principle of sanctity of human life, the life of a human being is absolute, valuable regardless of its quality, and inviolable.¹³ This doctrine prohibits any acts resulting in the death of an individual either directly or indirectly. In general, assisted suicide violates the sanctity of human life since active or passive assistance of a physician or a family member contributes to the death of the person concerned.¹⁴ Opposition to assisted suicide on this ground is further supported by the so-called “slippery slope” argument. The latter assumes that, due to basic human nature and attributes of society, decriminalization of assisted suicide inevitably leads to the exposition of members of vulnerable groups to serious abuses, such as involuntary euthanasia.¹⁵

Respect for autonomy means the recognition of the value and the decision-making capacity of human beings, and the facilitation of autonomous actions for them.¹⁶ This principle compels everyone to respect the decisions and acts of the individual. On the other hand, there is an obligation of the state to provide for an environment in which each individual may decide and act autonomously. Therefore, when the quality of one’s life significantly deteriorates due to medical conditions or old age, the individual may freely choose the time and the manner of his or her own death.¹⁷ In this connection, proponents of respect for autonomy recognized that the approach of modern societies towards death and suicide had significantly changed. This led to a shift in moral paradigm, the emergence of the “morality of self-fulfillment”, according to which everyone shall have the possibility to pursue a life of self-fulfillment even if it means dangerous or otherwise morally reproachable choices.¹⁸

The comparative analysis carried out by the ECtHR showed that assisted suicide is illegal in 36 out of 42 member states of the Council of Europe. Only four states “allow medical practitioners to prescribe lethal drugs”.¹⁹ Therefore, sanctity of human life may be considered the prevalent moral norm among the majority of European states. With their rather autonomy-driven legislations, the Netherlands, Belgium, Luxemburg and Switzerland represent the minority approach.

3. Relevant Provisions of the ECHR

It is the task of the ECtHR to interpret and apply the provisions of the ECHR to ensure that member states comply with their respective obligations arising from the convention.²⁰ In so doing, it takes into account the relevant moral norms and arguments concerning the case at hand to uncover the moral truths behind these rights. However, the Strasbourg court may only refer to these moral rules indirectly, e.g. in connection with the rights and freedoms set out in the ECHR. Consequently, it is necessary to outline the relevant provisions in order to examine the enforcement of the principles of sanctity of human rights and respect for autonomy within the case-law of the ECtHR.

Sanctity of human life is inherent in the right to life. According to paragraph 1 of Article 2 of the ECHR, “[e]veryone’s right to life shall be protected by law”. This provision enshrines one of the basic values of a democratic society that allows no derogation even in time of war or other public emergency threatening the life of the nation under Article 15 of the ECHR.²¹ States are therefore obligated to refrain from intentional and unlawful deprivation of life. In *Osman v. the United Kingdom*, the ECtHR held that Article 2 also implies a positive obligation that compels states to take preventive measures in order to protect the life of an individual.²² Moreover, the scope of positive obligations extends to active measures as well, as the Strasbourg court stated in *Keenan*.²³ Therefore, if

the authorities knew or ought to have known that the life of the individual had been at real and immediate risk, they might be held responsible for the violation of the positive aspects of the right to life.²⁴

Paragraph 1 of Article 8 of the ECHR safeguards the four basic aspects of personal autonomy by declaring that “[e]veryone has the right to respect for his private and family life, his home and his correspondence”.²⁵ According to the established jurisprudence, this provision safeguards the autonomous individual against arbitrary intrusion into their privacy from the state. Authorities may only interfere with the exercise of the right to respect for private life in accordance with the law, when it is necessary in a democratic society in the legitimate interests set out in Paragraph 2 of Article 8.²⁶ The right to respect for private life also implies certain positive obligations. This positive aspect inherent in Article 8 compels the states to take the necessary measures to ensure the “effective” respect for private life.²⁷

Although sanctity of human life and respect for autonomy are primarily safeguarded by Articles 2 and 8 of the ECHR, these moral norms are not exclusively connected to these provisions. According to the jurisprudence of the ECtHR, autonomy may be referred to in connection with the right to life, as well as sanctity of human life may be taken into account regarding the right to respect for private life. These moral norms are therefore interconnected in the jurisprudence of the Strasbourg court as well.

4. Sanctity of Human Life in the Case-Law concerning Assisted Suicide

Although indirectly, the first reference to the principle of sanctity of human life may be found in the very first decision concerning assisted suicide. As the member of the British Voluntary Euthanasia Society, the applicant in *R. v. the United Kingdom* had assisted several individuals to commit suicide. For this reason, Nicholas Reed was sentenced to 18 months imprisonment. He lodged a complaint with the European Commission of Human Rights (EComHR) complaining that his conviction had constituted a violation of his right to respect for private life. In its decision, the EComHR found that “the acts aiding, abetting, counselling or procuring suicide are excluded from the concept of privacy by virtue of their trespass on the *public interest of protecting life* [...]”.²⁸ Consequently, since the acts committed by the applicant are contrary to the sanctity of human life, there had been no unlawful interference with the exercise of his right to respect for private life.

The first judgment in which the ECtHR applied the doctrine was *Pretty v. the United Kingdom*. The 43-year-old applicant suffered from a progressive neuro-degenerative disease that led to paralysis, after which Diane Pretty had a very poor life expectancy of weeks or months. For this reason, she decided to end her life in a painless and dignified manner, with the help of her husband. Therefore, she requested that her husband be exempted from criminal liability in case he assists her in committing suicide. However, neither the authorities, nor the English courts had granted her request.

Diane Pretty lodged a complaint with the ECtHR alleging that the prohibition in English law on assisting suicide infringed her rights under the ECHR. Firstly, the applicant argued before the Strasbourg court that granting her request to end her life with the help of her husband would not violate her right to life, otherwise decriminalization of assisted suicide in certain states would be contrary to the ECHR. Secondly, according to Diane Pretty, Article 2 protects not only the right to life, but the right to die as well. And thirdly, she claimed that under Article 8 she had a right to decide when and how to die. Consequently, the British authorities’ refusal to grant her request had interfered with her right to respect for private life.

As to the alleged violation of the applicant’s right to life, the Strasbourg court – recalling its relevant case-law – found that Article 2 of the ECHR is unconcerned with the issue of quality of human life by way of its clear wording. Thus the relevant provision of the ECHR “cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die”.²⁹ Therefore, an individual’s choice to commit suicide is not protected by Article 2.

It is clear from the reasoning of the ECtHR that the issue of assisted suicide may not be referred to in connection with the right to life. However, recognition of the absolute priority of sanctity of human life over respect for autonomy would have rendered the decriminalization of assisted suicide contrary to the ECHR. Therefore, the Strasbourg court emphasized that “conflicting considerations of personal freedom and the public interest [...] can only be resolved on examination of the concrete circumstances of the case”, and as such it implies the interpretation of other provisions, especially Article 8 of the ECHR.³⁰

The ECtHR – without in any way “negating the principle of *sanctity of life*” – found that the notion of quality of life gains significance under the right to respect for private life.³¹ However, personal autonomy shall be balanced against public health and safety considerations: when a case involves more serious harm to the individual and the public, autonomy may be lawfully limited. In this respect, the Strasbourg court accepted the slippery slope argument referred by the British Government. It held that “[c]lear risks of abuse do exist” concerning assisted suicide. Therefore, the purpose of prohibition of the intervention under English law was to “safeguard life by *protecting the weak and vulnerable* and especially those who are not in a condition to take informed decisions”.³²

Although the ECtHR found no violation of the applicant’s rights, there are two important consequences of the judgment concerning the further jurisprudence. Firstly, the ECtHR has not since adjudicated cases concerning assisted suicide in accordance with Article 2 of the ECHR. Secondly, and more importantly, the conflict between the competing moral norms has been taken into account under the right to respect for private life. This has paved the way for a more nuanced approach towards assisted suicide that is based on the balance between the principles of sanctity of human life and respect for autonomy.³³

5. Respect for Autonomy in the relevant Jurisprudence

The first reference to the principle of respect for autonomy may be also be found in *R. v. the United Kingdom*. The EComHR noted in its decision that the scope of private life covers suicide. Although it excluded the acts of the third party from the protection of the right to respect for private life. The commission held that the prohibition of assisted suicide might “touch directly on the private lives of those who sought to commit suicide”.³⁴ Therefore, all restrictions of the decisions and actions of the person concerned are subject to Article 8 of the ECHR.

In the last 15 years, the ECtHR has assessed regulations – either prohibition or legalization – of assisted suicide in accordance with the right to respect for private life on several occasions. However, there are two decisions that point out the relevant factors to be taken into account in this respect. The principle of respect for autonomy was first invoked by the Strasbourg court in *Pretty*. In this judgment, it held that “private life” is a broad term that covers – among others – physical and psychological integrity, identity of a person, sexual life of a person and the right to establish and develop relationships with others. In addition, the notion of *personal autonomy* serves as an important principle underlying the interpretation of the guarantees under Article 8.³⁵ On these bases, the ECtHR found that the right to respect for private life includes the choice to pursue even harmful or dangerous actions.

Furthermore, the Strasbourg court also referred to the change in society’s approach towards the issue of suicide. It recognized that in an era of growing medical sophistication combined with longer life expectancies, *many people are concerned with the idea of suicide* as a possible solution for the significant deterioration of quality of life.³⁶ Consequently, the ECtHR came to the conclusion that it had not been prepared to exclude that prohibition of assisted suicide constitutes an interference with the right to respect for private life.³⁷

The explicit recognition of the respect for autonomy in connection with assisted suicide in *Pretty* turned out to be a milestone concerning the subsequent case-law. Reference to personal autonomy as a guiding principle has become the basis of the reasoning of the ECtHR. This autonomy-driven approach facilitated the examination of other aspects of assisted suicide, such as the regulation of those states that decriminalized this intervention.

In 2011, the Strasbourg court had the first opportunity to further develop its jurisprudence in *Haas v. Switzerland*. This case significantly differed from that of *Diane Pretty*, since Swiss law allows physicians to assist terminally ill patients in order to facilitate their painless suicide. Prior examination of the patient is obligatory to determine the individual’s wish is firm and sound, and whether the person concerned understands the consequences of his or her decision. If all conditions are met, the physician may write a prescription necessary to obtain lethal dose of a substance.³⁸

Ernst G. Haas had been suffering from a serious bipolar affective disorder that – according to the applicant – made it impossible for him to live with dignity. In order to commit suicide, the applicant asked several physicians for a prescription of 15 grams of sodium pentobarbital. However, since his disease was not considered to be a terminal illness, none of the physicians provided him with the necessary prescription. Subsequently, Ernst G. Haas unsuccessfully applied for an exemption from the mandatory medical examination to the Swiss authorities and courts. Finally, he lodged an application with the ECtHR complaining that his right to respect for private life had been violated by the fact that Swiss law does not allow him to obtain sodium pentobarbital without a medical prescription.

Based on the principles set out in its previous case-law, especially the principle of respect for autonomy, the Strasbourg court recognized a new right in connection with assisted suicide deriving from Article 8. It found that “an individual’s *right to decide by what means and at what point his or her life will end*, provided he or she is capable of freely reaching a decision on this question and acting in consequence”, constitutes an integral aspect of the right to respect for private life.³⁹ Thereafter, the ECtHR examined the case from the perspective of positive obligations under Article 8.

As to the Swiss regulation of assisted suicide, the Strasbourg court held that reference to Article 2 of the ECHR would be appropriate, since the right to life creates positive obligations for the authorities “to protect the lives of vulnerable persons”.⁴⁰ It further emphasized that the risks of possible abuse inherent in a system that allows access to assisted suicide shall not be underestimated. For this reason, the state shall take all measures that are necessary to prevent abuses. Consequently, the requirement of medical examination and the need for a prescription to obtain the lethal substance under Swiss law is a legitimate means to protect life.⁴¹

The *Haas* judgment may be considered as the culmination of principles set out in the previous case-law of the ECtHR. One focal point of the reasoning of the Strasbourg court is the recognition of the right to decide the time and manner of death which is explicitly based on the principle of respect for autonomy. On the other hand, the doctrine of sanctity of human life has been considered the main decisive factor concerning the interference of authorities in the exercise of the above-mentioned – autonomy-driven – right. Therefore, the ECtHR reconciled the moral principles concerning assisted suicide in order to strike a fair balance between the interest of the individuals, and that of society and the state. This approach has been consistently applied by the Strasbourg court in its subsequent jurisprudence.⁴²

Conclusions

In the course of application of the moral interpretation of the provisions of the ECHR regarding assisted suicide, the ECtHR regularly takes into account the principles of sanctity of human life and respect for autonomy. Reference to these moral norms and the relevant arguments is necessary not only to discover the moral truths behind the relevant human rights, but in order to solve conflicts of interests that may be insolvable purely using the language of the law.

There has been a significant development concerning the reference to each of the moral norms. Whilst the EComHR only mentioned the sanctity of human life in *R. v. The United Kingdom*, the ECtHR applied substantively the doctrine in the *Pretty* judgment. Interestingly, after the latter case the Strasbourg court takes into account this principle in connection with the right to respect for private life instead of the right to life which primarily enforces sanctity of human life. One reason for this practice is that the ECtHR found that self-determination falls outside the scope of the right to life. Moreover, in accordance with the decision of the EComHR, the Strasbourg court primarily examines assisted suicide under Article 8 of the ECHR.

Similarly, the relevant case-law regarding the respect for autonomy has evolved as well. The EComHR has extended the scope of Article 8 to the decisions and acts of the person willing to commit suicide. *Pretty* constitutes the next step in the jurisprudence, in which the ECtHR interpreted personal autonomy as the grounding moral principle behind the right to respect for private life. Finally, recognizing the change in society's approach towards death and suicide, the Strasbourg court found that the individual's autonomous decision on the time and manner of death is a right protected by Article 8 of the ECHR.

Since the first case concerning assisted suicide, emphasis has shifted in the relevant jurisprudence concerning assisted suicide from the principle of sanctity of human life to respect for autonomy. However, latter has no absolute prevalence over the former. It is the expressed intention of the ECtHR to reconcile the two moral norms. To this end, it refers to the sanctity of human life and the slippery slope argument as a factor to be taken into account whenever personal autonomy is at stake. States, especially those that have decriminalized assisted suicide shall take all the necessary measures in order to protect vulnerable individuals and prevent abuses inherent in such a system. These purposes may only be achieved by striking a fair balance between the competing private and public interest, and thus between the moral norms related to assisted suicide.

¹ *George Letsas: A Theory of Interpretation of the European Convention on Human Rights*. Oxford University Press, Oxford, 2007, p. 79.

² *Tom L. Beauchamp – James F. Childress: Principles of Biomedical Ethics (6th Edition)*. Oxford University Press, New York, 2009, p. 354.

³ *George J. Annas: American Bioethics – Crossing Human Rights and Health Law Boundaries*. Oxford University Press, Oxford, 2005, p. 25.

⁴ Replies to the Questionnaire for Member States relating to Euthanasia. Available at: <https://rm.coe.int/16803a72c2>

⁵ *Timothy E. Quill – Jane Greenlaw: Physician-Assisted Death*. In: Mary Crowley (ed.): *From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*. The Hastings Center, Garrison (NY), 2008, p. 138.

⁶ *Jan Narveson: Definitions and Moral Issues*. In: C. G. Prado (ed.): *Assisted Suicide – Canadian Perspectives*. University of Ottawa Press, Ottawa, 2000, pp. 30–31.

⁷ Report of the Commission, *R. v. the United Kingdom*, D.R. 33, 270–275.

⁸ *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III.

⁹ *Koch v. Germany*, no. 497/09, 19 July 2012.

¹⁰ *Haas v. Switzerland*, no. 31322/07, ECHR 2011.

¹¹ *Gross v. Switzerland*, no. 67810/10, 14 May 2013.

¹² *Beauchamp – Childress*, op. cit., p. 184.

¹³ *Matthew P. Previn: Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*. The Georgetown Law Journal 84(1995)/3, pp. 592–593.

¹⁴ *Gordon DuVal: Assisted Suicide and the Notion of Autonomy*. Ottawa Law Review, 27(1995)/1, p. 13.

¹⁵ *Antonios P. Tsarouhas: The Case Against Legal Assisted Suicide*. Ohio Northern University Law Review, 20(1993–1994), pp. 804–805.

¹⁶ *Beauchamp – Childress*, op. cit., p. 102.

¹⁷ *Reginald Bussey: Physician-Assisted Suicide – The Hippocratic Dilemma*. Thurgood Marshall Law Review, 22(1996–1997), p. 256.

¹⁸ *Edward Rubin: Assisted Suicide, Morality and Law – Why Prohibiting Assisted Suicide Violates the Establishment Clause*. Vanderbilt Law Review 63(2010)/3, pp. 777 and 780.

¹⁹ *Koch* § 26.

²⁰ Article 19 of the ECHR.

²¹ *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324.

²² *Osman v. the United Kingdom*, 28 October 1998, § 115, Reports of Judgments and Decisions 1998-VIII.

²³ *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III.

²⁴ *Daniel Rietiker: From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in the Light of the Recent Haas v. Switzerland Judgment*. Harvard Human Rights Journal, 2012/1, p. 99.

²⁵ *David Harris et al.: Law of the European Convention on human Rights (2nd Edition)*. Oxford University Press, Oxford, 2009, p. 361.

²⁶ *Ivana Roagna: Protecting the right to respect for private and family life under the European Convention on Human Rights*. Council of Europe, Strasbourg, 2012, p. 45.

²⁷ *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31.

²⁸ Report of the Commission, *R. v. the United Kingdom*, D.R. 33, 271–272 (emphasis added).

²⁹ *Pretty* § 39.

³⁰ *Reitiker*, op. cit., p 113.

³¹ *Pretty* § 65 (emphasis added).

³² Ibid. (emphasis added).

³³ See Haas § 57–58, Koch § 51 and Gross § 58.

³⁴ Report of the Commission, R. v. the United Kingdom, D.R. 33, 271.

³⁵ Pretty § 61.

³⁶ Pretty § 65.

³⁷ Pretty § 67.

³⁸ Kristina Ebbott: A “Good Death” Defined by Law: Comparing the Legality of Aid-in-Dying around the World. In: William Mitchell Law Review 37(20110)/1, pp. 197–199.

³⁹ Haas § 51 (emphasis added).

⁴⁰ Haas § 54.

⁴¹ Haas § 58.

⁴² Koch § 51–51. and Gross § 58–59.